ALLEN & OVERY

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Restructuring Across Borders

England and Wales: corporate restructuring and insolvency procedures

Overview

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Introduction

When a corporate borrower faces financial difficulties there are a variety of restructuring and insolvency options available.

The four principal restructuring and insolvency regimes for companies under English law are:

- **receivership** (including administrative receivership);
- **voluntary arrangements** and **schemes of arrangement**;
- **administration**; and
- **liquidation** (also known as winding-up).

From a creditor's perspective, the choice of procedure will depend upon whether the borrower has granted security. If security has been granted, **receivership** may well be the most appropriate choice although the Enterprise Act 2002 had a significant impact on the secured lender's right to appoint an **administrative receiver** (discussed below). Receivership may be classified as a self-help remedy for secured creditors. A secured creditor who cannot appoint an administrative receiver may instead seek to appoint an administrator.

If no security has been granted, the choice of procedure will depend largely on whether there is a business to be rescued. If there is, an informal bank rescue or workout outside of any of the formal insolvency procedures (i.e. a restructuring of the company on an informal, consensual basis by agreement between the company and its principal lenders or creditors) may be appropriate. Alternatively, a restructuring or rescue may be conducted using one of the formal rescue procedures (i.e. a voluntary arrangement or scheme of arrangement or administration).

A **voluntary arrangement** or **scheme of arrangement** involves a compromise of the company's debts with its creditors on a statutory basis and, in the case of a scheme, with the sanction of the court. **Administration** is the collective insolvency proceeding under the Insolvency Act 1986 for dealing constructively with a company's difficulties. Administrators may be appointed by the court and out of court in certain circumstances.

If there is no business to be rescued, it may be more appropriate to put the company into **liquidation**, the formal dissolution procedure for English companies.

For our views on the potential impact of Brexit on the UK's cross-border insolvency and restructuring regime, please see our client bulletin "Implications of Brexit for cross-border insolvencies and restructurings".

Receivership

Receivership is, essentially, a self-help remedy for secured creditors, although the Enterprise Act 2002 severely restricted the circumstances in which a secured lender can appoint an administrative receiver (see below). It is not a collective insolvency procedure but a method by which a secured creditor can enforce its security, realise the assets secured and obtain repayment.

The receiver appointed acts principally in the interests of his appointor and not for the general body of creditors.

Secured creditors will generally wish to appoint an **administrative receiver**, if able to do so. An administrative receiver has wide powers, granted by statute, to carry on running the business. The objective will usually be to sell the business as a going concern. An administrative receiver can only be appointed by the holder of a floating charge who is able to appoint over the whole or substantially the whole of the company's property.

Since 15 September 2003, when the relevant provisions of the Enterprise Act 2002 came into force, there has been a general prohibition on the appointment of an administrative receiver, subject only to limited statutory exceptions. The secured lender's right to appoint an administrative receiver is now limited to circumstances in which the lender has "grandfathered" security (i.e. a floating charge which was created before 15 September 2003), security created in the context of a capital markets or project finance transaction (for example, a repackaging or securitisation, a public-private partnership or utilities project), situations identified in Part VII of the Companies Act 1989 (transactions involving recognised investment exchanges and clearing houses) and security granted as part of an arrangement with a registered social landlord (in the context of social housing financings) or an arrangement with a protected railway company or other specific companies.

Therefore, in most cases where security has been taken after 15 September 2003, the lender will not be able to appoint an administrative receiver and consequently will not be able to block the appointment of an administrator – sometimes previously viewed as adverse to a secured lender – but will instead be entitled to appoint an administrator of its choice (see below).

Where a creditor has a fixed charge over only some of a company's property, there may still be circumstances in which it is beneficial for that creditor to appoint a fixed charge receiver over that asset only for the purpose of enforcing the security, realising that asset and distributing proceeds to the charge-holder. However, it should be noted that where an administrator is subsequently appointed over that company, the administrator can require any previously appointed receiver to vacate office.

Schemes of arrangement and voluntary arrangements

Where a company is essentially profitable but its debt burden and interest burden is too great, it may be able to persuade its creditors to either convert some of their debt into equity or to reschedule its payment obligations by extending the maturity/payment dates and to continue funding the company. This is a simple example of a restructuring which might be effected through a voluntary arrangement or a scheme of arrangement. Restructurings can be pursued through the formal procedures set out in the Insolvency Act and the Companies Acts but can also be effected on a simple contractual basis. Many rescue and support operations are conducted out of court in this way.

A company voluntary arrangement (**CVA**) is the formal procedure (essentially, a contract between the company and its creditors) provided for by the Insolvency Act which enables a company to agree with its creditors how its debts should be dealt with. The procedure is very flexible and there are no constraints on the form and content of the arrangement subject to certain basic information that must be included and certain safeguards for secured and preferential creditors that must be adhered to. A supervisor (an insolvency practitioner) is appointed to oversee the implementation of the arrangement, though the exact nature of his role will depend upon the terms of his appointment as set out in the arrangement itself.

The arrangement, if approved by the requisite majorities of shareholders and creditors (broadly, more than 50% by value and more than 75% by value respectively of those attending the meeting or taking part in the relevant decision procedure, as applicable) takes effect and binds all creditors who would have been entitled to vote at the meeting or in the relevant decision procedure, whether they attended/took part, voted or even had notice of the meeting or decision procedure.

No protection from creditor action is afforded by the CVA procedure whilst the CVA is negotiated unless the company concerned is a "small company" (as defined in the Companies Act 2006) and other criteria set out in Schedule A1 to the Insolvency Act 1986 are met, in which case a statutory moratorium is available.

An alternative to a voluntary arrangement is the scheme of arrangement under sections 895-901 (Part 26) of the Companies Act 2006. This is a compromise or arrangement between a company and its creditors or members (or any class of them) which requires the agreement of over 50% in number and 75% in value of creditors and/or members (or classes of them) in order to become binding on all of them, when sanctioned by the court.

The terms of the scheme will vary from case to case but will, quite likely, require creditors to accept a percentage of the debts due to them and/or may involve a write-off of debt and/or a debt for equity swap. Again, no protection from creditor action is afforded (not even for a "small" company).

The decision whether to use a CVA or a scheme of arrangement will depend on the facts and circumstances of each case. Most significantly, a scheme may be used in respect of a foreign company that does not have its centre of main interests in England and Wales. Alone, neither provides the protection of a moratorium unless the company is a small company, in which case the CVA may offer a distinct advantage. Both bind all creditors except a CVA cannot affect the rights of secured creditors without their consent (so no cram-down of secured creditors), but a scheme may give rise to class issues that it might be possible to avoid in a CVA. A scheme is generally more time-consuming, cumbersome and consequently more expensive to put together. A CVA may carry the stigma of being an "insolvency proceeding".

If recognition of the process will be required in the EU, a CVA may be more appropriate as EU Member States are (at the moment) required to give automatic recognition to a CVA implemented in the UK under the terms of the EU Insolvency Regulation ((EU) 2015/848). A scheme of arrangement is not subject to the same EU automatic recognition process but recognition may be achieved if the scheme is conducted under the umbrella of administration or can usually be established under principles of private international law. This distinction may fall away once the United Kingdom formally leaves the European Union, if the United Kingdom loses the benefit of the EU Insolvency Regulation.

If recognition of the proceedings will be required in the US, both CVAs and schemes of arrangements are capable of recognition in the US (under Chapter 15 of the US Bankruptcy Code).

Administration

Administration is a procedure pursuant to which a company's business may be restructured or its assets realised, under the protection of a statutory moratorium (a protective breathing space from creditors), a particular feature of the administration procedure. It is sometimes described as the UK equivalent of the US Chapter 11 procedure but it is dangerous to take this analogy too far. Each company in a group must be dealt with individually.

An administrator is an insolvency practitioner and, once appointed, the administrator takes control of the company and all its assets, displacing the directors. An administrator owes a duty of care to all creditors of the company.

An administrator may be appointed by the court on the application of a creditor (including a secured creditor), the directors of the company or the company itself. The application must be supported by a witness statement evidencing the company's insolvency (or, in the case of an application by the holder of a "qualifying floating charge" (see below), evidence that the floating charge is enforceable) and a statement by the proposed administrator, consenting to act.

The court may make an administration order only if it is satisfied that the company is or is likely to become unable to pay its debts (or that the floating charge is enforceable, as applicable) and that making the order is reasonably likely to achieve the purpose of the administration.

An administrator may also be appointed without involving the court (i.e. out of court) by the holder of a "qualifying floating charge" or by the company itself or its directors. The holder of a "qualifying floating charge" must hold security, which includes a floating charge, over the whole or substantially the whole of the assets of the company and which meets certain drafting requirements. A qualifying floating charge holder can appoint out of court if the floating charge is enforceable – the company need not necessarily be insolvent. The company and directors can only appoint if the company is unable to pay its debts.

If a creditor (other than a qualifying floating charge holder) uses the court route into administration or the company or the directors use either the court route or the out-of-court route into administration, notice must be given to any holder of a qualifying floating charge. This enables the qualifying floating charge holder to get in first with an out-of-court appointment of an administrator of its own choosing or, if not prohibited, the appointment of an administrative receiver thereby blocking the proposed appointment of the administrator by the company/directors/another creditor. The qualifying floating charge holder is only required to give notice to any prior qualifying floating charge holder.

An appointment out of court is a relatively straightforward process and involves completing and filing (a purely administrative matter) the appointment and supporting documents with the court whereupon the appointment takes effect. Appointment documents are relatively straight-forward to complete, though care must be taken to ensure that they are completed correctly so as not to invalidate the proposed appointment. Many out-of-court appointments (including all of those made in London) will now be made online, using the court's e-filing system and appointment takes effect once the filing fee has been paid. However, urgent appointments by a qualifying floating charge holder must be effected by emailing or faxing the appointment documents to court if the court is not open for business at the time the appointment needs to be made.

There is a statutory three-stage purpose of administration. The primary objective is to rescue the company as a going concern, but the administrator may pursue the secondary objective of achieving a better result for the company's creditors as a whole than would be likely if the company were wound up without going into administration if the administrator considers that the primary objective is not reasonably practicable or that the secondary objective would achieve a better result for the company's creditors as a whole. The third objective, which will only apply if neither of the other two objectives is possible, is to realise property in order to make a distribution to one or more of the secured or preferential creditors but without 'unnecessarily harming' the interest of the unsecured creditors. The administrator is required to produce proposals as to how the purpose of the administration is to be achieved within eight weeks of his appointment.

Liquidation

Liquidation (or winding-up) is the dissolution procedure for companies under English law. In that sense, it might be thought akin to Chapter 7 in the United States. It is a procedure of last resort. ("Bankruptcy" is a term applied only to individuals in England, never to companies.)

Liquidation can take one of two forms: it can be a voluntary liquidation which occurs where the shareholders of the company pass a resolution to place the company into liquidation. Alternatively, the company or a creditor may present a petition to the court for a compulsory winding-up and, if the company is insolvent, a winding-up order will be made by the court in due course.

The liquidator, who is an insolvency practitioner, takes control of the company and collects, realises and distributes its assets. Shareholders, creditors and the court have different degrees of control depending on the type of liquidation. Once the process has been completed, the company is dissolved.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. Two of the key changes in the Recast Regulation are (i) that it brings into scope certain pre-insolvency "rescue" proceedings and these are now listed alongside the traditional insolvency procedures in Annex A, and (ii) it introduces a coordination and cooperation regime for insolvency proceedings of several entities within the same group. The Recast Regulation retains the split between main and secondary/territorial insolvency proceedings but secondary insolvency proceedings are no longer restricted to a separate list of winding up proceedings – secondary insolvency proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main insolvency proceedings in Annex A and secondary insolvency proceedings (which were confined to terminal proceedings) in Annex B.

Of the above restructuring and insolvency regimes covered in this Factsheet, compulsory liquidation, creditors' voluntary liquidation, administration and

CVAs were available as main insolvency proceedings under Annex A of the Original Regulation. Compulsory liquidation and creditors' voluntary liquidation were available as secondary insolvency proceedings under Annex B of the Original Regulation.

Under the Recast Regulation, compulsory liquidation, creditors' voluntary liquidation, administration and CVAs are listed in Annex A. Receivership (including administrative receivership) is not a collective insolvency proceeding and, therefore, it is not listed in Annex A to the Recast Regulation (and it was not listed in Annex A or B to the Original Regulation). Similarly, as noted above, schemes of arrangement are not listed in Annex A to the Recast Regulation (and it was not listed in Annex A or B to the Original Regulation).

Further information

For further information on any of the above insolvency procedures, please refer to our more detailed Factsheets available on Restructuring Across Borders (see below).

Allen & Overy has an online service for clients focusing on debt restructurings and insolvency issues. Developed by Allen & Overy's market-leading Restructuring group, "Restructuring Across Borders" is an easy to use website that provides information and guidance on all key practical aspects of restructuring and insolvency in various jurisdictions, including Europe and the US.

To request access for your organisation, please contact your usual Allen & Overy contact, or email rab@allenovery.com.

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