The Insolvency Review

Ninth Edition

Editor
Donald S Bernstein

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THE INSOLVENCY REVIEW

NINTH EDITION

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Donald S Bernstein

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CONTENTS

PREFACE.. v
Donald S Bernstein

Chapter 1 AUSTRALIA.. 1
Dominic Emmett and Hannah Cooper

Chapter 2 AUSTRIA.. 20
Eva Spiegel and Alexander Zollner

Chapter 3 BERMUDA 33
John Wasty, John Riihiluoma, Lalita Vaswani and Sam Riihiluoma

Chapter 4 BRAZIL... 41
Mauro Teixeira de Faria and Rodrigo Saraiva Porto Garcia

Chapter 5 CANADA.. 57
Michael Nowina, Sandy Park and Milinda Yimesghen

Chapter 6 CHINA.. 69
Ren Yimin and Zhu Yun

Chapter 7 ENGLAND AND WALES.. 81
Karen McMaster, Sarah Levin, Lynette Janssen and Matthew Fonti

Chapter 8 FRANCE.. 104
Fabrice Baumgartner and Aude Dupuis

Chapter 9 GERMANY... 112
Andreas Dimmling

Chapter 10 GREECE.. 125
Athanasia G Tsene

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Chapter 11 HUNGARY.....146
Zoltán Faludi and Enikő Lukács

Chapter 12 INDIA.....157
Margaret D'Souza

Chapter 13 JAPAN.....170
Tomohiro Okawa

Chapter 14 LUXEMBOURG.....189
Clara Mara-Marhuenda, Sébastien Binard and Grégory Minne

Chapter 15 MEXICO.....206
Darío U Oscós Coria and Darío A Oscós Rueda

Chapter 16 POLAND.....229
Karol Tatara, Adam Królik, Anna Czarnota, Sandra Bartkowska-Michalska and Mateusz Kaliński

Chapter 17 SAUDI ARABIA.....242
Adli Hammad

Chapter 18 SPAIN.....255
Manuela Serrano

Chapter 19 SWITZERLAND.....266
Daniel Hayek and Mark Meili

Chapter 20 UNITED STATES.....279
Donald S Bernstein, Timothy Graulich, Christopher S Robertson and Thomas S Green

Appendix 1 ABOUT THE AUTHORS.....307
Appendix 2 CONTRIBUTORS' CONTACT DETAILS.....321

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PREFACE

As with prior editions of *The Insolvency Review*, this ninth edition includes in-depth information regarding current market conditions and insolvency case developments in a number of countries. Because of the ongoing covid-19 pandemic, we owe more than the usual debt of gratitude to the outstanding professionals around the globe who annually dedicate their time and talents to this book. Their contributions reflect the diversity of their respective national commercial cultures and laws, and, for the past two years, the disparate impact of covid-19 around the world.

I had hoped that by this time we would have greater visibility into the impact of the pandemic on national economies, but while we know more today than we did last year and have vaccines that seem to be effective against the viral variants to date, countries have faced repeated setbacks due to the evolution of the virus, limited access to vaccines in some places and resistance to vaccination and mitigation measures in others. As a result, the adverse impact of the pandemic on the health and livelihoods of so many around the world continues.

This adverse impact has of course been blunted by fiscal stimulus, payment moratoria and the temporary suspension of director liability for ongoing trading in a number of countries, and insolvency activity in many countries has consequently been lower than expected. However, as time goes on the financial stresses temporarily suppressed by economic relief measures continue to build, and concern grows over what will happen when relief measures expire. This has led to repeated extensions of relief measures in a number of countries despite the recognition that these measures cannot remain in place forever.

It seems senseless for there to be mass evictions of residential and business tenants and the failure of numerous businesses – especially small and medium-sized businesses that were viable before the pandemic – when temporary relief measures expire. The question is whether there is a way to mitigate the longer term economic impact of the pandemic so tenants and businesses can survive the crisis and be restored to financial health, thereby preserving their income-generating capacity and jobs. Some have suggested that solutions like permanent relief from pandemic-related rent arrears and the creation of 'emergency restructuring entities' to facilitate business restructurings and channel public and private funds to viable businesses should be considered.

The economic costs of the pandemic will have to be borne by consumers, investors, employees or taxpayers. The policy question is whether these costs can be minimised and made more sufferable by creating mechanisms that spread their absorption in a more orderly and equitable way.

As I do each year, I want to thank the contributors to this book for their efforts to make *The Insolvency Review* a valuable resource. As each of our authors knows, this book is a challenging undertaking every year, and is particularly so during the pandemic. We have far

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less visibility into what is really going on in the global economy and where things are headed. Nevertheless, my hope is that this year's volume will help all of us, authors and readers alike, reflect on the larger picture, keep our eye on likely, as well as necessary, developments and point to better ways to address the adverse financial impact of the current crisis.

Donald S Bernstein
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September 2021

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Chapter 7

ENGLAND AND WALES

Karen McMaster, Sarah Levin, Lynette Janssen and Matthew Fonti[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

This chapter details the following English insolvency and restructuring processes,[2] which are the key tools available under English law to restructure and/or wind down a company:

a formal insolvency processes, including liquidation, administration and company voluntary arrangement (CVA), which are governed by the Insolvency Act 1986 (the Insolvency Act) and the Insolvency Rules (England and Wales) 2016 (the Insolvency Rules);[3]

b a stand-alone moratorium process, during which a financially distressed company can engage in negotiations with creditors or otherwise prepare for restructuring, which is also governed by the Insolvency Act, as amended by the recently adopted Corporate Insolvency and Governance Act 2020 (CIGA);

c schemes of arrangement (schemes) and restructuring plans, which are two pre-insolvency restructuring tools that can be used to compromise or reschedule debt with agreement from a statutory majority of creditors, subject to certain requirements being satisfied as set out in the Companies Act 2006 (the Companies Act), as amended by CIGA;[4] and

1 Karen McMaster is partner and Sarah Levin, Lynette Janssen and Matthew Fonti are associates at Milbank LLP. The authors are grateful for the contributions of Tina Lockwood, Connor Clune and Damilola Odetola to this chapter.

2 This chapter considers insolvency and related restructuring laws applicable in England and Wales. It does not address analogous, but different, laws that apply in Scotland and Northern Ireland. This chapter does not consider receivership or administrative receivership—a self-help remedy for secured creditors to realise charged assets—as it is not a collective process. English insolvency tools available to individuals fall outside this chapter's scope.

3 The Insolvency Rules came into force on 6 April 2017, in most cases, replacing the Insolvency Rules 1986 in their entirety.

4 Note that there is some disagreement as to whether restructuring plans are an insolvency or pre-insolvency tool. To propose a restructuring plan, a company must show financial difficulties that may affect the company's ability to carry on as a going concern, as discussed in Section I.iv, in *Gategroup*, whether a restructuring plan should be considered an insolvency proceeding for the purposes of the Lugano Convention was hotly contested. In large part due to the financial difficulty requirement, the court found a restructuring plan was an insolvency process. See Section III.

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d procedures for the recognition of foreign insolvency proceedings, which are governed by the Cross-Border Insolvency Regulations 2006 (SI 2006/1030) (CBIR) that implement the UNCITRAL Model Law on Cross Border Insolvency (the UNCITRAL Model Law) in the United Kingdom (UK).

ii Policy

Until the 1980s, the most common outcomes for an over-indebted company were receivership initiated by the secured creditor to realise its collateral followed by liquidation.[5] Since the publication of the 'Cork Report' in 1982, however, English insolvency law increasingly centres on corporate rescue.[6] The Insolvency Act, adopted in 1985 (and quickly reworked and replaced in 1986), saw the advent of administration – a rescue process which permits the ongoing operation of a business under the protection of a moratorium and the guardianship of an impartial insolvency practitioner.

The Enterprise Act 2002 later simplified the administration regime and introduced the 'qualified floating charge holder' – a creditor entitled to appoint an out-of-court administrator to enforce security in the event of default under a floating charge.[7] This replaced the more advantageous right that floating charge holders previously had to appoint a receiver.[8] The change directed secured creditors into a better balanced and more debtor-friendly procedure, as the administrator's primary objective is to rescue the company while acting in the interests of all creditors.[9]

The recent passage of CIGA in 2020 further transformed the restructuring regime, introducing a new stand-alone moratorium process, restrictions on certain termination rights of contractual counterparties (including a ban on *ipso facto* termination rights) and crucially, the introduction of the restructuring plan, which permits cross-class cramdown.

The inclusion of more flexible, debtor-friendly processes is a result, in part, of the ever increasing complexity of corporate capital structures, the growth of secondary debt markets and divergent views among stakeholders, requiring a shift from the traditional approach of achieving purely consensual restructuring solutions. Debtors under English insolvency law now have access to a variety of tools that prevent creditor hold-outs: CVAs, schemes of arrangement and restructuring plans each provide debtors with a form of majority rule that encourages compromises from creditor groups and consensus.

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5 Omar, Paul and Gant, Jennifer, Corporate Rescue in the United Kingdom: Past, Present and Future Reforms (May 18, 2016), (2016) 24 *Australian Insolvency Law Journal* 40, available at https://ssrn.com/abstract=3848575.

6 Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558.

7 A floating charge qualifies if its terms give the holder power to appoint an administrator, and the charge (alone or together with other charges held) relates to the whole or substantially the whole of the company's property. See Insolvency Act 1986 (Insolvency Act), Schedule B1 Paragraphs 14 and 16.

8 See Department of Trade and Industry, Productivity and Enterprise: Insolvency – A Second Chance (White Paper, Cm 5234, 2001) paragraphs 2.4–2.6.

9 Insolvency Act, Schedule B1 Paragraph 3.

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iii Insolvency procedures

This section outlines the processes, referenced above, that can be used to rescue or wind up a company in England, subject to eligibility requirements. Some processes, such as stand-alone moratoria, CVAs, schemes of arrangement or restructuring plans, may form part of a wider restructuring or may offer a means to rescue a company on their own.

Liquidation

Liquidation is a company dissolution procedure pursuant to which a liquidator realises the assets of a company and distributes them to creditors in the priority prescribed by the Insolvency Act. Once concluded, the company will be dissolved and removed from the register of companies.

There are two forms of liquidation, also known as winding-up, under the Insolvency Act: (1) compulsory liquidation, by order of the court; and (2) voluntary liquidation, which is divided into a members' voluntary liquidation (MVL) or a creditors' voluntary liquidation (CVL). An MVL is a solvent liquidation and requires a statutory declaration of solvency from the company's directors within the five weeks immediately preceding the date of the resolution for winding-up.[10] A CVL can be a solvent or insolvent liquidation, but is subject to some degree of control by creditors.

Administration

Administration is a rescue procedure, which allows for the reorganisation of a company's debts and/or the realisation of its assets under the protection of a statutory moratorium on creditor action. Upon appointment of the administrator, the moratorium prevents action against the company or its property, including enforcement of security, absent consent of the administrator or leave of the court, subject to some exceptions.[11]

An administration must achieve one of three statutory objectives, listed in order of priority:

a rescue the company as a going concern;

b achieve a better result for the company's creditors, as a whole, than would be likely in a winding up if the first objective cannot be achieved or it would achieve a better result for creditors as a whole than the first objective; or

c realise the company's property for distribution to secured or preferential creditors, if it is not reasonably practicable to achieve either of the first two objectives and it will not unnecessarily harm the interests of creditors as a whole.[12]

An administrator must, subject to certain exceptions, submit a proposal to creditors for approval within the first several weeks of the administration (subject to extension). The administration ends automatically after one year, unless extended by court order or with creditors' consent. Complex administrations often require extensions. A company may exit administration prior to the deadline if the administrator (and the court, where necessary) is satisfied that one or

10 Insolvency Act, Section 89.

11 Insolvency Act, Schedule B1 Paragraphs 43 and 44. Exceptions include contractual set-off rights (at least until the administrator makes an authorised distribution) and secured creditors' rights to enforce against certain collateral to which the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003/3226) apply, including shares.

12 Insolvency Act, Schedule B1 Paragraph 3.

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more of the statutory objectives have been achieved. On exiting administration, the company may resume normal business. The administrator may alternatively place the company into a CVL or distribute the company's assets in accordance with the Insolvency Act (achieving substantially the same result as a liquidation) should they conclude that there is no reasonable prospect of rescuing the company.

Administrations are sometimes used to facilitate a pre-packaged sale of the company's business or assets, where the terms of the sale are agreed before the appointment of an administrator (referred to as a 'pre-pack'). The sale is effected immediately upon (or soon after) the administrator's appointment.[13] Neither notification to, nor consent from, unsecured creditors is required.[14] Given the potential for abuse, various regulations increase transparency and fairness in pre-packs, including certain disclosure requirements to creditors of the details and justification for a pre-pack sale and certain protections in the event of a pre-pack sale to a connected party.[15]

Company voluntary arrangement

A CVA constitutes a binding agreement between a company and its unsecured creditors to compromise the company's debts, usually made with the aim of allowing the company in financial difficulty to avoid liquidation. CVAs are traditionally popular with companies that have significant unsecured debts with similar features, such as lease liabilities. Secured creditors and preferential creditors are not bound by a CVA unless they consent, making CVAs less attractive to companies with large amounts of secured debt.

Once put to a vote, a CVA proposal will be implemented if:

a approved by 75 per cent or more (by value) of the company's creditors; and

b not rejected by more than 50 per cent (by value) of the company's creditors admitted for voting who are 'unconnected creditors'.[16]

Notice of the proposal and the vote must be provided to all known creditors of the company.[17] The proposal, once approved by the statutory majorities will bind all unsecured creditors, known and unknown, regardless of whether the creditor was notified.[18]

A CVA may be used alongside, or to obviate the need for, other insolvency procedures. The advantage of a CVA is that it is quick to implement,[19] offering a flexible tool that requires minimal court involvement. For the reasons stated above, CVAs have proven to be a popular tool for the retail sector, both at the height of the 2008 global financial crisis and more

13 Jacqueline Ingram and Yushan Ng (ed), *The Art of the Pre-Pack* (Global Restructuring Review, 2019) 11.

14 ibid., 9.

15 Statement of Insolvency Practice (SIP 16 – Pre-packaged Sales in Administration; Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021/427.

16 Insolvency Act, Section 5(2)(b); the Insolvency Rules, Rule 15.34.

17 Insolvency Act, Section 3(4).

18 The Insolvency Act and the Insolvency Rules set out various 'decision procedures' that may be used when creditors are required to make a decision. Challenges on the grounds of unfair prejudice are possible in some circumstances – see further under Section I.iv.

19 The CVA becomes effective immediately after the resolution to approve it has been passed (for which 14 days' notice is required).

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recently. They have also been the focus of a significant amount of litigation, often supported by industry bodies (often landlords) seeking to protect against disadvantageous outcomes and precedent.

Moratorium

Introduced last year with CIGA, the new stand-alone moratorium is a debtor-in-possession process that protects a company from creditor action so it may explore its rescue options. The moratorium ends automatically 20 business days after coming into force, but may be extended in a number of ways, including for one further 20-business-day period by unilateral action of the company's directors.[20] Where combined with other procedures, the moratorium will come to an end once the court sanctions a scheme or restructuring plan, the company goes into administration or liquidation or when a CVA is approved by creditors.

The stand-alone moratorium is similar to the moratorium available in an administration in that, for as long as it applies, no steps can be taken to enforce security, commence insolvency or other legal proceedings against the company or, in the case of landlords, forfeit a lease.[21] The company is restricted from making certain payments or disposals of property, granting security and entering into certain market contracts during the moratorium unless an exception applies.[22] While the moratorium is not an insolvency 'process' per se, it can be combined with the CVA, scheme of arrangement or restructuring plan, a feature which was previously lacking in the English insolvency framework.

The strength and popularity of the moratorium is significantly undermined by the fact that it is not available to entities with a significant amount of public debt (see Section I.iv). As such, it is much less likely to constitute a 'safe harbour' backdrop to a complex reorganisation of a large company – in contrast to certain other processes, such as Chapter 11 in the United States.

Scheme of arrangement

A scheme effects a court-sanctioned compromise or arrangement between a company and its creditors (or any class of them) outside a formal insolvency process.[23] A scheme may be used to vary a class of creditors' rights and can bind all creditors if the requisite majority or majorities of each class (at least 50 per cent in number and at least 75 per cent by value) vote in favour of the scheme. If approved by the requisite majorities, the court has discretion

20 Note that beyond any one-time unilateral extension by the directors, the company would need: (1) the consent of its pre-moratorium creditors; (2) to make a court application; or (3) to propose a CVA, scheme or restructuring plan (with the latter two requiring a court order), to have the moratorium extended. Insolvency Act, Sections A10-A15.

21 The payment holiday from pre-moratorium debts does not apply to debts or other liabilities arising under a contract or other instrument involving financial services, which includes lending contracts and guarantees. See the Insolvency Act, Section A18 and Schedule ZA2. However, as a practical matter, creditors under lending contracts and guarantees have limited rights in a moratorium: they are still barred from commencing insolvency proceedings or enforcing on collateral (other than certain financial collateral, including shares).

22 By way of example, the monitor may give consent to the company making payment of certain pre-moratorium debts or granting of security over the company's property. The company can continue to dispose of its property in the ordinary way of its business if the property is not subject to a security interest.

23 Note schemes are also available to effect an arrangement with shareholders.

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to sanction the scheme.[24] The scheme becomes effective upon the court's sanction, and subsequent filing of the sanction order with the Registrar of Companies. The process of obtaining sanction for a scheme takes time, but courts can be sympathetic to expedited timetables. It is possible to complete the scheme procedure in approximately six to eight weeks subject to court availability.

In contrast to a CVA (in which the creditors effectively vote as a single class), debates regarding the appropriate composition of creditor classes are common and will be considered at the convening hearing, a court hearing that takes place prior to the creditor vote. The scheme retains a crucial advantage over CVAs, however, in that it can bind secured creditors.

A further advantage of schemes is the ability to release claims against third parties where necessary to give effect to the scheme.[25] For example, schemes are often used to release guarantors. If not released, the subrogated claims of those guarantors against the scheme company, often referred to as 'ricochet claims', would undermine the scheme.[26] As discussed in further detail below, this feature of schemes makes them an increasingly attractive tool for large corporate groups with complex capital structures and guarantors in several jurisdictions. It has also provided the impetus for a great deal of recent innovation in scheme, and by extension restructuring plan, practice. Some such innovations are discussed in Section III's summary of the Gategroup restructuring plan.

Schemes have been used to bind creditors to amendments and extensions of outstanding loans, debt-for-equity swaps and more recently during the covid-19 crisis, to facilitate approvals for pre-emptive 'baskets' for super senior or rescue financing, where it was impractical to use contractual thresholds to obtain consent.[27]

Restructuring plan

Introduced under CIGA and similar in many ways to a scheme, the restructuring plan is a court-sanctioned compromise or arrangement among a company and its creditors or members (or a class or classes or them). The restructuring plan differs from a scheme in two key respects: (1) the company proposing the restructuring plan must show some level of financial distress; and (2) the restructuring plan can be used to bind a non-consenting class of stakeholders (i.e., cross-class cramdown).

A restructuring plan will be approved by a class if at least 75 per cent in value of those participating in the vote approve it.[28] Following the vote, at the sanction hearing, the court has discretion to sanction the restructuring plan if all classes approved the restructuring plan. If one or more classes did not approve the restructuring plan, the court still has discretion to sanction the restructuring plan where:

a none of the members of the dissenting class would be any worse off than they would be in the 'relevant alternative' which is the scenario the court considers most likely to occur in relation to the company if the restructuring plan were not sanctioned; and

b at least one class who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative approved the restructuring plan.

24 Companies Act 2006 (Companies Act), Section 899.

25 See *Re Lehman Brothers International (Europe) (In Administration)* [2010] 1 B.C.L.C. 496.

26 ibid.

27 See *Re Swissport Fuelling Ltd (No. 2)* [2020] EWHC 3413 (Ch).

28 In contrast to a scheme, there is no requirement that a majority in number must also vote in favour.

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As with a scheme, it is possible to release claims against third parties (such as guarantors) where necessary to give effect to the restructuring plan.[29]

iv Starting proceedings

Liquidation

A compulsory liquidation may be initiated by, among others, a creditor, the company or, in certain circumstances, a shareholder presenting a winding up petition to the court for the compulsory winding up of a company.[30] The compulsory liquidation commences when the court enters a winding up order in respect of the company.

An MVL commences with a special resolution passed by the members and requires a statutory declaration of solvency of the directors.[31] A CVL is also initiated by a special resolution of the members (other than as an exit from administration) but no statutory declaration of solvency is made.[32]

Administration

A company can be placed into administration either in-court or out-of-court. The company, its directors or any creditor may file an application to the court for the appointment of an administrator via the in-court route. Alternatively, the company, its directors or, in certain circumstances, a holder of a qualifying floating charge (a QFC holder) may give notice to the court documenting the appointment of an administrator.[33] In some cases, it may be preferable to pursue the in-court route to, for example, give a proposed administrator comfort where a pre-pack sale is contemplated or to allay recognition concerns when there are cross-border issues at play. Either way, an interim moratorium shields the company from creditor action if there is a delay between an applicant filing for administration and the administration order taking effect (when the in-court procedure is used) or if the applicant is required to give advance notice of its notice of intention to appoint an administrator (when the out-of-court procedure is used).

Certain secured creditors retain pre-emptive rights over commencement of an administration. A company pursuing the out-of-court route must provide notice of intent to appoint an administrator to certain persons, including secured creditors with the right to appoint an administrative receiver and QFC holders.[34] A secured creditor with the right to appoint an administrative receiver may then block the out-of-court appointment by appointing an administrative receiver during the notice period, or it may substitute its choice of insolvency practitioner as administrator. A QFC holder who does not have the power to appoint an administrative receiver may substitute its choice of insolvency practitioner as administrator (provided the appointment is not being made by a prior ranking QFC holder), though it cannot block the administration.

29 *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch).
30 Insolvency Act, Section 124.
31 Insolvency Act, Section 89.
32 Insolvency Act, Sections 86 and 90.
33 Insolvency Act, Schedule B1 Paragraphs 14 and 22.
34 Insolvency Act, Schedule B1 Paragraph 26(1).

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Company voluntary arrangement

While governed by the Insolvency Act, CVAs do not require a company to be in financial distress or insolvent.[35] A CVA may be proposed by a company's directors if the company is not in administration or liquidation, or by the administrator or liquidator (as applicable) if it is.

Moratorium

A company is eligible for the protection of the moratorium unless they are excluded.[36] One significant exclusion is where a company has or can accrue debt of at least £10 million under a 'capital market arrangement'.[37]

The directors of an eligible company commence the moratorium by filing: (1) a director's statement that the company is or is likely to become unable to pay its debts; and (2) a monitor's statement that it is likely that the moratorium would result in a rescue of the company as a going concern. A court application is required where there is an outstanding winding up petition or the company is an eligible overseas company.[38] The court may only make an order where the company has an outstanding winding up petition if it is satisfied that a moratorium would achieve a better result for the company's creditors as a whole than would be likely if the company were wound up without first being subject to a moratorium. The moratorium takes effect when the relevant documents are filed with the court or when the court makes a favourable order.[39]

Scheme of arrangement

A scheme is typically initiated by the company. Schemes are available to companies registered in England, but can (and often are) used by non-English overseas companies so long as they are liable to be wound up under the Insolvency Act and have a 'sufficient connection' to England and Wales.[40] In practice, a foreign company is likely to satisfy the first limb of this test. The second limb has been found to be satisfied where, among other things, the company's finance documents are English law-governed (including where they have been amended to be so). Recognition of schemes in foreign jurisdictions is a key element of the practical analysis of whether to pursue a scheme in respect of a foreign company and is discussed in greater detail in Section I.vii.

Restructuring plan

Like a scheme, a restructuring plan will usually be initiated by the company. It may be proposed in respect of the same types of companies as a scheme, subject to certain limited exceptions and subject to meeting the financial difficulty test. To be eligible to propose a

35 Insolvency Act, Section 1.

36 Insolvency Act, Schedule ZA1 Paragraph 1.

37 Insolvency Act, Schedule ZA1 Paragraph 13.

38 A company is excluded if its registered office or head office is outside the United Kingdom and its functions correspond with the functions of any excluded company registered under the Companies Act, such as a non-exempt company which carries on the regulated activity of effecting or carrying out contracts of insurance. Insolvency Act, Schedule ZA1 Paragraph 18.

39 See Insolvency Act, Section A6 for the full list of relevant documents.

40 Companies Act, Section 895(2); *Stocznia Gdanska SA v. Latreefers Inc (No. 2)* [1998] EWHC 1203 (Comm).

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restructuring plan, the company must: (1) have encountered, or be likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern; and (2) have proposed a compromise or arrangement with its creditors or members (or any class of them) for the purpose of eliminating, reducing, preventing or mitigating the effect of such financial difficulties.[41] There is no solvency criterion, thereby making the restructuring plan available to both solvent and insolvent companies.

v Control of insolvency proceedings

Who exercises control in a plenary insolvency proceeding and how much control they have is largely a function of the rules of the proceeding itself. No matter the proceeding, however, directors of an English company must exercise caution when there is doubt as to a company's solvency. Directors may be liable for wrongful trading if they continued trading the business after they realised, or ought to have concluded, that the company has no reasonable prospect of avoiding an insolvent liquidation or insolvent administration, unless the court is satisfied they took every step with a view to minimising the potential loss to the company's creditors.[42] Directors may also be liable for fraudulent trading if they have carried on the business with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose.[43] If their conduct in the lead-up to an insolvency is found to make them unfit to be concerned in the management of a company, directors may also be required to pay compensation for the benefit of creditors or as contribution to the company's assets, be disqualified from acting as directors or from being involved in the management of a company, for a period between two and 15 years.[44] Even before insolvency, however, directors must be cautious. When there is doubt as to a company's solvency, directors must consider the interests of the company's creditors, so as to minimise the potential loss to them.[45]

Liquidation

In all forms of winding-up, the appointed liquidator or the official receiver manages the company's affairs and the liquidation, rather than the company's directors or officers. On appointment, the directors' powers to bind the company automatically cease, although in case of a voluntary liquidation, the directors may retain some powers if approved by the liquidator or creditors.[46]

The court has minimal involvement in the conduct of a voluntary liquidation, whereas in a compulsory liquidation the court determines the application for a winding up order.

41 Companies Act, Section 901A.

42 Insolvency Act, Section 214(4).

43 Insolvency Act, Section 213.

44 Company Directors Disqualification Act 1986, Sections 6, 15A.

45 The primacy of the creditors' interests and precisely when the duty to consider creditors' interests arises are yet to be defined, but courts consistently state (without holding) that the duty arises some time prior to the time that the tests of insolvency are satisfied. *BTI 2014 LLC v. Sequana SA* [2019] EWCA Civ 112. The question of when directors must consider creditors' interests is currently awaiting judgment from the UK Supreme Court in *Sequana*. Note that considering creditors' interests was a common law obligation, codified by section 172(3) of the Companies Act. See Explanatory Notes to the Companies Act, Paragraphs 331–332.

46 Insolvency Act, Sections 91(2) and 103.

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Administration

Administrations are managed by an administrator, who must be a qualified insolvency practitioner. Once appointed, they are an officer of the court and must carry out their functions in the interests of creditors as a whole.[47]

In general, the administrator takes control of the company's business and assets from its directors.[48] Like the liquidator, the administrator is empowered to seek a court order against directors for contributions to the company's assets if his or her investigations reveal instances of wrongful or fraudulent trading, and to set aside transactions at an undervalue, preferences and transactions defrauding creditors.[49]

Although the administrator generally takes control of the operation of the company's business, 'light-touch' administrations (in which the administrator leaves some management powers and day-to-day operations with directors) have recently regained some popularity. Much like a hybrid between traditional administration and a US Chapter 11 debtor in possession process, the light-touch administration offers moratorium protection to the company, allowing the directors to focus on the long-term viability of the business, while the administrator supervises the directors and addresses immediate threats to the company's survival. Although not a new concept in English law, light-touch administration was not commonly used and a debtor's directors/management were traditionally wholly displaced by the administrator. Since April 2020, however, it has attracted support from prominent practitioners[50] and some respected members of the judiciary.[51]

The court in an administration has varying levels of involvement, depending on whether the process is commenced by way of an in-court or out-of-court application and whether the administrator is likely to need directions, owing to the complexity of the company's affairs. The court's involvement in an out-of-court and simple application may be limited to receipt and processing of the documents required to be filed at court.

CVA

The appointed 'nominee' (an insolvency specialist, generally an accountant) plays a significant role in a CVA and is appointed by the company's directors on proposal of the CVA.[52] The nominee reports to the court on whether, in his or her opinion, the proposal has a reasonable prospect of being approved and implemented, and whether it should be put to members and creditors. Following the report, the nominee seeks approval of the company's members at a meeting and the creditors by way of a qualifying decision procedure (e.g., correspondence or physical meeting).

47 Insolvency Act, Schedule B1, paragraph 3(2).

48 See Insolvency Act, Schedule 1.

49 Insolvency Act, Sections 238(1), 239(1), 243, 246ZA, 246ZB.

50 The Insolvency Lawyers Association (ILA) and the City of London Law Society have recently published a draft 'Consent Protocol', which aims to provide support and directional guidance for the light touch administration. See 'Joint administrators' consent under paragraph 64 of schedule B1 to the Insolvency Act 1986' <www.r3.org.uk/technical-library/england-wales/technical-guidance/covid-19-contingency-arrangements/more/29356/page/1/the-consent-protocol-administration/> accessed 20 July 2021.

51 Snowden J's recent judgment in *Re Carluccio's (In Administration)* [2020] EWHC 886 (Ch).

52 Insolvency Act, Section 1. Where the administrator or liquidator proposes the CVA, he or she usually acts as the nominee.

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A creditor or member can challenge the CVA within 28 days after notice of approval is filed with the court only on the grounds of unfair prejudice to them or material irregularity in the approval process (or both).[53] Objections on the basis of unfair prejudice ultimately present a question of fact; for instance, a CVA that treats different unsecured creditors in different ways may be prejudicial to those creditors, but the question of fairness depends on the overall effect of the CVA.[54] Objections on the basis of material irregularity are also a question of fact, but relate to how the decision procedure used to consider the CVA proposal was conducted. Issues that the courts have considered include valuation of creditor claims and whether creditors with claims likely to be settled by a third party can vote in favour of a CVA.[55] Upon a successful challenge, the court may revoke or suspend the approval of members or the decision by creditors and make any supplemental directions as it thinks fit.[56]

Moratorium

The directors remain in control of the company during the moratorium, and as such, their usual legal duties continue alongside additional duties imposed by the moratorium,[57] including obligations to notify certain of the company's stakeholders of the moratorium as soon as reasonably practicable.[58] The appointed monitor also has duties during the moratorium, including an ongoing duty to end the moratorium by filing a notice with the court if the monitor considers that the company is unlikely to be rescued as a going concern.[59]

Creditors may also challenge the actions of the directors or the monitor during the moratorium by applying to the court on the basis that their interests are unfairly harmed. Having regard to the need to safeguard the interests of the persons who have dealt with the company in good faith and for value, the court may make such order as it thinks fit including bringing the moratorium to an end.[60]

Scheme and restructuring plan

The directors of the company remain in office when a scheme or restructuring plan is proposed. There are few restrictions on what can be included in the scheme or restructuring plan, and the company proposes terms that it thinks will be agreeable to creditors or members and capable of being sanctioned by the court.

Both the scheme and restructuring plan require court oversight at two junctures. At the first hearing (the convening hearing), the court considers the composition of creditor classes and summons the meetings of creditors or members to consider the scheme or restructuring plan. It will consider, among other things, any issues which may arise as to the constitution of meetings, any issues as to the existence of the court's jurisdiction to sanction the scheme,

53 Alternatively, if the applicant did not receive notice, within 28 days of the day on which they became aware that the qualifying decision procedure had taken place. See Insolvency Act, Section 6.

54 *Re Cancol Ltd* [1996] 1 All ER 37.

55 See *Re Newlands (Seaford) Educational Trust* [2007] BCC 195; *HMRC v. Portsmouth City Football Club Ltd and others* [2010] EWHC 2013 (Ch)).

56 For example, the court may direct the company to hold another vote which attempts to cure the subject of the challenge. See Insolvency Act, Section 6.

57 See *Re System Building Services Group Ltd* [2020] EWHC 54 (Ch); *Hunt v. Michie* [2020] EWHC 54 (Ch).

58 Failing to do so is an offence without reasonable excuse. See Insolvency Act, Section A24.

59 See Insolvency Act, Section A42. If the monitor fails to bring the moratorium to an end, a creditor can bring an application to bring it to an end.

60 Insolvency Act, Section A42(7).

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and any other issue not going to the merits or fairness of the scheme but which might lead the court to refuse to sanction the scheme.[61] After the classes vote and assuming the requisite majorities are reached, the court will then exercise its discretion to sanction the scheme or restructuring plan if certain requirements are met. Creditors may also object at the sanction hearing on grounds of fairness, jurisdiction and the selection of the 'relevant alternative', among other grounds.

vi Special regimes

Certain businesses are excluded from general insolvency regimes and subject instead to special insolvency regimes that, depending on the type of business, may be based on the administration procedure in the Insolvency Act. Special rules apply to certain banks and analogous bodies,[62] insurance companies,[63] postal services,[64] water or sewerage companies,[65] certain railway companies,[66] air traffic control companies,[67] London Underground public–private partnership companies,[68] building societies[69] and bodies licensed under the Energy Act 2004,[70] among others. It is beyond the remit of this chapter to set out in detail the scope of each special regime.

vii Cross-border issues

Foreign corporate groups with complex cross-border operations regularly 'forum shop' into English courts to use the UK's established and flexible insolvency and restructuring processes. Prior to the UK's exit from the European Union (the EU), a foreign debtor's use of administration, CVAs or liquidation was regulated in part by the Recast Insolvency Regulation (EU) 2015/848 of 20 May 2015 (the RIR), which required that the centre of main interests (COMI) of the debtor be in England for the English insolvency to be opened

61 'Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006)' (*Judiciary of England and Wales*, 30 June 2020), paragraph 6 <https://www.judiciary.uk/publications/practice-statement-companies-schemes-of-arrangement-under-part-26-and-part-26a-of-the-companies-act-2006/> accessed 16 July 2021.

62 Banking Act 2009 as amended by Financial Services (Banking Reform) Act 2013 and Bank Recovery and Resolution Order 2014, SI 2014 No. 3329; Bank Recovery and Resolution Directive and Section 17 of and Schedule 2 to the Financial Services (Banking Reform) Act 2013; and The Investment Bank Special Administration Regulations 2011, SI 2011/245 (supplemented by the Investment Bank Special Administration (England and Wales) Rules 2011, SI 2011/1301).

63 The Insurers (Reorganisation and Winding Up) Regulations 2004, SI 2004/353. Separate regulations apply to Lloyd's insurers: see the Insurers (Reorganisation and Winding Up) (Lloyd's) Regulations 2005, SI 2005/1998.

64 Postal Services Act 2011, Sections 68–88.

65 Water Industry Act 1991 and the Water Industry (Special Administration) Rules 2009, SI 2009/2477.

66 Railways Act 1993, Sections 59–65 and the Railway Administration order Rules 2001, SI 2001/3352.

67 Transport Act 2000, Sections 26–32.

68 Greater London Authority Act 1999, Sections 220–224 and the PPP Administration Order Rules 2007, SI 2007/3141.

69 Banking Act 2009, Parts 2 and 3 (as modified by the Building Societies (Insolvency and Special Administration) Order 2009, SI 2009/805).

70 Energy Act 2011 (supplemented by The Energy Supply Company Administration Rules 2013, SI 2013/1046).

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as a main proceeding and recognised by the courts of EU member states.[71] Some foreign debtors historically availed themselves of this access and automatic recognition by shifting COMI of the relevant debtor entity to England. In contrast, schemes were not listed as 'insolvency processes' for the purpose of the RIR, and, under English law, the ability of a foreign debtor use the scheme is subject to the lesser standard of 'sufficient connection' to England and Wales. English courts are fairly accepting of forum shopping into English jurisdiction, delineating 'good forum shopping', where the forum is the best place to reorganise the corporate group for the benefit of creditors (and, possibly, other stakeholders), in contrast to 'bad forum shopping', where the company acts for selfish motives to benefit itself, its shareholders or directors, at the expense of creditors.[72]

Since the UK's exit from the EU on 31 January 2021, the question of whether foreign corporate groups will continue to structure deals into English jurisdiction is less clear. While English courts now have relatively broad authority to open a plenary insolvency proceeding in respect of a foreign debtor,[73] there are real questions as to how and whether an English court judgment in respect of a foreign debtor will be recognised in other jurisdictions, particularly in the EU member states. The principles of mutual recognition of proceedings and judgments included within the RIR no longer apply with respect to administrations, CVAs and liquidations commenced in England. Thus, even if an English court finds that a debtor's COMI is in England, there is no certainty that the proceeding will be recognised in the courts of the EU member state. Similarly, the Recast Judgments Regulation (EU) 1215/2012 (the RJR), which has historically formed the presumed basis for recognition of schemes (and restructuring plans) in EU member states, no longer applies. Cross-border

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71 A company's COMI is the jurisdiction where a company administers its business. For the purposes of cross-border insolvency proceedings, the location of a company's COMI is a determining factor in establishing which member state (if any) has jurisdiction to open and hear insolvency proceedings for that particular company. There is a rebuttable presumption that this is the jurisdiction where a company's registered address is, though other factors can be influential. See Article 3(1) of the RIR, the Insolvency Rules and CBIR.

72 An early example of 'good' forum shopping can be seen in the Schefenacker restructuring, where the holding company of a German automotive supplier moved ownership of its assets and liabilities to a new, English-registered holding company so that it could enter into a CVA. See 'Proposal for a Company Voluntary Arrangement' (*Schefenacker Plc*, 9 March 2007) <https://www.bondcompro.com/schefenackercva/genDocumentStreamUS.asp?DocumentID=67> accessed 16 July 2021. See also *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch); *Re Gategroup Guarantee Ltd* [2021] EWHC 775 (Ch).

73 Although the UK exited the EU on 31 January 2020, the UK transposed certain aspects of EU restructuring and insolvency law into domestic UK law as part of the 'Brexit' process. The retained portion of EU restructuring and insolvency law is commonly referred to as the 'Retained Insolvency Regulation,' and it governs the types of debtors that may commence formal insolvency proceedings in the UK. In addition to companies registered in England and Wales and with COMI in England and Wales, CVAs, administration and liquidation are available to certain non-English companies, including those with COMI in an EU member state (other than Demark) and an establishment in England and Wales. Schemes and restructuring plans continue to be available to a broader set of foreign companies with 'sufficient connection' to England and Wales. See the Insolvency (Amendment) (EU Exit) Regulations 2019, SI 2019/146 (as amended by the Insolvency (Amendment) (EU Exit) Regulations 2020, SI 2020/647 and the Insolvency (Amendment) (EU Exit) (No. 2) Regulations 2019, SI 2019/1459)); *Stocznia Gdanska SA* (n 40).

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corporate groups subject to an English scheme or restructuring plan must find other means to ensure recognition of the English court's judgments in Europe and elsewhere, as discussed in more detail in Section V.

Proceedings opened outside of the UK can generally obtain recognition in the UK under the provisions of the CBIR. The CBIR implements the UNCITRAL Model Law and applies it regardless of whether the relevant foreign country has enacted the UNCITRAL Model Law.[74] Moratorium relief on creditor action is automatically granted on recognition of a foreign main proceeding (where the debtor's COMI is in the foreign proceeding's jurisdiction). Other relief may be obtained at the court's discretion. The English courts are required to cooperate 'to the maximum extent possible' when recognition is granted. The English courts can also offer assistance and relief under Section 426 of the Insolvency Act, which provides for cooperation both between jurisdictions within the UK and between the UK and other designated (mainly Commonwealth) jurisdictions. Finally, if the CBIR and Section 426 of the Insolvency Act do not apply, the English courts have inherent jurisdiction to cooperate with foreign insolvency representatives and recognise foreign proceedings, in instances where the relevant foreign office holder has satisfied the common law principles developed by the English courts.[75]

II INSOLVENCY METRICS

Many expected the covid-19 pandemic, which shuttered the global economy at the end of March 2020, to cause a wave of restructuring and insolvency activity in England. GDP declined by by 9.8 per cent in 2020, which is the steepest drop since 1948.[76] In June 2020, only 65.9 per cent of UK businesses were trading.[77] The percentage of businesses trading generally tracks the start and end of lockdown restrictions: in October 2020, 86.1 per cent of UK businesses were trading, when there were few restrictions in place; in January 2021, just 71 per cent were trading when the country re-entered national lockdown. This figure now stands at 88 per cent as at July 2021, which is the highest trading percentage since June 2020.[78]

74 The English courts may refuse to provide assistance under the CBIR if it would be manifestly contrary to public policy. See CBIR, Schedule 1, Article 6.

75 See *Rubin & Anor v. Eurofinance SA & Ors* [2012] UKSC 46. Those common law principles provide when a foreign court has jurisdiction to give a judgment *in personam* that is capable of enforcement or recognition as against the relevant judgment debtor in England and Wales. Jurisdiction exists if the judgment debtor: (1) was present in the foreign country when the proceedings were instituted; (2) claimed or counterclaimed in the proceedings; (3) voluntarily appeared in the proceedings and, therefore, submitted to the jurisdiction; or (4) previously agreed to submit to the jurisdiction.

76 ibid.

77 Jon Gough, 'Business insight and impact on the UK economy: 28 January 2021' (Office for National Statistics, 28 January 2021) <https://www.ons.gov.uk/releases/businessinsightsandimpactontheukeconomy28january2021> accessed 15 July 2021.

78 Emily Hopson, 'Business insights and impact on the UK economy: 1 July 2021' (Office for National Statistics, 1 July 2021) <https://www.ons.gov.uk/releases/businessinsightsandimpactontheukeconomy1july2021> accessed 15 July 2021.

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Despite the downturn in businesses' operations, insolvencies have remained low since the start of the first national lockdown in March 2020, compared with pre-pandemic levels.[79] The total number of registered underlying company insolvencies through 2020 decreased to the lowest annual level since 1989, representing a 27 per cent decrease compared with 2019 numbers.[80] Insolvency numbers continue to decrease through 2021 as shown by the percentage difference in the latest reported quarter (the first quarter of 2021) compared as follows.[81]

Comparator	Total company insolvencies	CVLs	CVAs	Administrations
2020 (fourth quarter)	-22 per cent	-18 per cent	-54 per cent	-44 per cent
2021 (first quarter)	-38 per cent	-24 per cent	-46 per cent	-52 per cent

Consistent with the trend since 2018, the highest number of insolvencies in the first quarter of 2021 was in the construction sector, the second highest was in the 'wholesale and retail trade' (repair of vehicles' industrial grouping), followed by the accommodation and food services activities sector.[82] As at the first quarter of 2021, all three sectors saw a decrease in company insolvencies from the previous year of 44 per cent, 41 per cent and 42 per cent respectively.

The continued reduction in company insolvencies[83] has been attributed to government measures put in place in response to the covid-19 pandemic, some of which include:

a temporary restrictions on the use of statutory demands and certain winding up petitions from 27 April 2020 to 30 September 2021;[84]

b enhanced government financial support for companies and individuals, including:
- the 'Coronavirus Job Retention Scheme', under which the government contributes 80 per cent of furloughed employees' wages up to a cap of £2,500 per month;[85] and
- the exclusion of primarily hospitality businesses from paying business rates for the 2020 to 2021 tax year;[86]

79 'Insolvency Statistics – January to March 2021' (*Insolvency Service*, 30 April 2021) <https://www.gov.uk/government/statistics/company-insolvency-statistics-january-to-march-2021/commentary-company-insolvency-statistics-january-to-march-2021> accessed 15 July 2021.

80 Insolvency Service, 'Insolvency Statistics – October to December 2020' (*Insolvency Service*, 29 January 2021) <https://www.gov.uk/government/statistics/company-insolvency-statistics-october-to-december-2020> accessed 15 July 2021.

81 'Insolvency Statistics – January to March 2021'.

82 'Insolvency Statistics – January to March 2021'.

83 'Insolvency Statistics – January to March 2021'.

84 Ali Shalchi and Lorraine Conway, 'New business support measures: Corporate Insolvency and Governance Act 2020' (House of Commons Library, 1 July 2021) <https://commonslibrary.parliament.uk/research-briefings/cbp-8971/> accessed 15 July 2021.

85 'Policy paper: Changes to the Coronavirus Job Retention Scheme from July 2021' (HM Revenue & Customs, 3 March 2021) <https://www.gov.uk/government/publications/changes-to-the-coronavirus-job-retention-scheme/changes-to-the-coronavirus-job-retention-scheme> accessed 15 July 2021.

86 'Guidance: Check if your retail, hospitality or leisure business is eligible for business rates relief due to coronavirus (COVID-19)' (Ministry of Housing, Communities & Local Government, 18 March 2020) <https://www.gov.uk/guidance/check-if-your-retail-hospitality-or-leisure-business-is-eligible-for-business-rates-relief-due-to-coronavirus-covid-19> accessed 15 July 2021.

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c the 'Recovery Loan Scheme', providing flexible financing arrangements for UK businesses guaranteed mostly by the government;[87] and
d the Bank of England keeping interest rates at 0.1 per cent.[88]

Many businesses took up the offer of government financial support to aid their recovery. Under the 'Coronavirus Business Interruption Loan Scheme,' 'Coronavirus Large Business Interruption Scheme' and the 'Bounce Back Loan Scheme,' 1.6 million loans were granted totalling £79.31 billion.[89] These three initiatives closed to new applications on 31 March 2021, and were replaced by the 'Recovery Loan Scheme'. Data has not yet been provided evidencing the uptake under the Recovery Loan Scheme. At its peak in May 2020, the 'Coronavirus Job Retention Scheme' supported 30 per cent of the UK workforce.[90] Although this fell to 11 per cent by mid-August, it increased to 17 per cent in January 2021 with the national lockdown.[91] This translates to a total of 11.5 million jobs having been furloughed since the introduction of the scheme as at 23 June 2021.[92]

Although these schemes seem to have allowed businesses to recover and limited insolvency numbers, they have come at a cost. The government's budget deficit reached a peacetime record of £303 billion, or 14.3 per cent of GDP, in 2020/2021.[93] The measures taken to support businesses and households are estimated to cost around £340 billion across 2020/21 and 2021/22.[94]

Financial support the government has provided is coming to an end on 30 September 2021 in respect of the furlough scheme and 31 December 2021 in respect of the Recovery Loan Scheme.[95] Despite optimistic forecasts for GDP growth in 2021 averaging at 6.5 per cent between the Bank of England and Office for Budget Responsibility as at 1 June 2021, it

87 'Guidance: Recovery Loan Scheme' (HM Treasury and Department for Business, Energy & Industrial Strategy, 3 March 2021) <https://www.gov.uk/guidance/recovery-loan-scheme> accessed 15 July 2021.

88 'Interest Rates and Bank Rate' (Bank of England, 15 June 2021) <https://www.bankofengland.co.uk/monetary-policy/the-interest-rate-bank-rate> accessed 15 July 2021.

89 'HM Treasury coronavirus (COVID-19) business loan scheme statistics' (HM Treasury, 8 July 2021) <https://www.gov.uk/government/collections/hm-treasury-coronavirus-covid-19-business-loan-scheme-statistics> accessed 15 July; 'Final Covid loans data reveals £80 billion of government support through the pandemic' (HM Treasury, 6 July 2021) <https://www.gov.uk/government/news/final-covid-loans-data-reveals-80-billion-of-government-support-through-the-pandemic> accessed 15 July 2021.

90 'Official figures show that the furlough scheme has worked: saving jobs and helping more than half of employees back to work already' (HM Treasury, 15 September 2020) <https://www.gov.uk/government/news/official-figures-show-that-the-furlough-scheme-has-worked-saving-jobs-and-helping-more-than-half-of-employees-back-to-work-already> accessed 15 July 2021.

91 Jon Gough, 'Business insights and impact on the UK economy: 28 January 2021' (Office for National Statistics, 28 January 2021).

92 Andy Powell and Brigid Francis-Devine, 'Coronavirus: Impact on the labour market' (House of Commons Library, 23 June 2021) <https://commonslibrary.parliament.uk/research-briefings/cbp-8898/> accessed 15 July 2021.

93 Matthew Keep, 'The budget deficit: a short guide' (House of Commons Library, 21 May 2021) <https://commonslibrary.parliament.uk/research-briefings/sn06167/> accessed 15 July 2021.

94 Daniel Harari, Matthew Keep and Philip Brien, 'Coronavirus: Economic impact' (House of Commons Library, 1 June 2021) <https://commonslibrary.parliament.uk/research-briefings/cbp-8866/> accessed 15 July 2021.

95 ibid.

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seems likely that with the cessation of certain initiatives and the expiry of restrictions on the use of some insolvency tools for creditors, a sharp increase in the numbers of companies resorting to, or being forced into, insolvency procedures will follow.

III PLENARY INSOLVENCY PROCEEDINGS

i Scheme: Codere

The Codere group operates an international gaming business. Its financial position worsened significantly during the covid-19 pandemic as venues were suddenly closed and major sporting events cancelled. A group of five institutions holding Codere notes formed an ad hoc committee (the AHC) to negotiate a restructuring with the company, culminating in the proposal of a scheme to amend its existing notes debt and raise new financing (among other things) that would be voted on by a single class of existing noteholders. Alongside its negotiation of the treatment that would be afforded to all noteholders, the AHC also negotiated a relatively typical 'package' of rights, including the right to participate in the new financing at a discounted basis, a 2.5 per cent new financing backstop fee, a 1 per cent work fee and payment of the AHC's advisers' fees.

In this case, one creditor argued that the 'package' of rights and benefits made available to the AHC represented value not available to other creditors and as such, the AHC should form a separate class. The result of separating the classes would be to give the non-AHC creditors a veto on the scheme.

At the Codere convening hearing, the court rejected the creditor's challenge, finding that none of the rights was sufficient to fracture the class.[96]

In recent years, a market has developed for rights available to ad hoc committees that negotiate the terms of a corporate group's restructuring. Ad hoc committees can provide a focal point for negotiating higher returns for a class of creditors and for sounding what compromises will be acceptable to those creditors – a role that can be useful where debt is widely held. Falk J's decision in *Codere* joins *Noble*, among others, as one more instructive decision (this time rigorously contested) on what rights ad hoc committees may negotiate for themselves.[97]

ii CVA: New Look Retailers Limited

New Look operates a large chain of retail, clothing, footwear and accessories stores in the UK. Like many retail businesses, New Look's revenues plunged as a result of the covid-19 pandemic. By August 2020, New Look was projected to run out of cash by October 2020 and knew it could not continue trading without a significant restructuring of its liabilities.

96 The new financing was not a new right granted by the scheme, but rather a separate financing on commercial terms, including with respect to the backstop fee (a conclusion supported by the fact that one AHC member did not participate). The payment of advisers' fees was also regarded as independent of the scheme. The work fee, though treated as a right conferred by the scheme, was justified by the substantial work and risk undertaken by the AHC in negotiating the deal. Even if the new financing and advisers' fees should be taken into account, then by reference to the likely alternative of a liquidation, the differences between the rights of AHC members and other scheme creditors were not so great that all scheme creditors could not consult together with a view to their common interest. See *Re Codere Finance 2 (UK) Ltd* [2020] EWHC 2441 (Ch).

97 See *Re Noble Group Ltd* [2019] 2 B.C.L.C. 505.

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New Look proposed a comprehensive restructuring, which included (among other things) a scheme with respect to its senior secured notes liabilities and a CVA to vary lease terms with certain landlords. Under the CVA, landlords were separated into groups that were to receive different ongoing rental payments based (in part) on viability of the stores at those rental locations. Other categories of creditors receiving different treatment in the CVA included the unsecured portion of the senior secured noteholders' claims, general unsecured creditors, intragroup liabilities and other unsecured debt of the company. All creditors voted together, notwithstanding their different treatment, in accordance with the terms of the Insolvency Act. The CVA was approved with 81.6 per cent by value of those present voting in favour and 88.9 per cent turnout.

Certain landlords challenged the CVA, arguing unfair prejudice, among other things, because the CVA: (1) imposed reduced rent on landlords while permitting New Look to retain possession; (2) separated creditors into groups with differing treatment; and (3) obtained approval by virtue of the votes of 'favoured' creditors (such as the senior secured noteholders, who were unimpaired by the CVA but had been separately impaired by a scheme).[98] The court rejected the challenges.

First, the court held that the company was free to impose reduced future rent on landlords while permitting the tenant to retain possession. In this regard, it was important that the compromised landlords retained a right to terminate the leases and that the return to landlords under the modified leases was better than the insolvent alternative (in this case, a prepack administration). Importantly, the court confirmed that the new rental rate need not be at market level and that it was not for the court to evaluate commercial lease terms.

Second, the court took no issue with the differing treatment of creditors under the CVA, and the fact that the CVA was approved by virtue of the votes of differently treated creditors was found to be within the CVA's statutory remit. Zacaroli, J emphasised the distinction between the statutory provisions and case law governing schemes, which contemplate voting by multiple classes, versus those governing the CVA. The Insolvency Rules expressly contemplate secured and preferential creditors voting in a single class with unsecured creditors in a CVA, but no one would expect all creditors to receive the similar treatment.

The New Look judgment, therefore, provides substantial flexibility to companies seeking to restructure. It suggests that, provided certain requirements are satisfied, the votes of locked up financial creditors may be used to swamp those of landlords (or, potentially, other commercial creditors) and impose upon them below-market rental rates. The landlords were granted leave to appeal the decision on grounds of unfair prejudice, among others, although one landlord has already decided not to pursue the appeal.

iii Restructuring plan: Virgin Active

The Virgin Active group operates over 100 gyms around the UK and elsewhere. Government-imposed shutdowns in response to the covid-19 pandemic forced gyms to close in all of Virgin Active's territories and interrupted its primary revenue stream, membership payments. In early 2021, Virgin Active reached agreement with its shareholders and over 80 per cent of its secured creditors to restructure its liabilities via a restructuring plan, which provided in relevant part:

98 *Lazari Properties 2 Ltd v. New Look Retailers Ltd* [2021] EWHC 1209 (Ch).

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a a maturity extension to the group's secured term facility, along with amendments to interest payments, financial covenants, events of default and the permitted disposal regime;

b a substantial compromise of rental arrears and future payments to landlords depending on the desirability of relevant lease; the least desirable (class E landlords) were not entitled to any past, present or future rent and received a cash payment equal to 120 per cent of what they would have received in an administration; and

c new money contribution from shareholders in the form of debt, with some equity contribution and a compromise of substantial intercompany liabilities and fees under licensing arrangements.

Ultimately, the restructuring plan was approved by secured creditors and the most favoured class of landlords, and was then sanctioned by the court using the new 'cramdown' power over the objection of the other classes of landlords.[99] As discussed in Section I.iii, for a restructuring plan to be sanctioned over the objection of a class of creditors, it must overcome three hurdles under Section 901G of the Companies Act: (1) the dissenting class must be no worse off than they would be in the relevant alternative; (2) the plan must have been approved by at least one class of creditors with a genuine economic interest in the company; and (3) the court must exercise its discretion to sanction the plan.

The company presented evidence that an accelerated sale of assets in administration was the most likely alternative to the restructuring plan (thus, the 'relevant alternative') and that in that alternative unsecured creditors would be 'out of the money.' An ad hoc group of landlords objected. The landlords attacked the company's evidence as unreliable and lacking key information, such as market testing. Following two days of valuation testimony and cross-examination of the company's witnesses, the court accepted the company's valuation evidence as the only evidence before it and refused to imply a blanket obligation on companies to engage in market testing.

The landlords secondly urged the court not to exercise its discretion to sanction the restructuring plan because, among other reasons, it permitted shareholders to retain equity while substantially impairing unsecured creditors who did not negotiate the deal. As colourfully stated by the landlords' counsel, 'if you are not sitting at the table, it is because you are lunch'.[100] The court surveyed scheme and restructuring plan case law to conclude that it is for the in-the-money creditors to determine how to divide value, including by distributing 'restructuring surplus' to shareholders, as there is no statutory requirement that restructuring plans comply with the absolute priority rule.[101] The court did, however, lend some weight to the shareholders' contribution of new money financing to the group. Thus, the judgment does not answer the question of whether shareholders would be permitted to retain value in the absence of satisfying some form of 'new value' exception to the absolute priority rule.

99 *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch).

100 ibid.

101 The lack of any absolute priority protection – i.e., that junior creditors cannot recover where there is an impaired senior class, is a fundamental distinction between the restructuring plan and Chapter 11.

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iv Restructuring plan: Hurricane

Hurricane Energy PLC is part of a group of oil extraction companies. In 2021, it proposed a restructuring plan to, among other things, extend maturity of its bonds, reduce principal and issue equity to the bondholders, who would take ownership of 95 per cent of its shares. The shareholder class, whose equity stake would be diluted to 5 per cent under the restructuring plan, rejected it.

The company argued that the shareholders were 'out of the money' in the relevant alternative and thus that the restructuring plan should be sanctioned over their negative vote. The company presented evidence that the relevant alternative to the restructuring plan would be a controlled wind-down of activities, following which there would be insufficient cash to repay the bonds in full. The company also presented evidence that if the restructuring plan were sanctioned, there could be some return to equity, but not a significant return. The focus of the sanction judgment was therefore whether the shareholders would be better off having a 5 per cent equity interest which promised no meaningful return (if the restructuring plan were sanctioned) or in the relevant alternative.

As the relevant alternative involved a period of continued trading, the court considered the range of possible courses of action open to the company during that continued period of trading, including those more optimistic alternatives presented by the shareholders that projected a full pay out to bondholders. The court found that it did not need to be satisfied that the most likely outcome was that there would be a return to the shareholders at some point in the future. The fact that there was a realistic prospect that the company would be able to discharge its obligations to the bondholders was enough to refute the contention that the shareholders would be worse off under the relevant alternative than under the restructuring plan. The court therefore declined to sanction the restructuring plan.

The *Hurricane* judgment puts some pressure on companies that seek to restructure but are not in an immediate insolvency crisis. The court may scrutinise any evidence in relation to the relevant alternative and may conclude that junior stakeholders should not have their interests compromised where there is a realistic prospect that the outlook for the stakeholders could improve.

v Restructuring plan: Gategroup

Gategroup provides catering, retail and other services to airlines and airports. Between January and September 2020, Gategroup revenues plummeted 67 per cent due to the global pandemic. By late 2020, Gategroup faced immediate cash needs and two near-term maturities. It agreed with its key stakeholders to restructure by: (1) extending maturities of its senior lending facility and its Swiss law bonds; and (2) obtaining new money from its shareholders.

Gategroup's bonds were governed by Swiss law and issued by a Luxembourg company; Gategroup had no English connection. Gategroup's bonds were primarily in retail hands and required a strict two-thirds quorum for amendments, making a purely contractual amendment impossible. To address these issues, Gategroup chose to implement its restructuring through England's new restructuring plan.

To obtain the necessary 'sufficient connection' with England, Gategroup proposed its restructuring plan through a newly incorporated English entity, which became a 'co-obligor' on the bonds (and the senior lending facility) through a deed poll – a one-way assumption of liability, granted in favour of the relevant creditors. As discussed in Section I.iii, a scheme or restructuring plan can be used to release liabilities of creditors against non-scheme

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companies, on the basis that the releases are 'necessary' for the scheme to take effect. To create a subrogation claim, the Gategroup bond issuer executed a deed of contribution in favour of the new scheme company and vice versa. It therefore became 'necessary' to seek releases of claims against the Gategroup bond issuer (and any other obligor that could seek indemnity against the plan company) as part of the restructuring plan.

Notwithstanding the artificiality of Gategroup's construct to access the English restructuring plan, the court concluded that because there was no other realistic alternative to the plan, the artificiality of the structure 'should not prevent the company and its creditors being able to take advantage of the English scheme or [restructuring] plan jurisdiction.'[102] It bears noting that co-obligors structures have been successfully used in many schemes and plans in recent years.

The jurisdiction question was further complicated in this case by the fact that the bonds were subject to an exclusive Swiss law jurisdiction clause. A key issue, therefore, became whether the Lugano convention (to which the UK was a party on the day before it exited the UK, when this case was commenced) applied to restructuring plans, or whether restructuring plans are insolvency proceedings and thus exempt from the Lugano Convention. If the Lugano Convention applied, the exclusive jurisdiction clause in the Swiss law bonds would prevent the English court's exercise of jurisdiction. In a thorough judgment (but a significant departure from equivalent thinking on schemes), the court determined that the restructuring plan is an insolvency proceeding not subject to the Lugano Convention, in no small part due to the requirements that a company be in financial distress before it is eligible for the restructuring plan.

IV ANCILLARY INSOLVENCY PROCEEDINGS

Sturgeon Central Asia Balanced Fund Ltd

Sturgeon Central Asia Balanced Fund Ltd (Sturgeon) was a closed-end investment fund, incorporated in Bermuda, aimed to provide Japanese investors and opportunity to invest in Central Asia. Following an ultra vires amendment to the company's by-laws in 2014, a shareholder successfully petitioned for Sturgeon to be wound up under Bermuda law on the grounds that it was 'just and equitable' to do so. Sturgeon was indisputably solvent at the time of the winding up. The Bermuda winding up was recognised as a foreign main proceeding under the CBIR following an *ex parte* hearing before Falk, J.

On review petitioned by one of Sturgeon's directors, Chief Insolvency and Companies Court Judge Briggs terminated the recognition order, reasoning that the definition of 'foreign proceedings' does not include processes relating to solvent debtors and more particularly, does not include 'actions that are subject to a law relating to insolvency but have the purpose of producing a return to members.'[103] Article 2 of the UNCITRAL Model Law defines foreign proceeding as 'a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation'. Relying heavily on history of the formulation of the UNCITRAL Model Law and its interpretive guides, the court found that to be consistent

102 *Re Gategroup Guarantee Ltd* [2021] EWHC 775 (Ch) [14].

103 *Carter v. Bailey and Hutchison (as foreign representatives of Sturgeon Central Asia Balance Fund Ltd)* [2020] EWHC 123 (Ch) [117].

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with the stated purpose of the UNCITRAL Model Law, the words 'for the purpose' must mean for the purpose of insolvency (liquidation) or severe financial distress (reorganisation). In coming its conclusion, the court departs from US Chapter 15 decision *In re Betcorp Ltd*,[104] in which a US bankruptcy court granted recognition to a voluntary liquidation of an Australian company, noting that the definition of 'foreign proceeding' does not require the company to be insolvent or to be adjusting its debts.

V TRENDS

i Cross-border recognition

As discussed throughout this chapter, following the UK's withdrawal from the EU and the end of the transition period on 31 December 2020, considerable uncertainty remains as to the future of cross-border recognition of English court judgments in EU member states. Principles of mutual recognition of proceedings and judgments included within the CBIR have fallen away, and other tools for mutual recognition of civil judgments, such as the RJR (which is crucial in the scheme context) are also no longer available. Aside from recognition from a UK perspective, there remains a question as to whether the UNCITRAL Model Law has effect in too few EU Member States to retain its relevance.

However, schemes and restructuring plans often and predominantly effect changes to debt governed by English or New York law. A route to recognition, therefore, is generally going to be available via Chapter 15 of the US Bankruptcy Code or via Rome I or private international law, which reflects the principles that English courts may effect changes to English law debt. As a result, it is likely that English restructuring tools will continue to be a popular and effective means of restructuring the liabilities of international entities, despite the challenges posted by Brexit.

ii Flexible allocation of value in restructurings

Topical schemes of arrangement and restructuring plans have been successful in allowing debtors to allocate value in ways which are not consistent with insolvency outcomes, and this was expressly approved in *Swissport* and *Virgin Active*.[105] In this way, some stakeholders, and in particular equity holders, may feel emboldened to use restructuring plans to cram down and crystallise losses of uncooperative or undesirable creditors while retaining substantial (upside) value and rights in the equity. While as a trend this could be limited (see, for example, *Amigo*,[106] where the value accruing to the equity without any proportionate contribution contributed to the scheme failing), it may be influential in the way schemes and restructuring plans develop, particularly if equity holders are in a position to exert control over a debtor or (through funding) control its solvency.

While there is limited precedent, it also seems that restructuring plans may not provide a fertile ground for valuation fights, unlike Chapter 11, for example. This is likely to be driven partly by the lack of a moratorium – for example, in *Virgin Active*, where the company's pending insolvency was used as a reason that a market testing process could not be carried out – but also by what appears to be the court's relative lack of sympathy for the inability of

104 *In re Betcorp Ltd*, 400 B.R. 266 (Bankr. D. Nev. 2009).

105 *Re Swissport Fuelling Ltd* [2020] EWHC 1773 (Ch); *Virgin Active*, *supra*.

106 *Re ALL Scheme Ltd* [2021] EWHC 1401 (Ch).

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creditors (with far less information) to produce reliable valuation evidence. However, we can imagine a scenario where a restructuring process provides an opportunity for an interloper to make a competing bid for a distressed business, and we have seen this to some extent in, for example, the *Caffè Nero* CVA.[107]

iii Uncertain use of restructuring plans

When the restructuring plan became available under CIGA in 2020, there were serious questions about how effective it would be. Would the courts look to scheme case law to determine class, jurisdiction and fairness issues? Would it be possible to use cross-class cramdown, or would courts be reluctant to permit it in practice? What parameters would courts put on cross-class cramdown?

A year and nine restructuring plans later, it is increasingly clear that restructuring plans are a flexible tool, with somewhat company-friendly cramdown provisions that have proved useful for dealing with unsecured creditors in particular, such as landlords and trade creditors. However, the impact of the *Hurricane Energy* case has dampened expectations somewhat. While the case might be confined to its facts, it would be unfortunate if the implication is that restructuring plans are not available as a true pre-insolvency tool.[108] Case law is likely to develop further, but on a simplistic level, cases in the vein of *Hurricane* could lead to perverse outcomes – for example, better outcomes for stakeholders that are in a position to dictate the solvency or insolvency of an entity (by calling defaults or depriving an entity of funding). This is an area to be followed closely.

iv Greater litigation surrounding restructuring plans

Of the nine restructuring plans proposed since the tool became available, four have been the subject of formal challenge in court and two have received open dissent from creditors opposed to the debtor's direction.[109] While only *Hurricane* was challenged successfully, the novelty of the restructuring plan may see ambitious law firms and emboldened creditors continuing to air their grievances and test the limitations of the cross-class cramdown power. Foreseeably, this may culminate in increased litigation and objections surrounding restructuring plans until clear precedent is developed and outcomes become more predictable.[110]

107 *Nero Holdings Ltd v. Young* [2021] EWHC 1453 (Ch).

108 *Re Hurricane Energy PLC* [2021] EWHC 1759 (Ch).

109 Reorg Research, Inc. `Schemes' (Reorg Database) <https://app.reorg.com/v3/#/schemes?favorite=2> accessed 31 August 2021.

110 Email from Reorg Research, Inc. to authors (27 August 2021).

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Appendix 1

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