

# An Introduction to English Insolvency Law

**SLAUGHTER AND MAY**

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## CONTENTS

1.	Formal Insolvency Procedures	1
1.1	Company Voluntary Arrangement (“CVA”)	2
1.2	Scheme of Arrangement	3
1.3	Administration	3
1.4	Administrative Receivership and Receivership	5
1.5	Liquidation (Winding Up)	6
2.	Personal Liability of Directors	8
2.1	General duties of directors	8
2.2	Delinquent Directors	8
2.3	Fraudulent Trading	8
2.4	Wrongful Trading	9
2.5	Disqualification	9
3.	Vulnerable Transactions	10
3.1	Transactions at an Undervalue	10
3.2	Preferences	10
3.3	Floating Charges	11
4.	Cross Border Aspects	11
5.	European Regulation on Insolvency Proceedings	12
6.	Restructuring	12
7.	Insolvency Rules in Other Countries	12

The purpose of this memorandum is to provide an introduction to the concepts of English insolvency law. It aims to highlight some of the formal insolvency procedures and issues which can apply to a company in financial difficulties and also to address some of the potential personal liabilities of the directors of the company.

## 1. Formal Insolvency Procedures

When a company is in financial difficulties there are, broadly, five formal procedures which may apply:

- (i) a **voluntary arrangement** may be entered into between the company and its creditors;
- (ii) a **scheme of arrangement** may be effected;
- (iii) an **administrator** may be appointed;
- (iv) an **administrative receiver** or **receiver** may be appointed;
- (v) the company may go into **liquidation** (otherwise known as **winding up**).

In looking at these procedures an important distinction needs to be drawn. Some of them are designed to assist a company in getting back on its feet by restoring it to financial strength. Others, in contrast, are the procedures which will apply when the company itself cannot be rescued and all that can be done is to sell the assets, if possible, as part of a business as a going concern, and then dissolve the company.

Broadly speaking, voluntary arrangements and schemes of arrangement are procedures designed to assist a company to reach agreement by way of compromise with its creditors. As such they may form part of a corporate reorganisation or rescheduling of debt.

The administration procedure was substantially revised by the Enterprise Act 2002, the relevant parts of which came into force on 15 September 2003. The purpose of the reforms was to make administration the principal insolvency procedure for both company rescue and the realisation of value in the company for the benefit of either all the creditors or the secured and preferential creditors. At the same time, the right of secured creditors to appoint administrative receivers was substantially restricted. The primary objective of administration is the rescue of the company. This was intended to be the purpose of the previous administration procedure but, with certain notable exceptions such as Olympia & York and Railtrack, it was generally a prelude to the break up and dissolution of a company.

The administration procedure was streamlined to make the appointment of an administrator easier and to reduce the need to make applications to court. The two most significant changes were the giving of power to certain secured creditors, the company or its directors to appoint an administrator out of court and to the administrator to make distributions to secured and preferential creditors. The reforms also included a number of subtle changes to the wording of provisions which previously had settled interpretations.

The power of a secured creditor to appoint an administrative receiver pursuant to a charge entered into on or after 15 September 2003 has been substantially restricted. While charges entered into before that date will not be subject to the prohibition, charges entered into after that date will only confer the power to appoint an administrative receiver if the company granting the charge falls within one of eight exceptions at the time of the appointment of the administrative receiver. These exceptions principally apply to companies involved in capital market transactions and companies involved in various forms of financed projects (see paragraph 1.4 below).

Receivership and liquidation are likely to signal an acknowledgement that the company itself has no future and all that can be sought is the maximisation of the proceeds of the sale of its assets or business. This may enable a purchaser to acquire at least part of its business as a going concern, thereby preserving the underlying business and employment. While part of the purpose of the new administration regime is to establish it as a rescue mechanism, in practice administration may still result in the dissolution of companies, not least as those companies which are capable of rescue are usually rescued by restructurings outside formal insolvency proceedings.

#### 1.1 Company Voluntary Arrangement (“CVA”)

The directors (or, if the company is in administration or liquidation, the administrator or liquidator) may propose to the shareholders and unsecured creditors a composition in satisfaction of the company’s debts or a scheme of arrangement of its affairs. A person authorised to act as a nominee or supervisor, currently a licensed insolvency practitioner (a professional with insolvency experience, normally an accountant), reports to the court as to whether, in his opinion, the proposal should be put to shareholders and creditors. If he believes the proposal should be put, meetings of shareholders and creditors are called to approve the proposal. Approval requires a simple majority at the shareholders’ meeting and a majority in excess of three-quarters (by value) at the creditors’ meeting (subject to the exclusion of secured creditors and certain other limitations concerning, for example, creditors who are connected with the company).

Certain modifications of the rights of secured and preferential creditors (as to which see below) cannot be approved, unless those creditors agree. Otherwise an approved proposal binds the creditors who would have been entitled to vote whether or not they had notice of the creditors’ meeting, although it can be challenged if it unfairly prejudices the interests of a creditor or shareholder of the company. If a proposal is approved it is implemented under the supervision of the authorised person referred to above, who becomes known as the “supervisor”.

The Insolvency Act 2000 inserted Schedule A1 into the Insolvency Act 1986 and contains provisions for a moratorium on legal processes, including the enforcement of security, of between one and three months for an eligible company contemplating a voluntary arrangement. This is known as the small company CVA moratorium. These provisions came into force on 1 January 2003. Eligibility for the moratorium is principally determined with reference to the definition of a small company to be found in the Companies Act 2006,

which is based on financial and employee tests. A special purpose vehicle in a securitisation or other financial structure may fall within the definition of small company. However, the statute contains exclusions from eligibility for companies involved in certain financial transactions.

The main advantage of a CVA is that it is an informal procedure which does not involve the court and may therefore prove less expensive than other procedures. In addition, the optional moratorium available for small companies will protect the company from creditor actions whilst the proposals are being put in place. The moratorium provisions may be extended to medium-sized and large companies if the insolvency reform proposals anticipated in the 2009 Budget are implemented. In the meantime, such companies can continue to take the benefit of a moratorium by combining the CVA with an administration.

## 1.2 Scheme of Arrangement

A company (or an administrator or liquidator) or any creditor or shareholder of a company may petition the court to summon a meeting of creditors or shareholders to agree to a compromise or arrangement between the company and its creditors or shareholders. If a simple majority in number of those voting and a three-quarters majority in value is obtained at any meeting, and if the court sanctions the compromise or arrangement, the compromise or arrangement will be binding on the company and the creditors or the shareholders. Where the compromise or arrangement is part of a reconstruction of the company or of an amalgamation of two or more companies, the scheme can provide for the transfer of assets and liabilities from one company to another.

One of the main advantages of a scheme of arrangement over a CVA is that it is binding on all creditors, including secured and preferential creditors, providing the appropriate approvals are obtained and it is sanctioned by the court. It can also be useful where a large number of creditors are involved, particularly if a few of them are refusing to engage in discussions regarding restructuring solutions. However, the statutory procedure can be expensive, cumbersome and less flexible than a consensual restructuring and requires the involvement of the court.

## 1.3 Administration

An administrator may be appointed either by application to the court or by filing papers with the court documenting an out of court appointment. An appointment out of court may be made by a secured creditor who is the holder of a qualifying floating charge, the company or its directors. A qualifying floating charge is a floating charge over the whole or substantially the whole of the company's property. An application to court to appoint an administrator may be made by the company, its directors or any creditor. Once an application has been lodged or notice of intention to make an appointment out of court has been given an interim moratorium automatically arises whereby, unless leave of the court is obtained, the company may not be wound up except where the Secretary of State or the FSA presents a petition on public interest grounds (although a petition for winding

up may still be presented), fixed security may not be enforced, goods held under leasing, hire purchase, conditional sale or subject to retention of title agreements may not be repossessed and all legal processes and proceedings against the company are stayed.

A holder of a qualifying floating charge is able to make an appointment either in or out of court at any time when an event has occurred which would allow him to enforce his charge. For all other appointments, whether in or out of court, it is necessary to show that the company is or is likely to become unable to pay its debts. Regardless of how an administrator is appointed, he will be an officer of the court.

In all cases, an insolvency practitioner's opinion that the purpose of administration is capable of being achieved must be provided. All administrations share the same purpose which is set out as a cascade of objectives. The first objective is the rescue of the company as a going concern. Only if this is not reasonably practicable or there would be a better result for the creditors as a whole if the value in the company is realised does the second objective apply. The second objective is to achieve a better result for the creditors as a whole than would be likely if the company were wound up without first being in administration. Only if the second objective is not reasonably practicable does the third objective of realising the company's property for the benefit of one or more secured or preferential creditors apply.

Where an administrative receiver is in office, the appointment of an administrator must be made by an application to the court. The court will only make an appointment where the appointor of the administrative receiver consents or where the court thinks that the security under which the administrative receiver was appointed is liable to be released or discharged as a preference or a transaction at an undervalue or that the floating charge is voidable for want of new consideration at the time of its creation.

Where a secured creditor retains the right to appoint an administrative receiver he may use this right to block the appointment of an administrator by appointing an administrative receiver prior to the appointment of an administrator. A person appointing an administrator must give notice to any person who may be entitled to appoint an administrative receiver or administrator as the holder of a qualifying floating charge. During the notice period, a secured creditor who retains the right to appoint an administrative receiver may do so or may instead substitute his choice of insolvency practitioner as administrator. A holder of a qualifying floating charge who does not have the power to appoint an administrative receiver may substitute his choice of insolvency practitioner as administrator even though he cannot block the appointment of an administrator.

If an administrator is appointed the moratorium referred to above continues (unless the administrator or the court agrees otherwise) and the affairs, business and property of the company are managed by the administrator. The directors' powers and duties of management cease although the administrator may leave some or all powers with the directors if he so chooses. Within ten weeks of his appointment, the administrator must present proposals to the creditors for approval, unless the court extends this period. He

has power, however, to sell the assets of the company in certain circumstances without the consent of the creditors and prior to the first meeting of creditors. A person dealing with an administrator in good faith and for value need not enquire if he is acting within his powers. Thus a purchaser of assets from the insolvent company will not normally need to check the authority of the administrator.

The administrator has wide powers to manage the business of the company. He may apply to the court for consent to sell assets which are subject to a fixed charge or are in the possession of the company under a hire purchase, conditional sale, chattel leasing or retention of title agreement. Such consent may be granted, but only on terms that the net proceeds of sale (and any deficiency between the proceeds and the amount which would be realised on an open market sale) are paid to the secured creditor.

The powers of administrators were extended by the Enterprise Act 2002. An administrator can make distributions to secured and preferential creditors and, with the court's permission, unsecured creditors. Where an administrator elects to make a distribution, mandatory set off rules apply. This enables administration to be used as a means of realising security. Creditors with priority (for example, those with fixed charges and preferential debts) must be paid before creditors with floating charge security. The administration set-off rules are a modified version of those which apply in liquidations.

Preferential debts are limited to employees' claims for unpaid wages and unpaid employer's contributions to company pension funds. The former preferential status of PAYE, VAT and NI debts (known as Crown preference) was abolished in September 2003. In respect of charges entered into on or after 15 September 2003, in most cases a proportion of the proceeds of the sale of assets subject to any floating charge will be set aside for the benefit of unsecured creditors. This fund will not exceed £600,000.

The administrator also has greater control over the administration procedure. Subject to court or creditor consent, the administrator is able to dispense with meetings, extend deadlines and determine whether the administration should terminate in a dissolution, a creditors' voluntary liquidation, a CVA, a scheme of arrangement or a compulsory liquidation.

The administration procedure also exists in modified form for certain regulated industries and partnerships.

#### 1.4 Administrative Receivership and Receivership

A receiver (or manager) is a person appointed pursuant to the terms of the relevant security document by a secured creditor as a means of enforcing his security. An administrative receiver is a receiver (or manager) of the whole or substantially the whole of a company's property who is appointed by or on behalf of holders of debentures secured by a floating charge or by such a charge and other forms of security.

An administrative receiver has similar management powers to those of an administrator and also any additional powers conferred by the security document under which he is appointed. There is, however, no moratorium, although the appointment of an administrative receiver usually prevents the making of an administration order, unless the person appointing the administrative receiver consents.

The administrative receiver takes possession of the secured assets with a view to realising their value and applying it to pay the amounts due to the secured creditor who appointed the receiver. Again, creditors with fixed charges and preferential debts must be paid before creditors with floating charges and a proportion of floating charge realisations may be set aside for the benefit of unsecured creditors (see paragraph 1.3 above).

A receiver appointed under a fixed charge (usually called a fixed charge, or Law of Property Act, receiver) has limited powers in respect of the property over which he is appointed. He pays the proceeds of the property to the holder of the fixed charge and, in this case, preferential debts do not rank ahead.

The Enterprise Act 2002 prohibits the appointment of an administrative receiver to most companies. Floating charges entered into before the prohibition came into force on 15 September 2003 are not subject to the prohibition. Where a charge is entered into on or after 15 September 2003 it will only be possible to appoint an administrative receiver where the company granting the charge falls into an exception to the prohibition. The exceptions cover capital markets transactions (securitisations), companies which trade on the financial markets, companies involved in public-private partnership and utilities projects, high value financed projects, companies subject to special administration regimes, companies involved in urban regeneration projects and registered social landlord companies. The exceptions are complex and can be amended by statutory instrument. Whether a company has the benefit of an exception will fall to be determined on the date of appointment of an administrative receiver.

## 1.5 Liquidation (Winding Up)

A company may go into liquidation through either a compulsory or a voluntary winding up or, if it is a bank or building society, it may be made subject to a special insolvency regime under the Banking Act 2009.

### (i) Compulsory Winding Up

Winding up in this case commences when a petition is presented to the court. A petition may be presented by the company, the directors, any creditor or (subject to certain exceptions) any person liable to contribute to the assets of a company in the event of a winding up. The grounds on which a court can make a winding up order include the company being unable to pay its debts and where the court believes it is just and equitable that the company be wound up. Where there is a holder of a qualifying floating charge in respect of the company in compulsory liquidation he

may apply to court to have the winding up order discharged and an administrator appointed instead.

(ii) Voluntary Winding Up

A voluntary winding up is one instigated by the company itself passing a resolution at a meeting of shareholders. There are two types of voluntary winding up: a "members' winding up" and a "creditors' winding up". A members' voluntary winding up is only possible where the directors are able to make a declaration that all the liabilities of the company will be met within a period not exceeding twelve months. In this case the shareholders appoint the liquidator, whereas in a creditors' winding up the creditors have a greater say and are also able to appoint a liquidation committee to supervise certain aspects of the winding up. Where there is a holder of a qualifying floating charge in respect of the company, the company must give prior notice to the charge holder of the intention to put a resolution for voluntary liquidation to its members.

In both a compulsory and a voluntary winding up the liquidator is under a duty to collect in and realise the assets of the company and to distribute them to the creditors and, if there is a surplus, to the shareholders according to their entitlements. Once all the assets have been distributed the company is dissolved. If, however, the liquidator believes that he could achieve a better result for the creditors if the company was in administration then he may apply to the court for himself or another person to be appointed as administrator.

The basic rule concerning the priority of creditors in a winding up is that each claim is treated equally. This rule is subject to whatever security may exist over the company's assets. A secured creditor with a fixed charge has priority insofar as the proceeds of sale of the charged property are concerned. The claims of any floating charge holders are subordinated to those of any fixed charge holders. The floating charge holder is also obliged to account to certain preferential creditors (for example, claimants in respect of wages not exceeding a specified amount due in the last four months and pension contributions due in the last twelve months prior to the onset of insolvency). In addition, its claims will be subordinated to the expenses of the winding up, to the extent that the assets of the company available for the payment of unsecured creditors are insufficient to meet them. As mentioned above, Crown preference was abolished in September 2003 and, as regards charges entered into on or after 15 September 2003, in most cases a proportion of the proceeds of the sale of assets subject to any floating charges will be set aside for the benefit of unsecured creditors.

Unsecured creditors are entitled to share in the remaining assets after the payment of the expenses of the winding up and the satisfaction of the claims of the secured and preferential creditors. Where the remaining assets are not sufficient to pay the expenses of a winding-up, assets subject to a floating charge will be used to pay those expenses, in priority to the claims of the floating charge holder and to any preferential creditors entitled to be paid in priority to the floating charge holder. Any surplus is paid to the shareholders in accordance with their entitlements, subject to any claims by subordinated creditors.

## 2. Personal Liability of Directors

This part of the memorandum addresses duties and obligations placed on directors which, if not complied with, can render them personally liable. For the purposes of these provisions directors include *de facto* and shadow directors.

### 2.1 General duties of directors

The common law imposes duties of skill and care on directors of the company which apply at all times. These have recently been enshrined in statute. One of the key duties is the duty to promote the success of the company for the benefit of its members as a whole. This duty is subject to any law requiring directors in certain circumstances (for example, when the company is approaching insolvency) to consider or act in the interests of the company's creditors.

### 2.2 Delinquent Directors

If in the course of a winding up anyone who has been involved with the promotion, formation or management of the company is found to have misapplied, retained or become accountable for any money or other property of the company, or been guilty of misfeasance or breach of a fiduciary or other duty in relation to the company, a court may on an application by the official receiver, liquidator or a creditor compel him to:

- (i) repay, restore or account for the money or property of the company with interest; or
- (ii) contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary duty or other duty as the court thinks just.

Breaches of duty which could be relevant here may include a director's involvement in the company granting a preference or entering into a transaction at an undervalue (which are explained below).

### 2.3 Fraudulent Trading

A court, on application by a liquidator in a winding up (or by a bank liquidator or administrator under the Banking Act 2009) can order that any person who was knowingly a party to carrying on the business of a company with intent to defraud creditors or any other person, or for any fraudulent purpose, be liable to make such contribution (if any) to the company's assets as the court thinks proper. Liability may attach to persons who are not directors of the company but have been involved in fraud; for example, a company which assisted the insolvent company in perpetrating the fraud.

Fraudulent trading is also a criminal offence carrying with it the threat of imprisonment, a fine or both. Such an offence may apply whether or not the company has been, or is in the course of being, wound up.

Fraudulent trading can arise when directors of a company allow it to incur credit when they know there is no good reason for thinking that funds will be available to repay the relevant debt when it becomes due or shortly thereafter. Thus directors would have to be reasonably satisfied that services or goods supplied to the company can be paid for on the due date.

#### 2.4 Wrongful Trading

A court, on application by a liquidator in a winding up (or by a bank liquidator or administrator under the Banking Act 2009), can order that a director of a company which has gone into insolvent liquidation is liable to make such contribution (if any) to the company's assets as the court thinks proper if:

- (i) before the commencement of the winding up, the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation; and
- (ii) thereafter the director failed to take every step with a view to minimising the potential loss to the company's creditors which he ought to have taken.

The standard required as to what a director ought to know, the conclusions he ought to reach and the steps he ought to take is the standard of what would be known, reached or taken by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as those of the director in relation to the company and with the general knowledge, skill and experience that the director has. Under the Banking Act 2009, giving notice to the Financial Services Authority of the presentation of a petition for the winding-up of a bank or an application to place it into administration, if done with a view to minimising the potential loss to a bank's creditors, may assist a director of a bank to defend a wrongful trading claim.

Not only do the wrongful trading provisions apply to directors and former directors (and there is no distinction for these purposes between executive and non-executive directors) but they also apply to *de facto* directors and to shadow directors, who are people or companies in accordance with whose instructions or directions the directors of a company are accustomed to act.

#### 2.5 Disqualification

Apart from personal liability, where a director engages in fraudulent or wrongful trading or has been found guilty of other misconduct in connection with a company and is held to be unfit by the court, he may be disqualified by court order for a period of between two and fifteen years from acting as a director or from having any involvement in the promotion, formation or management of any company. This includes directors of banks that are placed into liquidation or administration under the Banking Act 2009.

The Insolvency Act 2000 introduced provisions into the Company Directors Disqualification Act 1986 for a director who has been guilty of misconduct to give an undertaking to the Secretary of State not to act as a director for a given period. This enables the time and expense of disqualification proceedings to be minimised.

In light of the above it is clearly essential that the directors of a company receive legal and other professional advice in the event of financial difficulties. In these circumstances, the directors of a company are strongly urged to seek the assistance of an insolvency practitioner at an early stage to provide them with an experienced and objective view of the company's problems. By following the advice of such a practitioner the directors will reduce the likelihood of the circumstances described above where the directors may be personally liable.

### **3. Vulnerable Transactions**

#### **3.1 Transactions at an Undervalue**

A transaction is at an undervalue if a company makes a gift to a person or enters into a transaction on terms where the company receives no consideration or one which has a value which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company. It is a defence that the transaction is entered into in good faith for the purpose of carrying on the company's business and that there are reasonable grounds for believing that it will benefit the company.

A transaction at an undervalue may be set aside if it was entered into during the period of two years ending with the onset of insolvency (broadly, the commencement of the winding up or administration procedure) and the company was insolvent on a cash flow or balance sheet test at the time it entered into the transaction or became insolvent by entering into it. There is a presumption of insolvency if the parties to the transaction are connected, for instance it is an intra-group transaction or it is with a director of the company.

Where a company enters into a transaction at an undervalue for the purpose of putting its assets beyond the reach of current or future creditors, the transaction is vulnerable to being unwound at any time, whether or not the company is insolvent.

#### **3.2 Preferences**

A preference is given to a creditor or a guarantor or a surety of its debts if the company does anything or suffers anything to be done which has the effect of putting that person in a position which, if the company were to go into insolvent liquidation, would be better than the position he would have been in if the thing had not been done. The repayment of a debt by a customer to its bank on the due date could be within this wide definition. The company must have been influenced in deciding to give the preference by a desire to produce the preferential effect, in order for the preferential transaction to be vulnerable. There is a presumption of such influence if the parties are connected.

Any such transaction will be set aside if, in the case of a non-connected person, it was entered into in the six months period before the commencement of the winding up of the company or its entry into administration. This period extends to two years in the case of a connected person. Further, for the transaction to be set aside, the company must be insolvent at the time of the transaction or as a result of entering into the transaction.

If a transaction is established as being at an undervalue or a preference, the court has very wide powers to put the parties back into the position they were in before the transaction was entered into, although there is protection for a third party who enters into one of the transactions in good faith and without notice.

### 3.3 Floating Charges

A floating charge may be invalid if it is created within two years of the onset of insolvency, if the parties are connected, or within one year if they are not. There is a defence that the company was solvent when the charge was created (on a balance sheet and cash flow test) and did not become insolvent as a consequence of the transaction, but this solvency test will not apply if the parties are connected.

The charge will, however, be valid to the extent of the value of so much of the consideration for the charge as consists of money paid or goods or services supplied to the company at the same time as or after the creation of the charge, together with interest, if any, payable under the relevant agreement.

## 4. Cross Border Aspects

The Cross-Border Insolvency Regulations 2006 implement the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") in the UK. The Regulations are substantially in the form of the UNCITRAL text with certain amendments to make them compatible with English law. They provide for recognition of foreign insolvency representatives in the UK, for co-operation between courts and for co-ordination of cross-border insolvency proceedings. The Model Law has also been enacted in a number of other jurisdictions, most significantly in the USA as Chapter 15 of the US Bankruptcy Code.

The terms of the Model Law are broadly drafted and will require extensive interpretation by the courts. It will be some time before the impact of the Model Law becomes clear.

There are also provisions for co-operation between the UK jurisdictions (England and Wales, Scotland and Northern Ireland) in respect of corporate insolvency whereby the courts will assist one another. These provisions also extend to other countries designated by the Secretary of State for Trade and Industry. This process is only of limited use, in particular as the foreign or other UK jurisdiction court must make a request to the English court for assistance. It may be possible, for example, to obtain an administration order from the English court in relation to an overseas company following an application by a foreign court. The countries designated for these purposes by the Secretary of State are generally those which have equivalent reciprocal arrangements, principally Commonwealth countries, for instance Australia, Canada and Hong Kong.

## **5. European Regulation on Insolvency Proceedings**

The Regulation applies to all EU member states except Denmark. It provides for EU-wide recognition of an administrator, a supervisor of a CVA, a provisional liquidator or liquidator of a compulsory liquidation and, with court sanction, a liquidator of a creditors' voluntary liquidation. The Regulation also provides for reciprocal recognition in the UK of insolvency officers of other EU member states. An insolvency officer will be entitled to apply the rules of his home jurisdiction in any other EU jurisdiction, subject only to public policy and fundamental rules of the jurisdiction in which he seeks to apply them. Where a company has an establishment in any EU member state other than that in which it has its centre of main interests (where the proceedings would normally be commenced), it may be possible to commence winding-up proceedings to which local law will apply. However, the anti-avoidance rules of the jurisdiction in which the insolvent company has its centre of main interests will apply across the EU and will override the rules of any other state in which there is a local liquidation. There are a number of exceptions to the application of the law of the home jurisdiction in other EU member states, for instance in respect of security, set-off and retention of title.

Case law has established that the Regulation has extended the jurisdiction of the English court to include jurisdiction over non-EU domiciled companies which have their centre of main interests in England.

## **6. Restructuring**

Over recent years there has been a shift away from formal insolvency proceedings towards corporate recovery by the restructuring of a company's finances by private negotiated agreement with creditors. Insolvency proceedings often prove to be inflexible and frequently lead to the demise of the debtor company. Furthermore, formal insolvency proceedings generally preclude debtor-in-possession restructuring. US based holders of UK corporate bonds are increasingly expecting restructuring outcomes which are similar to those achieved by a debtor-in-possession procedure under Chapter 11 of the US Bankruptcy Code, typically involving debt for equity swaps and the dilution of existing shareholdings along with a further injection of funds. As a restructuring is a non-statutory remedy, however, no moratorium will arise other than by agreement between the creditors and there is no statutory mechanism by which to compel a dissenting creditor to participate in the restructuring unless a formal procedure such as a CVA or a scheme of arrangement is put in place.

## **7. Insolvency Rules in Other Countries**

The rules described above are the ones which apply under English law. Other countries will have their own rules. There is, as yet, little uniformity or standardisation of approach between different countries. The concepts are, however, quite similar. Thus, for example, most countries will have concepts of liquidation and many have a procedure which protects the company while it tries to resolve its difficulties.

The different rules mean that when a company is in financial difficulties it is necessary to address the insolvency laws of:

- (i) the country of its incorporation; and
- (ii) each country in which it has any significant assets.

It is not always easy to reconcile the differences between the various laws which may apply. In the Maxwell case, for example, a mode of operation had to be agreed between the administrator appointed by the English courts and the trustee appointed by the US courts.

Slaughter and May  
June 2009

This memorandum provides an introduction to English insolvency law and is not intended to contain definitive legal advice, which should be sought, as appropriate, in relation to any particular transaction. If legal advice is required, please refer to George Seligman, Ian Hodgson or Sarah Paterson at Slaughter and May or your usual contact at the firm.

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## **CONTACT ADDRESSES**

### **London**

One Bunhill Row  
London EC1Y 8YY  
United Kingdom  
T +44 (0)20 7600 1200  
F +44 (0)20 7090 5000

### **Paris**

130 rue du Faubourg Saint-Honoré  
75008 Paris  
France  
T +33 (0)1 44 05 60 00  
F +33 (0)1 44 05 60 60

### **Brussels**

Square de Meeûs 40  
1000 Brussels  
Belgium  
T +32 (0)2 737 94 00  
F +32 (0)2 737 94 01

### **Hong Kong**

47th Floor  
Jardine House  
One Connaught Place  
Central  
Hong Kong  
T +852 2521 0551  
F +852 2845 2125

[www.slaughterandmay.com](http://www.slaughterandmay.com)