Restructuring & Insolvency

Contributing editor
Bruce Leonard

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GETTING THE DEAL THROUGH

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Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

General insolvency legislation

The legislation principally applicable to the insolvency of companies incorporated in England and Wales is the Insolvency Act 1986 (the Insolvency Act) as amended from time to time. The Insolvency Act is supplemented by subordinate legislation, the most important of which are the Insolvency Rules 1986 (the Insolvency Rules). The Company Directors Disqualification Act 1986 (the CDDA 1986) deals with the position of directors of insolvent companies.

In relation to reorganisations, the Companies Act 2006 is also relevant as this sets out the provisions concerning schemes of arrangement (discussed further in question 11 below).

As at the time of writing, the UK remains part of the European Union, and, hence, the EC Regulation on Insolvency Proceedings 2000 applies (see also 'Update and trends'). This affects cross-border insolvencies and is discussed in more detail in questions 29 and 47 and the chapter on the European Union. The Cross-Border Insolvency Regulations 2006 (which incorporated into English law the UNCITRAL Model Law on Cross-Border Insolvency) are also relevant and are discussed in question 47.

On 25 May 2016, the UK government issued a consultation paper 'A review of the corporate insolvency framework – options for reform'. The consultation focuses on four areas:

- the creation of a new moratorium: This will provide companies with a moratorium on creditor action, initially of three months, subject to eligibility and qualifying conditions, with some supervision by an insolvency practitioner;
- helping businesses to continue to trade through a restructuring process: Providers of supplies essential to the particular business may be compelled to continue to supply, on the same terms as previously, and notwithstanding any contractual termination rights, through any moratorium and subsequent administration or company voluntary arrangement;
- developing a flexible restructuring plan: Proposals to allow stakeholders (including secured and unsecured creditors) to be crammed down across classes if they receive no less than in a liquidation; and
- exploring options for rescue financing: The consultation discusses whether to allow companies to grant security interests, during administration and other rescue processes, which could have priority (super-priority) over existing security (including prior fixed charges), subject to the creation of safeguards for existing secured creditors, and on allowing rescue financing to take priority over administration expenses.

The consultation closed on 6 July and the UK government intends to publish a response within three months thereof and, depending on the outcome, will bring forward final proposals for legislation as soon as parliamentary time allows. Should the government implement some of these reform suggestions, they will impact the insolvency landscape (and answers to some of the questions in this chapter) quite dramatically. Where relevant, we have referenced the consultation in the questions where the topic may be impacted.

Determining whether a debtor is insolvent

'Insolvency' itself is not defined by the Insolvency Act. Instead the Act contains the concept of a company being 'unable to pay its debts'. A company is deemed to be unable to pay its debts if:

- it has not paid a claim for a sum due to a creditor exceeding £750 within three weeks of service of with a written demand in the prescribed form (known as a statutory demand);
- an execution or judgment against the company is unsatisfied;
- it is proved to the satisfaction of the court that it is unable to pay its debts as they fall due, also having regard to contingent and prospective liabilities, (generally known as 'cash flow insolvency'); or
- if it is proved to the satisfaction of the court that the value of the company's assets are less than the amount of its liabilities, taking into account contingent and prospective liabilities, (commonly known as the 'balance sheet test'). The highest court in England, the Supreme Court, held in *BNY Corporate Trustee Services Ltd v Eurosail UK 2007-3BL plc* [2013] UKSC 28 that the court is required to make an assessment of the company's assets and liabilities and to decide whether, on the balance of probabilities (making proper allowance for contingent and prospective liabilities), the company cannot reasonably be expected to meet those liabilities.

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

There are no courts that deal solely with insolvency procedures. The High Court can wind up any company incorporated in England and Wales (and in some cases, foreign companies – see question 3). Any criminal matters must be dealt with by the relevant criminal court.

Excluded entities and excluded assets

3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

Generally, registered companies incorporated in England and Wales and companies formed outside England and Wales with their centre of main interests (COMI) in England and Wales can be subject to all forms of insolvency proceedings. Within the Insolvency Act there are separate provisions regarding the winding up of unregistered companies, which also apply to unregistered associations, friendly societies and foreign companies (provided they have sufficient connection with the jurisdiction).

The insolvency of partnerships (other than limited liability partnerships) is dealt with by the Insolvent Partnerships Order 1994 (as subsequently amended). Limited liability partnerships are subject to the Insolvency Act and related subordinate legislation subject to exceptions.

Special regimes

In addition, there are special insolvency proceedings in respect of companies belonging to certain key industries. There are no fewer than 17 tailor-made insolvency regimes. The aim of the special regimes is to ensure the continuity of service and the orderly wind down and hand over of service provision where the services form an essential part of the country's infrastructure or are systemically important.

Legislation also exists that is designed to protect the financial markets from the insolvency of a market participant. This disapplies to a certain extent the general insolvency law and introduces specific provisions. This area is a highly complex and deeply regulated area. Key legislation governing the issue is Part VII of the Companies Act 1989 and Part XXIV of the Financial Services and Markets Act 2000 (as amended) as well as subordinate legislation.

Regulated entities, such as financial institutions, are supervised and regulated by two regulatory bodies, the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA), which are each given specific powers to apply for and participate in the application for the insolvency of a regulated entity.

Further, there are certain legislative measures taken at the European Union level (which are transposed into English law) regulating in which country within the European Union an insurance company or credit institution ought to be wound up. These are the Insurers (Reorganisation and Winding up) Regulations 2004 (implementing Council Directive 2001/17 EC on the reorganisation and winding up of insurance undertakings) and the Credit Institutions (Reorganisation and Winding Up) Regulations 2004 (implementing Council Directive 2001/24 EC on the reorganisation and winding up of credit institutions). The aim of these two regulations is to provide greater consumer protection and to achieve a consistent approach to insolvency proceedings across the European Union.

Excluded assets

All property in which the company has a beneficial interest will fall within the insolvent estate and be available for the benefit of creditors. Assets subject to a fixed charge, supplied under hire purchase agreements, subject to retention of title claims (see question 8) or which the company holds on trust for a third party are not beneficially owned by the company and therefore do not fall within the insolvent estate, subject to such claims being valid, and in the case of a trust, the trust being properly constituted.

Public enterprises

4 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

There are no specific rules for government-owned enterprises and the normal rules on insolvency applicable to the type of company involved apply. As noted in question 3, there are special insolvency proceedings regarding of companies belonging to key industries and these special insolvency proceedings will often provide for the government or a particular department or agency to be involved in the process. Creditor remedies are therefore also as provided in the respective insolvency proceeding.

Protection for large financial institutions

5 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

Yes. The Banking Act 2009 (the Banking Act), which came into force on 21 February 2009 (as amended), governs the rescue or wind down of banks and other financial institutions. The Banking Act establishes a permanent special resolution regime providing HM Treasury, the Bank of England and the appropriate regulator (the authorities) with tools to deal with banks that get into financial difficulties.

The special resolution regime in the Banking Act applies to the following:

- UK incorporated institutions authorised under the Financial Services and Markets Act 2000 to accept deposits (although note that the regime applies in a modified way only to building societies and not to credit unions);
- building societies (although there are specific modifications here);
- systemically important investment firms (these are UK investment firms that have an initial capital requirement of €730,000);
- recognised central counterparties (CCP) (these terms are defined in the legislation but means UK clearing houses and clearing houses whose application for authorisation under Regulation (EU) No. 648/2012 on OTC derivatives, central counterparties and trade repositories have yet to be determined);
- banking group companies (these are certain specified undertakings that are in the same group as a bank, investment firm or CCP; and
- banks that are not regulated by the Prudential Regulation Authority (PRA) (note that this provision is to future-proof the legislation as there are currently no UK banks that are not simultaneously authorised and regulated by the PRA).

The special resolution regime provides for five pre-insolvency stabilisation options: transfer to a private sector purchaser; transfer to a bridge bank; transfer to an asset management vehicle; bail-in and transfer to temporary public sector ownership. In addition, there are two insolvency options (see below). There are seven special resolution objectives which the relevant authorities must have regard to:

- ensuring the continuity of banking services in the UK and of critical functions;
- the protection and enhancement of the stability of the UK financial systems;
- the protection and enhancement of public confidence in the stability of the UK's financial system;
- the protection of public funds;
- the protection of depositors;
- the protection of client assets; and
- the avoidance of interference with property rights in contravention of a human right, in particular article 1 of the First Protocol of the European Convention of Human Rights.

A Code of Practice is in force giving guidance on the use of the special resolution tools.

The two insolvency options that form part of the special resolution regime in the Banking Act are bank insolvency and bank administration. The aim of bank insolvency is to provide for the orderly winding up of a failed bank or financial institution. The provisions are based on existing liquidation provisions. The aim of bank administration is to put into place a bank or financial institution administration procedure to deal with the residual part of a bank or financial institution where there has been a partial transfer of business to a private-sector purchaser or bridge bank pursuant to the special resolution provisions. A bank administrator may be appointed by the court to administer the affairs of the residual part of the insolvent bank.

The Banking Act excludes investment banks from the bank insolvency and administration procedures set out above where the investment bank is not an authorised deposit-taking institution. However, the Banking Act enabled a special regime to be put in place for investment firms. This is set out in the Investment Bank Special Administration Regulations 2011 (SI 2011/245) (the Regulations) and the Investment Bank Special Administration (England and Wales) Rules 2011 (SI 2011/1301). The administrator has three objectives: to ensure the return of client assets (including money) as soon as is reasonably practicable; to ensure timely engagement with market infrastructure bodies and the Bank of England, HM Treasury and the PRA; and to either rescue the investment bank as a going concern or wind it up in the best interests of creditors. The administrator is obliged to commence work on each objective immediately after appointment, but has the flexibility to prioritise the order of work as he or she thinks fit (subject to any PRA direction), in order to achieve the best result overall for clients and creditors. In general, the administration provisions set out in the Insolvency Act apply in the case of a special administration, subject to certain modifications set out in the Regulations. Where the investment bank is also a deposit-taking bank with eligible depositors, the Regulations allow the bank to be put into special administration (bank insolvency) or special administration (bank administration).

Secured lending and credit (immoveables)

6 What principal types of security are taken on immoveable (real) property?

The principal type of security granted over immoveable property is the legal mortgage. This is a transfer of the whole of the debtor's legal ownership in the property subject to the security. It is subject to the debtor's right to redeem the legal title upon repayment of the debt (known as the equity of redemption). The appearance of ownership remains with the debtor although the legal mortgage affects an absolute transfer subject to the right of redemption.

An alternative is the equitable mortgage, which creates a charge on the property but does not convey any legal estate or interest to the creditor. It can be created by a written agreement to execute a legal mortgage, by a mortgage of an equitable interest or by a mortgage that fails to comply with the formalities for a legal mortgage.

Another alternative is the fixed charge. This involves no transfer of ownership but gives the creditor the right to have the designated property sold and the proceeds applied to discharge the debt. A fixed charge attaches to the property in question immediately on creation (or, if acquired later, after creation but immediately on the debtor acquiring the rights over the property to be charged). The debtor may then only dispose of the property once the debt has been repaid or with the consent of the creditor.

Secured lending and credit (moveables)

7 What principal types of security are taken on moveable (personal) property?

The principal types of security relating to moveable property are mortgages and fixed charges (see question 6), floating charges, pledges and liens.

A floating charge does not attach to a specific asset but is created over a class of assets, present or future, and allows the debtor to buy and sell such assets while the charge remains floating. Floating charges are generally created over the whole business and undertaking of a company. It is only on the happening of a certain event, such as default on the repayment of the debt, that the charge attaches to the secured assets that are at that time owned by the debtor. This is called 'crystallisation'. On crystallisation, the charge acts like a fixed charge in that the debtor is no longer free to sell the assets without repayment of the debt or without the consent of the creditor.

A pledge is a form of security that gives the creditor a possessory right to the pledged asset. It is usually created by delivering the asset to the creditor, although symbolic or constructive delivery may be sufficient.

A lien is a possessory right of a creditor to retain possession of a debtor's asset until the debt has been repaid. It can be created by contract or by operation of law. The creditor has no right to deal with the asset and the lien is usually extinguished once the asset is returned to the debtor.

The Financial Collateral Arrangements (No. 2) Regulations 2003 (the FCA Regulations) are intended to give effect in England and Wales to the European Union Directive 2002/47/EC on financial collateral arrangements (the FCA Directive) in order to create a simple, effective legal framework for the use of securities (financial instruments) and cash as collateral by title transfer or pledge, removing burdensome formalities of execution, registration and enforcement. They also disapply certain provisions of the Insolvency Act. The FCA Regulations only apply to security over cash (including claims for repayment of money), credit claims (loans made available by credit institutions), financial instruments and shares. The FCA Regulations apply to arrangements made on or after 26 December 2003 (the date the FCA Regulations came into force), and case law has confirmed that they do not have retroactive effect. The FCA Directive provides that the security provider and taker must be a public authority, a central bank or other international bank, financial institution or central counterparty, settlement agent, clearing house or similar institution. The FCA Regulations do not contain this element. This has led to doubts about whether the FCA Regulations were valid made under the European Communities Act 1972 (see *The United States of America v Nolan* [2015] UKSC 63).

Unsecured credit

8 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

Certain creditors may have the benefit of a lien imposed by statute over the assets in their possession (see question 7). A supplier of goods may protect himself or herself by inserting a clause in the supply contract to the effect that title to the goods supplied will not pass to the buyer until payment has been received (known as a 'retention of title' or ROT clause). The contract can either provide for retention of title until the specific goods supplied by the contract have been paid for or, more usually, until all monies outstanding from the debtor have been paid. The creditor is therefore contractually entitled to the return of goods.

If none of the above remedies are available, then an unsecured creditor will need to commence proceedings against the debtor for debt recovery. If there is no substantive defence to the claim, the creditor can apply for summary judgment, which could take up to three months. If the debtor can show that he or she has a real prospect of successfully defending the claim, it could take much longer. In the meantime, if the creditor has evidence that the debtor is likely to dissipate his or her assets he or she can apply to the court for an order that assets up to the amount claimed be frozen or prevented from being dealt with or dissipated. Once a judgment has been obtained, then enforcement proceedings can commence. Remedies include sending a court officer to seize the debtor's goods or diverting an income source directly to a creditor (a third-party debt order).

Creditors (including unsecured creditors) can also apply to the court for a winding-up order, proceeding directly with an application for a winding-up order or serving a statutory demand on the debtor first (see question 1). Where a debt is genuinely disputed the dispute should be resolved through the commercial courts – the courts have consistently held that a winding-up petition should not be used as a way to enforce a debt where there is a triable issue. Unsecured creditors are also able to make an application to court for the appointment of administrators (see question 11 below).

There are no special rules for foreign creditors except that they may sometimes be required to provide security for the debtor's legal costs by making a payment into court.

Voluntary liquidations

9 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

There are two different procedures for the voluntary liquidation of a company, members' voluntary liquidation (a solvent liquidation) and creditors' voluntary liquidation (typically, an insolvent liquidation).

Members' voluntary liquidation (MVL)

If the directors are able to swear a statutory declaration that the company is solvent, a company can be placed into MVL. The MVL is commenced once the shareholders pass a special resolution (75 per cent majority) to place the company into liquidation. The shareholders choose the identity of the liquidator and he or she is appointed by ordinary resolution (over 50 per cent). On the liquidator's appointment, the directors' powers will cease. There is no automatic stay of proceedings once an MVL has commenced and generally, the court is not involved in an MVL. However, the court may order that any particular proceeding is stayed or partially stayed under its general, discretionary power.

If the liquidator subsequently determines that the company is, in fact, insolvent, then the MVL should be converted into a creditors' voluntary liquidation.

Creditors' voluntary liquidation (CVL)

If the company is insolvent, or the directors are unable to swear a statutory declaration as to solvency, a company can be placed into a CVL. Like an MVL, the process is started by the shareholders passing a special resolution (75 per cent) resolving to place the company into liquidation. The shareholders will also appoint a liquidator, but until the creditors' decision referred to below has taken place, the powers of that liquidator are limited. The directors must then seek a decision from the creditors within 14 days. Currently, the directors convene a physical creditors' meeting (typically on the same day as the shareholders' meeting), at which the creditors will be given information on the company (a statement of affairs) and at which the creditors may also appoint a liquidator if a resolution is passed by a majority in value of the creditors present and voting. If the shareholders have previously appointed a liquidator, the creditors' choice of liquidator will prevail. The Insolvency Rules 1986 are in the process of being recast, and significant changes will be made to physical creditors' meetings. The new rules are expected to enter into force in the spring of 2017.

On the liquidator's appointment, the directors' powers will cease. Like in an MVL, there is no automatic moratorium on proceedings against the company. The liquidator or any creditor or shareholder may, however, apply to the court for a stay on any proceedings under their general discretionary power.

Involuntary liquidations

10 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

In the case of involuntary liquidation (otherwise known as compulsory liquidation or winding up by the court), the creditor must apply to the court for a winding-up order. The most likely ground for a winding-up order is that the company is unable to pay its debts (see question 1).

If the court makes a winding-up order, the winding up is deemed to commence at the time of the presentation of the winding-up petition rather than at the date of the order (unless the winding-up order is made following an application for administration which the court determines to treat as a winding-up petition, in which case the winding-up is deemed to commence on the making of the order). Any disposition of the company's property and any transfer of shares made after the commencement of the winding up is, unless the court orders otherwise, void.

Once the winding-up order has been made, no action may be started or proceeded with against the company without the court's permission. The directors' powers will also cease at the time of the winding up order. In addition, the business of the company ceases except to the extent necessary for it to be wound up.

A secured creditor holding a qualifying floating charge can, in limited circumstances, appoint an administrative receiver. An administrative receiver realises the secured debt for the benefit of the debenture holder who appoints the administrative receiver. There is no statutory purpose of administrative receivership. Given the non-collective nature of the process, the availability of appointing administrative receivers was significantly curtailed by the Enterprise Act 2002. Following this Act, it is now only possible to appoint an administrative receiver under a qualifying floating charge where it is a charge created before 15 September 2003 or if a charge is created after this date, if it falls within certain exemptions (eg, if there is a capital market arrangement).

Voluntary reorganisations

11 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

There are three main processes set out by legislation, which are: company voluntary arrangements; schemes of arrangement; and, to a lesser degree, administrations.

Company voluntary arrangements (CVAs)

The process for a CVA is set out in Part 1 of the Insolvency Act. A CVA is an agreement between a company, its shareholders and its (unsecured) creditors where the directors (or a liquidator or administrator) propose a reorganisation plan, which usually involves delayed or reduced debt payments or a capital restructuring.

The CVA commences with the directors making a written proposal to an insolvency practitioner (called the nominee) who files a report with the court on whether to call meetings of the shareholders and creditors of the company to consider the proposal. While the nominee's report is filed at court, there is no court hearing or judicial examination on the matter. If the nominee concludes that the meetings should be held, a meeting of the company's shareholders and a meeting of the company's creditors is called. At the shareholder meeting, the proposal must be approved by 50+ per cent (in value). At the creditors' meeting, the proposal must receive the approval of 75 per cent (in value) of the company's creditors, present and voting. In addition to this requirement, a resolution will be invalid if those creditors voting against it include more than half in value of the 'unconnected' creditors. The definition of 'connected' is set out in the Insolvency Act and is very broad, most importantly including the company's shareholders. Votes are calculated according to the amount of the creditor's debt as at the date of the meeting.

Where the requisite approvals have been obtained, the CVA will bind every creditor who was entitled to vote at those meetings except for preferential and secured creditors, who are not bound by the CVA unless they agree to be. Where the meeting of shareholders and creditors produce conflicting conclusions, the creditors' decision prevails. However, in this case, a shareholder can within 28 days apply to the court for an order reversing or modifying the creditors' decision. Creditors may also apply to court to challenge the CVA within 28 days of the approval being reported to court if they think that they have been unfairly prejudiced or there has been a material irregularity in the conduct of the meetings. Once the CVA has been approved the nominee becomes the supervisor and is tasked with ensuring that the terms of the CVA are implemented.

During the CVA process there is usually no statutory moratorium. However, a 'small company' (defined by reference to its turnover, balance sheet and number of employees) wishing to propose a CVA can benefit from an initial 28-day moratorium.

CVAs are often used in the context of implementing an operational restructuring of a business (as opposed to a financial restructuring) – not least because of the inability to bind secured creditors in this process.

Schemes of arrangement

Schemes of arrangement are governed by the Companies Act 2006 and provide a mechanism enabling a company to enter into a compromise or arrangement with its creditors (including secured creditors). The process is commenced by a court application (ordinarily by the company, but this could also be made by any creditor, a liquidator or administrator) for an order that a creditors' meeting be summoned. At the creditors' meeting, the scheme is approved if 75 per cent in value and the majority in number of each class of creditors present and voting votes in favour. A second court application is then required at which the court is asked to sanction the scheme. Once sanctioned and delivered to the Registrar of Companies, the scheme will be binding on all the company's creditors.

Creditors can challenge the scheme in court at either the hearing for permission to convene the scheme meetings or the hearing to sanction the scheme. The usual grounds for challenge are that the class meetings were improperly constituted, the creditors were not given sufficient information or the scheme is unfair. During the scheme process there is no statutory moratorium. However, the court will generally be supportive of the restructuring process, assuming that the scheme has a reasonable prospect of succeeding. In one case, the court was even prepared to grant a temporary stay of proceedings for summary judgment against a company that is in the process of implementing a scheme (*FMS Wertmanagement AÖR v Vietnam Shipbuilding Industry Group & Ors* [2013] EWHC 1146 (Comm)). Recently, companies have also used a scheme to achieve a standstill period in which to progress a restructuring. Interestingly, these schemes did not implement the actual restructuring but simply provided the means to achieve a moratorium that was not obtainable without cram down of creditors (see the cases of *Metinvest (Re Metinvest BV* [2016] EWHC 79 (Ch)) and *DTEK* (*Re DTEK Finance BV* [2015] EWHC 1164 (Ch).

A company is entitled to implement a scheme if it is capable of being wound up in England and Wales. Case law has clarified that a company could be wound up in England and Wales if it could be said to have 'sufficient connection' with England and Wales. The question as to what constitutes 'sufficient connection' is a factual one but recent case law has continually reduced the threshold. A foreign company with either its COMI or an establishment in England has sufficient connection with England. Equally, there are a number of cases where sufficient connection was demonstrated because the facility documents were governed by English law and contained a clause granting exclusive and non-exclusive jurisdiction in favour of the English courts. Cases have included a scheme of arrangement where the facility agreement was not originally governed by English law but where governing law and jurisdiction were amended to English law as part of the restructuring process just before the scheme proposal for the purpose of establishing sufficient connection (*Re Apco Parking Holdings GmbH* [2014]

EWHC 1867 (Ch)) and where a new UK-incorporated company that voluntarily assumed obligations under the debt to be compromised was added to the group in order to be the scheme company (*Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch)). The English courts have therefore taken an expansive view of sufficient connection (even where this is established late and for the purpose of the scheme). Companies will need to take care to ensure that an English law scheme is capable of being enforced in the jurisdiction in which the company's assets are situated. An English law decision is of limited value if creditors are still able to take unilateral action to recover their 'schemed' debts in overseas jurisdictions. Generally, the English courts will require expert evidence that the scheme would be capable of being enforced in the home jurisdiction(s) of the debtor, which usually takes the form of a legal opinion from a legal academic qualified to practise in the relevant area of law. A scheme may also be combined with recognition proceedings in other jurisdictions, for example, Chapter 15 of the US Bankruptcy Code.

Schemes have been used to effect a 'balance sheet restructuring' and are sometimes combined with an administration (particularly where there is a need for a moratorium) or a CVA that can deal with the operational elements of a restructuring.

Administration

A company can achieve a successful financial reorganisation without the need to enter into any formal insolvency procedure, although if creditors are not generally supportive of the restructuring process or do not have confidence in the company's management it may be necessary to place the company into administration. Administration is an alternative insolvency procedure to liquidation that allows a (normally insolvent) company to continue trading with protection from its creditors by way of a moratorium (see question 15). This may give the company sufficient breathing space to be reorganised and refinanced. While a company is in administration it is controlled by an administrator, who will be a licensed insolvency practitioner, and to all effects and purposes, the directors' powers will cease (although they will remain in office). There is both a court-based procedure (via an administration application) and an out-of-court route (for use by a holder of a qualifying floating charge (QFC) or by the company or its directors) to place a company in administration.

The objectives of an administration are to be achieved via a waterfall effect. The primary objective is to rescue the company as a going concern and only if the administrator thinks that this objective is not reasonably practicable, or that a better result will be achieved for the company's creditors by some other means, can he or she consider the second or third objectives; achieving a better result for the company's creditors as a whole than would be likely if the company were wound up; or realising property to make a distribution to one or more secured or preferential creditors. An administration may last one year only (unless it is renewed with the consent of the creditors for one year, once, or with the consent of the court for an unlimited period of time). The administrator can collect in and distribute the company's assets. An administration can terminate either because the company is dissolved or because the administration is converted into a liquidation.

Note also the UK government consultation 'A review of the corporate insolvency framework' referred to in question 1. If the UK government implements some of the suggested topics of reform, this will impact voluntary reorganisations significantly. In particular, the restructuring moratorium and the flexible restructuring plan will provide a new landscape to implementing voluntary reorganisations. At this stage, it is not yet known whether the UK government will implement some of the reforms, and, if so, how.

Involuntary reorganisations

12 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

Although this is unusual, it is possible for a creditor to propose a scheme (but not a CVA). As a practical matter, a creditor is unlikely to have sufficient information to propose a satisfactory restructuring of the company's affairs.

A creditor may apply for the company to be put into administration and subsequently the administrator may propose either a CVA or a scheme. Where the creditor is a secured creditor holding a QFC, the appointment of the administrator may be made following a court-based procedure or an out-of-court route. If the creditor is unsecured, it must apply to court for an administration order.

The effects of the commencement of the reorganisation are discussed in question 11.

Mandatory commencement of insolvency proceedings

13 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

There is no express duty to commence insolvency proceedings at any particular time on the grounds of either cash flow or balance sheet insolvency, although directors may commence proceedings to try to minimise the risk of personal liability for wrongful trading.

Under section 214 of the Insolvency Act a liquidator or an administrator can bring an action against directors, former directors and 'shadow directors' for wrongful trading. A director may be held liable where he or she continues to trade after a time when he or she knew, or ought to have concluded, that there was no reasonable prospect of the company avoiding insolvent liquidation or administration. To avoid liability, once there is no reasonable prospect that a company can avoid going into insolvent liquidation or administration, directors must take every step to minimise potential loss to creditors and cannot simply walk away. This may involve filing for an insolvency procedure.

A consequence of carrying on business when insolvent can be that the court finds a director guilty under section 214. The court may declare that person liable to make such contribution to the company's assets as the court thinks proper, the amount being compensatory rather than penal.

It should also be noted that special administrators, appointed under bank administration, building society special administration and investment bank special administration, can also bring an action for wrongful trading under section 214 of the Insolvency Act.

Doing business in reorganisations

14 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?

A reorganisation can, and is typically, implemented outside of any formal insolvency or pre-insolvency procedure. If there is a reasonable prospect that the company will avoid going into insolvent liquidation or administration, the debtor can continue to carry on business during a reorganisation. Note that having this reasonable prospect is not a prerequisite in law to carry on the business. However, in practice directors will be wary about continuing to trade where there is no such reasonable prospect due to wrongful trading concerns (see question 13). They will be focused on ensuring that every step is taken to minimise loss to creditors, which often includes putting in place mechanisms to protect any new liabilities. If there is a consensual restructuring process, the creditors involved may require additional information about the company during this process and increased access to management. Other creditors, for example suppliers, may also change their terms of business to afford greater protection should the reorganisation fail and the company subsequently go into insolvent liquidation or administration. If no formal insolvency proceedings have commenced, creditors who continue to supply goods and services during the reorganisation process will not be subject to a particular statutory regime. Existing contractual arrangements continue to apply. In a reorganisation outside a formal insolvency process, the directors retain their management powers and will be tasked with driving the restructuring.

A reorganisation could also be implemented via an administration of the debtor (or the debtor's holding company). In administration, the administrator can carry on the business of the company where that is consistent with the purpose of the administration. To carry on the business, the administrator will pay creditors who supply goods or services to the company in administration in priority to ordinary unsecured creditors as expenses of the administration (otherwise the counterparty would not be likely to continue to trade). However, debts that had arisen prior to the insolvency will remain a provable debt and rank *pari passu* with other unsecured creditors. Certain types of supplies are protected by legislation and suppliers are prevented from terminating their supply (regardless of contractual termination rights) where the company is in an insolvency process and the office holder requests the continued supply. As from 1 October 2015, these include public utilities, such as gas and electricity as well as private suppliers of utilities, including supplies from a landlord to a tenant. In addition, communication services by a person whose business includes providing communication services as well as chip and PIN machines, computer hardware and software IT assistance connected to IT use, data storage and processing and website hosting services are 'protected supplies' if the relevant contract was entered into on or after 1 October 2015.

At various stages of the administration, the administrator must report to creditors and seek their approval for his or her proposals for achieving the purpose of the administration. The creditors may also appoint a creditors' committee that will have a supervisory function. An administrator is an officer of the court and may apply to the court for directions on how to conduct the administration. If a creditor believes that the administrator is not conducting the administration properly, that creditor may apply to the court for relief, which could include the removal of the administrator.

Separately, where a creditor has been granted fixed charged security over an asset of the company the administrator will require consent from the relevant fixed charge creditor or the court to release any such assets before such asset can be disposed of and the fixed charge creditor will be entitled to the net proceeds of sale. An administrator is able to deal with (and sell) assets subject to a floating charge without the charge holder's permission.

In a reorganisation outside a formal insolvency process, the directors retain their management powers and will be tasked with driving the restructuring.

If a reorganisation is implemented in the context of a formal insolvency process the directors' powers will depend on the type of process. For example, in administration, once the administrator is appointed, the directors' powers to exercise any management function, or actions that interfere with the administrator's powers, cease unless prior consent is given by the administrator. By contrast, in a CVA the directors remain in control with the assistance and supervision of the nominee and supervisor of the CVA.

Note also the UK government consultation 'A review of the corporate insolvency framework' referred to in question 1. If the UK government implements some of the suggested topics of reform, this will impact how a company in financial difficulties can do business while it undergoes a reorganisation significantly. In particular, the restructuring moratorium, rescue finance plans and designation of certain contracts as essential are likely to have a significant impact.

Stays of proceedings and moratoria

15 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Liquidations

When a company is placed in compulsory liquidation, no action or proceeding may be started or proceeded with against the company or its property without the court's permission. Permission will be refused if the proposed action raises issues that could be dealt with more conveniently and less expensively in the liquidation proceedings. However, this will not restrict claims made by secured creditors in respect of secured assets.

When a CVL or a MVL is commenced, there is no automatic moratorium on proceedings against the company. The liquidator or any creditor or member may, however, apply to the court for a stay on any proceedings. Such a stay will not be granted automatically, but will usually be granted where proceedings were commenced after the members' resolution (for more details on voluntary liquidations see question 9).

Reorganisations

The vast majority of reorganisations take place outside of formal insolvency proceedings. It will be up to the company and its creditors in each case to negotiate a stay where this is required. This will be a purely contractual negotiation. Where a stay is essential and cannot be agreed to contractually it may be possible to combine the reorganisation with an administration which then benefits from the automatic statutory moratorium. This may however not be desired in the context of the overall reorganisation.

Note also the UK government consultation 'A review of the corporate insolvency framework' referred to in question 1. If the UK government implements some of the suggested topics of reform, this will impact the available stays and moratoria in the UK.

If the restructuring is implemented by way of a scheme of arrangement and if it has the support of the majority of creditors and so has a reasonable chance of success, the court has in the past granted a temporary stay of proceedings against the company (see *FMS Wertmanagement AÖR v Vietnam Shipbuilding Industry Group & Ors* [2013] EWHC 1146 (Comm)) and question 11). Recently, companies have also used a scheme of arrangement to achieve a standstill period in which to progress a restructuring. Interestingly, these schemes did not implement the actual restructuring but simply provided the means to achieve a moratorium that was not obtainable without cramdown of creditors (see the cases of *Metinvest* (*Re Metinvest BV* [2016] EWHC 79 (Ch)) and *DTEK* (*Re DTEK Finance BV* [2015] EWHC 1164 (Ch).

Administration can also be used to implement reorganisations (see question 10). An interim moratorium comes into force on the date when an application is made for the appointment of an administrator, or when notice of the intention to appoint an administrator is filed with the court. This interim moratorium is made final once the company has gone into administration. There is little difference in the extent of the temporary and the final moratorium. The moratorium means, among others, the following:

- no steps can be taken to enforce security over the company's property or to repossess goods in the company's possession under any hire-purchase agreement without the consent of the administrator or the court's permission;
- a landlord may not exercise a right of forfeiture by peaceable reentry in relation to premises let to the company without the consent of the administrator or the court's permission; and
- no legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or its property without the consent of the administrator or the court's permission. This would include, for example, civil or criminal proceedings or other proceedings of a judicial or quasijudicial nature.

Broadly speaking, permission will be granted if to do so is unlikely to impede the achievement of the purpose of the administration. The court will engage in a balancing exercise weighing the interests of the individual creditor seeking to lift the moratorium against the interests of the creditor body as a whole.

As an alternative to going into administration, a small company (as defined by section 382 of the Companies Act 2006) may obtain the protection of a 28-day moratorium while it puts together a CVA (see question 11). Many of the features of this moratorium are similar to those that apply while a company is in administration. With creditor consent, the moratorium may be extended by up to two more months.

Post-filing credit

16 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

A liquidator and an administrator can raise, on the security of the company's assets, any money required. Such credit would have priority over ordinary unsecured creditors as an expense of the insolvency but only in respect of the new funds. Liquidation and administration expenses are also paid out of floating charge realisations in priority to payments to the floating charge holder (see question 33 for further detail).

However, in each case, any new loans and security will not take priority over pre-existing secured debt unless this is permitted under the terms of the pre-existing secured indebtedness and security documents.

In an informal restructuring, or a restructuring implemented by way of a scheme or a CVA, the obtaining of credit and the use of assets as security is a matter for agreement between the company and its creditors and the type of restructuring process implemented. So, for example, security could be released as a consequence of a scheme of arrangement with the support of the requisite majority of creditors, but as a CVA is unable to bind secured creditors without their consent, this would not be possible in a CVA (unless the secured creditor agrees).

Note also the UK government consultation 'A review of the corporate insolvency framework' referred to in question 1. If the UK government implements some of the suggested topics of reform, this may impact the availability of post-filing credit significantly. One of the proposals is to encourage rescue financing, meaning more options than are currently available are likely to be available to companies and lenders. The consultation sets out a number of possibilities to encourage rescue financing.

Set-off and netting

17 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Prior to the commencement of a formal insolvency procedure, contractual rules on set-off and netting apply. These rules could be amended by agreement as part of an informal reorganisation.

Insolvency set-off applies where there have been mutual dealings between a creditor and the company. The liquidator or administrator is required to take an account of what is due from each party to the other in respect of dealings and set off these sums. Set-off is mandatory, automatic and self-executing. This means that where the test is met, the parties have no choice and their claims are set off as a matter of law – it cannot be contracted out of. The effect of this is that unsecured creditors entitled to set-off have an advantage over other unsecured creditors as they will receive £ for £ rather than a diluted dividend. Note, however, that there are special provisions that apply to certain contracts in the financial markets. Insolvency set-off applies both in a liquidation (from the date that the liquidation takes effect) and in administration (but then only when the administrator has given notice of his or her intention to make a distribution to creditors).

Pursuant to the terms of the FCA Regulations, a close-out netting provision in a security document will apply even if the collateral provider or collateral taker is subject to winding-up proceedings or reorganisation measures, unless at the time the arrangement was entered into or the relevant financial obligations came into existence the other party was or should have been aware of such winding up or reorganisation.

Sale of assets

18 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Reorganisations

In practice, many reorganisations result from negotiations with creditors outside of any formal insolvency or restructuring procedures. Consequently, the terms of the reorganisation and therefore any provisions as to the sale or use of assets are subject to negotiation between all relevant parties and will be documented by way of contract.

Liquidations

Once a company has entered liquidation, the liquidator can sell any of the company's property by public auction or private contract, provided the assets are beneficially owned by the company (see question 3). This power can be exercised in both voluntary and compulsory liquidations without sanction of the court or liquidation committee. A liquidator can sell assets that are subject to floating charge security as if the charge did not exist but will need the consent of a holder of fixed charge security in order to sell this. Where such consent is obtained it will be a matter for negotiation as to whether the asset is sold free and clear of the security (with the liquidator accounting to the secured creditor for the purchase price) or whether the asset will be transferred subject to the security (which in many cases will not be satisfactory to a purchaser). Where a liquidator sells part or all of a business in liquidation, there is an exemption to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), which specifies that any dismissals by reason of the transfer will not automatically be unfair. This is in contrast to a sale in administration (see below).

Administrations

If a reorganisation occurs in the context of an administration, the administrator can carry on the business of the company to sell its assets, including secured or leased assets, where the disposal would be likely to promote the purposes of the administration. Where the assets are leased, subject to a valid ROT clause or are secured by a fixed (as opposed to a floating) charge, court sanction is required before an administrator can sell the assets without the lessor's or chargee's consent. Where the entire business (or a line of business) is sold by the administrator a tool called 'pre-pack administration' is often used. A pre-pack is in essence a sale of the business or assets of an insolvent company by an administrator where all the preparatory work for the sale (ie, identifying the purchaser, negotiating the terms of the sale and valuing the assets (potentially but not always via a marketing process)) takes place before the appointment of the administrator and the sale is then concluded immediately after his or her appointment. Where an administrator sells part or all of a business in administration, he or she must have regard to TUPE, which stipulates that certain employment contracts will automatically transfer to the purchaser.

To ensure transparency in respect of pre-pack sales, the Joint Insolvency Committee published Statement of Insolvency Practice (SIP) 16. This gives guidelines to insolvency practitioners regarding disclosure in the context of pre-pack sales, and requires office holders to submit a SIP16 statement to creditors following any pre-pack undertaken. It is important that creditors are provided with a detailed explanation and justification of why a pre-packaged sale was undertaken and details of any marketing process and valuations obtained (or an explanation of why no marketing or valuations were undertaken), so that they can be satisfied that the administrator has acted with due regard for their interest. Where a sale is to a connected party, the potential purchaser is encouraged to submit details of the proposed acquisition to a 'prepack pool' (a panel of insolvency experts). The pre-pack pool is to provide an opinion on the sale.

Although SIP16 is not legally binding, failure to comply could result in an administrator facing disciplinary action from his or her professional body.

'Stalking horse' bids and credit bidding

There is no specific legislation that either prevents or encourages the use of 'stalking horse' bids in sale procedures. How a particular sale process is carried out will be at the discretion of the directors or insolvency practitioner (as applicable), but regard needs to be had to the duties owed to creditors, and procedural guidance such as SIP16 (referred to above).

Credit bidding (including where the credit bidder is the assignee of the original creditor) in sales is permitted, although there is also no specific legislation on this point. The sale will not necessarily be the subject matter of a court decision, indeed in most cases it will be up to the insolvency office holder to decide whether a particular deal is in the best interest of the creditors and so should be implemented.

Intellectual property assets in insolvencies

19 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

There is no automatic right of a licensor or owner of IP to terminate the debtor's right to use IP assets. Such matters will be governed by the terms of the licence, for example, in particular in the event of default and termination provisions. Where the contractual provisions permit a termination, then this will be permitted under English insolvency law unless the supply is a protected supply (see question 13) in which case the supplier's ability to terminate the contract or the supply will be severally restricted. Note also the UK government consultation 'A review of the corporate insolvency framework' referred to in question 1. An insolvency representative does not have power to terminate a debtor's agreement with an IP licensor or owner and then continue to use the IP for the benefit of the estate.

Personal data in insolvencies

20 Where personal information or customer data collected by an insolvent company is valuable to its reorganisation, are there any restrictions in your country on the use of that information in the insolvency or its transfer to a purchaser?

A data controller is required to comply with the data protection principles set out in the Data Protection Act (the DPA) when processing any personal data. The first such data protection principle is that personal data must be processed fairly and lawfully. Where valuable customer data is collected by the insolvent company, it is one of the assets that an insolvency office holder is able to realise for the benefit of creditors. The DPA applies, and it is usual for an office holder to require a buyer of the data to comply with all the seller's obligations under the DPA and to provide an indemnity to the seller and the office holder against any liability for failure to have complied. This is often supported by an agreed form 'fair processing' notice, which the buyer will be required to send to each customer to inform the customer that the buyer is now the data controller and of any new purposes for which the customer's personal data will be processed by the buyer. Guidance from the Information Commissioner's Office takes the view that, in the case of insolvency, a customer database can be sold without obtaining the customers' prior consent; however, if the buyer wants to use the information for a new purpose, the buyer will need to get consent from each customer.

In *Re Southern Pacific Personal Loans* [2014] Ch 426, the English court held that liquidators do not constitute data controllers in their own right and are not personally responsible for the company's compliance with the provisions of the DPA. The liquidators instead act as agents for the company in taking decisions on its behalf. The liquidators in that case were concerned that the insolvent company should not be required to continue to hold personal data in order to comply with data access requests made by former customers. The court agreed that, in principle, personal data should be destroyed as soon as possible after the company ceases to conduct business, provided that the company must retain sufficient data to comply with any outstanding data access requests made before the data are destroyed. The court further qualified the principle by saying that liquidators must ensure that the company retains sufficient data to enable them to deal with any claims that may be made in the liquidation. The court held that in circumstances in which the liquidators had reason to anticipate the possibility of claims, they would be required to advertise for claims against the company and allow sufficient time for responses before disposing of personal data.

Rejection and disclaimer of contracts in reorganisations

21 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

In a reorganisation outside a formal insolvency process, the debtor has no legal right to reject or disclaim an unfavourable contract.

Administration

An administrator does not ordinarily have the power to disclaim onerous property. The exception to this is that special administrators, appointed under bank administration, building society special administration and investment bank special administration, can disclaim onerous property. As a matter of law, administration does not terminate contracts entered into by the company. Any termination provision must be expressly set out in the contract. In practice, the administrator may choose not to comply with contracts entered into by the company prior to administration. An administrator may, for example, decide that the return for creditors is higher if a particular contract is not complied with rather than if the contract continues to be complied with. This is – as for a solvent company – a pure commercial decision where the administrator will consider his or her duties to the creditors as a whole. Where an administrator has breached a contract that existed prior to the insolvency, any damages for breach will rank as a provable debt. Where an administrator breaches a contract entered into by him or her after the insolvency, damages for breach will rank as an expense of the administration and will therefore have 'super priority' (ie, be paid ahead of holders of floating charge security and unsecured creditors.

Liquidation

Liquidation is not a reorganisation procedure but could be used following reorganisation if assets of the company have been sold. It is (other than special administration regimes) the only process in which an unfavourable contract can be disclaimed. A liquidator may disclaim any onerous property. Onerous property is defined as any unprofitable contract, and any other company property that is unsaleable, is not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act. Property is broadly defined and it includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest whether present or future or vested or contingent, arising out of, or incidental to, property. A contract may be unprofitable if it gives rise to prospective liabilities and imposes continuing financial obligations on the company that may be detrimental to the creditors. But a contract is not unprofitable merely because it is financially disadvantageous; it is the nature and cause of the disadvantage that will be the determining factor.

The liquidator cannot disclaim a completed contract. This is because if the company has fully performed a contract then it will have no prospective liabilities, which means that the contract is not onerous and therefore cannot be disclaimed. In addition, there are various specific types of contract in relation to financial markets that the liquidator cannot disclaim.

Further, in the context of property, a liquidator must disclaim the whole of a property (ie, he or she cannot disclaim some and keep the remainder).

The liquidator is not entitled to use his or her power of disclaimer to disturb accrued rights and liabilities – the disclaimer only terminates the contract as to liabilities accruing after the time of the disclaimer.

A disclaimer does not affect transfers of property to the company if, for example, the company bought property that is unsaleable. A disclaimer by the liquidator will not terminate or rescind the sale contract to revest the property in the vendor. Its sole effect, in the absence of any other interest in the property, is to vest ownership in the Crown as bona vacantia.

The liquidator can disclaim a contract by notice if it is unprofitable, or simply decline to procure its performance by the company. If the liquidator declines performance then (in addition to other contractual remedies the counterparty may have) it can apply for rescission of the contract and claim for any damages that may be awarded. In either case, the contract comes to an end and the solvent party is left to prove damages for the loss resulting from the company's breach of contract, against which the company can set off the value of the other party's future performance that it has been denied. No time limit is laid down for the exercise of the power of disclaimer. However, a counterparty can require a liquidator to decide whether he or she is going to disclaim or not. If the liquidator then does not give notice of disclaimer within 28 days, he or she loses the right to disclaim.

A disclaimer operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the company, but does not affect the rights or liabilities of any other person except so far as is necessary for the purpose of releasing the company from any liability. A party aggrieved by a disclaimer can apply to the court to reverse the liquidator's decision but the court will not interfere unless the liquidator's action was in bad faith or perverse. Any person suffering loss or damage in consequence of the operation of the disclaimer is deemed to be a creditor of the company and may prove for the loss or damage in the liquidation.

As regards a breach of a contract (which has not been disclaimed), the counterparty will have a claim for breach of contract and will be able to prove for damages in the liquidation. Where a liquidator breaches a contract entered into by him or her after the insolvency, damages for breach will rank as an expense of the liquidation and will therefore have 'super priority', namely, be paid ahead of holders of floating charge security and unsecured creditors.

Arbitration processes in insolvency cases

22 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

When a company is in administration, the statutory moratorium will apply and will prevent any legal process from being initiated or continued (see question 15). Similarly, in a compulsory liquidation a moratorium is in place. The courts have held that arbitration is a legal process and therefore caught by the moratorium. Arbitration of disputes that arise post-administration would be subject to the same rules (see question 14) as regards whether the administrator or the courts would lift the moratorium to allow the arbitration to progress. However, where the office holder seeks directions from the court (ie, initiates litigation himself or herself, for example, in relation to a set off right) the counterparty will be able to rely on the arbitration clause and force the office holder to arbitrate the claim instead of litigating (see *Philpott & Orton (as joint liquidators of WGL Realisations 2010 Limited*) [2015] EWHC 1065 (Ch)).

Successful reorganisations

23 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

There are no mandatory features in an informal reorganisation; it is a matter for agreement between the creditors.

Scheme of arrangement

In a scheme (see question 11), there are also no mandatory features of the reorganisation plan. However, the scheme will need to be better than its alternative (most commonly an insolvency filing but a solvent comparator is also possible). For example, where the alternative to the scheme is liquidation, the scheme must offer a better result for creditors than they would receive in liquidation and evidence must be provided to demonstrate this. The legislation sets out that an explanatory memorandum to a scheme must explain the effect of the compromise or arrangement and state any material interest of the directors and the effect of that interest of the compromise or arrangement.

The process is commenced by a court application, by either the company or any creditor (or, where relevant, the liquidator or administrator), for an order that a meeting of creditors be summoned. There are separate creditors' meetings for each class of creditors. It is the responsibility of the party proposing the scheme to determine the correct classes. If incorrect class meetings are held, then the court will not have the jurisdiction to sanction the scheme.

The classic test for determining the constitution of classes is that a class should comprise 'those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'. The test for who forms a class is determined in accordance with the creditors' rights under the scheme, as opposed to broader collateral interests. Whether a group of creditors form a single class depends on the analysis of:

- the rights that are to be released or varied under the scheme; and
- any rights that the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied.

In many cases, it is not possible to be certain that a particular type of claim constitutes a class of creditors. However, in certain cases the distinction is relatively clear-cut; for example, secured creditors and unsecured creditors will almost certainly constitute separate classes. When an insolvent company proposes a scheme the court will look at the 'insolvency comparator', that is, the rights that the creditors would have against the company in an insolvent liquidation. The rights of creditors under a scheme can differ from the rights a creditor would have if the company went into insolvent liquidation; indeed, the purpose of many schemes is to produce an arrangement that differs from an insolvent liquidation. However, depending on the differences, this may have an impact on the analysis of which creditors form a separate class for the purposes of the scheme meeting and whether the scheme is fair and should be sanctioned. If the differences apply equally to all creditors, no question of separate classes arises. If the differences produce a result that affects one group of creditors differently from another then, subject to questions of materiality, they should form separate classes.

In order for any proposed compromise or arrangement put forward under a scheme to become binding on the creditors it must be approved by 75 per cent in value and the majority in number of each class of creditors present and voting, and then sanctioned by the court. The scheme will not be sanctioned unless it is fair – that is, a scheme that an intelligent and honest person, a member of the class concerned, and acting in respect of his or her interest might reasonably approve.

A scheme of arrangement can release non-debtor parties. The extent to which a scheme is capable of affecting third-party obligations depends on the extent to which those obligations can be treated as closely connected or ancillary to the company's own obligations and whether those obligations are personal only and not proprietary. The court has confirmed (see *Re La Seda de Barcelona* [2010] EWHC 1364 (Ch)) that, in the case of an English scheme of arrangement, guarantors that are themselves not bound by the scheme of arrangement can have their guarantees released under the terms of the scheme.

Company voluntary arrangement

In a CVA there are also no mandatory features (although again the legislation, the Insolvency Rules, sets out the matters that need to be dealt with in the proposal). Note that again, the CVA proposal must lead to a better outcome for creditors than its alternative (most commonly an administration or liquidation). There are no separate classes of creditors in a CVA, although secured and preferential creditors cannot be compromised without their consent. The process for implementing a CVA is set out at question 11. No court sanction is required. On application by a creditor, member or contributory the court may revoke or suspend a CVA that unfairly prejudices the interests of a creditor, member or contributory of a company.

Potential new flexible reorganisation plan

Under the UK government consultation 'A review of the corporate insolvency framework' referred to in question 1, a flexible restructuring plan is to be introduced. This may impact how successful reorganisations get implemented in future. At this stage, it is not yet known whether the UK government will implement some of the reforms, and, if so, how.

Expedited reorganisations

24 Do procedures exist for expedited reorganisations?

There are no provisions for the expedition of CVAs or schemes, and the implementation time will depend on its complexity, although the majority of the time spent on the reorganisation is in negotiation with the creditors and in preparation of the settlement documentation. In relation to schemes, which are court-driven processes, the court has been willing to hear applications on an expedited basis and also to convene meetings following comparatively short notice periods where there is an urgent requirement to do so. If a reorganisation is implemented through an administration process, this can be done on a quick timescale using the 'pre-pack administration' tool (set out at question 18).

Unsuccessful reorganisations

25 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

A dissenting creditor can defeat a reorganisation that takes place outside of a formal process by refusing to take part or, where appropriate, by applying for the company's liquidation (although the court has to exercise its discretion when making a winding-up order). The consequences of a breach by the debtor of any contractual agreement will depend on the terms of the agreement but will usually result in the creditor having all his or her previous rights restored.

A proposed CVA or scheme can be defeated if it does not get the statutory majorities of creditors voting in favour of it (see question 11). Assuming that the requisite majorities vote in favour at the scheme meeting, a scheme will be defeated if the court refuses to sanction the scheme either because it does not have the jurisdiction to sanction it, for example because the classes are incorrectly constituted, or because it is unfair. A CVA will be defeated if a creditor, member or contributory brings a successful challenge on the grounds of unfair prejudice or material irregularity at the meetings. A CVA may also be defeated if there is a mismatch between the decisions taken at the creditors' and the shareholders' meetings, and a shareholder successfully applies to court to challenge the decision taken at the creditors' meeting. If a scheme or a CVA is defeated, then unless new restructuring proposals can be agreed with the requisite majorities of creditors, it is likely that the company will be placed in administration or liquidation.

If there is default by the debtor in performing an approved plan in a scheme, the consequences will usually be set out in the scheme. Where there is a material default by the debtor in performing the terms of the CVA, the supervisor of the CVA is likely to issue a certificate of non-compliance setting out the manner in which the company has defaulted and the steps that the supervisor proposes to take. These steps will normally be set out in the CVA.

Insolvency processes

26 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

Notice, meetings and information and reporting obligations

The Insolvency Rules 1986 set out much of the process relating to each insolvency procedure. The Insolvency Rules are in the process of being recast. The recast is expected to enter into force in spring 2017. At the date of writing, the draft rules have been published but have not been laid before Parliament, so are still subject to change. The recast Insolvency Rules are not intended to be a complete overhaul of existing procedure but do provide for significant changes as regards creditor meetings. Physical creditor meetings are intended to be virtually abolished and one of a number of different types of 'qualifying decision procedure' (eg, deemed decision making) is to be used. Generally, whether it be an administrative receivership or an administration, a compulsory liquidation or a CVL, the Insolvency Act provides for early notification of all creditors by advertisement and for creditors to make decisions.

An administrative receiver must notify creditors following appointment and currently, unless the court directs otherwise, convene a meeting of unsecured creditors within three months of appointment to report on the conduct of the administrative receivership.

Administrators must also notify creditors following their appointment. Currently, a first meeting in an administration must be held as soon as reasonably practicable and within 10 weeks of the administration appointment. The purpose of this meeting is to consider the proposals for the company prepared by the administrator, which must be sent to creditors and members as soon as reasonably practicable and in any event within eight weeks of the administrator's appointment. The administrator is required to send a progress report to the creditors, the courts and the registrar of companies every six months.

In a compulsory liquidation, the official receiver is automatically appointed as liquidator. The official receiver must advertise his appointment. The official receiver may, and if one quarter in value of the company's creditors request it shall, call a creditors' meeting to choose a person to be appointed as liquidator instead of the official receiver. If the liquidator in a compulsory liquidation is not the official receiver, the liquidator must call a final creditors' meeting before the company is dissolved.

In a CVL, currently, a first creditors' meeting will take place shortly after the shareholders pass a resolution to place the company in liquidation. In practice, the creditors' meeting is likely to be on the same day as the shareholders' meeting. At this meeting, the main purposes will be to appoint a liquidator, fix the liquidator's remuneration and potentially appoint a liquidation committee. The liquidator must call a further creditors' meeting generally if the liquidation lasts more than one year.

Proceedings against third parties

Since the relevant section of the SBEEA came into force on 1 October 2015, a liquidator or administrator can assign certain causes of action (eg, an action for fraudulent or wrongful trading). The proceeds of the claim or assignment are not to be treated as part of the company's net property, that is to say the amount of its property that would be available for the satisfaction of claims of holders of debentures secured by a floating charge created by the company. In addition, in liquidation any office holder creditor has the right under section 212 of the Insolvency Act to bring proceedings against any company officer or anyone involved in the promotion, formation or management of the company, in relation to the return of any money or property of the company or in connection with any alleged misfeasance or breach of fiduciary duty. Further, a 'victim' of a transaction defrauding creditors may commence proceedings under section 423 of the Insolvency Act.

Enforcement of estate's rights

27 If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

Creditors may determine that it is in their best interests to fund the estate or office holder in order that a claim may be pursued by the office holder. Any fruits of the remedies will belong to the insolvency estate.

An insolvency office holder may also assign claims comprised in the company's property at the date of the insolvency and proceedings which are already ongoing at the date of the insolvency. Where such a claim is assigned, the fruits of the remedies can also be assigned. As stated in question 26, since 1 October 2015 an office holder will be able to assign a claim that he or she is entitled to pursue by virtue of being an office holder. These include transaction avoidance claims and wrongful trading claims. Creditors may take action themselves in the limited circumstances described in question 26.

Creditor representation

28 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

In restructurings outside of a formal insolvency process, traditionally the lenders have formed coordinating committees. These creditors usually consist of the largest, or the most influential, creditors. Any appointment is a matter of contract between the lenders and the company (who ordinarily will pay the lenders a fee for their acceptance to be on the coordinating committee and meet the costs of their advisers). More recently, there has been a shift from establishing formal coordination committees to creating more groups of ad hoc lender committees to drive a restructuring.

In a formal insolvency process (such as administration and liquidation), creditors' committees can be formed. A creditors' committee usually consists of between three and five creditors that have been voted into the committee by the creditors. However, the role of the creditors' committee varies taking into account the different natures of these insolvency procedures.

If a liquidation committee is appointed in either a CVL or a compulsory liquidation its role is mainly supervisory and to fix the liquidator's remuneration. The liquidator has to report to the liquidation committee on a regular basis.

The role of a creditors' committee in an administration is substantially the same as in liquidation.

The creditors' committee in an administrative receivership (see question 44) does not have a supervisory role. However, the administrative receiver must provide certain information to the creditors' committee.

Creditors' committees appointed under the terms of the Insolvency Act are not permitted to retain advisers. For creditors' committees formed by way of contract in restructurings outside of formal insolvency processes the matter will be dealt with contractually.

Insolvency of corporate groups

29 In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

English law treats each member of a corporate group as a distinct entity from any of its members, other than in very specific circumstances. Accordingly, the assets and liabilities of companies are not combined into one pool for distribution in an insolvency process. As a practical matter, where there is a corporate group, there may be administrative advantages to having the same insolvency office holder appointed in respect of each of the companies in the group (subject to any conflicts) but each entity will still be treated as separate.

Assets would only properly transfer to insolvency in another country where the office holder determined that the asset did not form part of the company's property. Given the administrator's duty to ensure the best return to creditors, they would not consent to the transfer of such assets without incontrovertible evidence that this was the case or there was a sale of the assets for value.

Under reforms to the EC Regulation on Insolvency Proceedings 2000 (Council Regulation (EC) No. 1346/2000) (the Recast Regulation) a new mechanism is introduced for a group coordination plan. For further detail on the Recast Regulation, refer to the chapter on the European Union.

Appeals

30 What are the rights of appeal from court orders made in an insolvency proceeding? Does an appellant have an automatic right of appeal or must it obtain permission to appeal? Is there a requirement to post security to proceed with an appeal and, if so, how is the amount determined?

Appeals in insolvency proceedings follow the ordinary course for appeals in England and Wales. Appeals of decisions made by a High Court judge will lie to the Civil Division of the Court of Appeal. A decision of the Court of Appeal can be appealed to the Supreme Court, the highest court in the UK. There is no general obligation to post security to proceed with an appeal unless a party specifically applies for the court to order security for costs.

Claims

31 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

Generally, unsecured creditors' claims are not submitted until the company is in liquidation. Claims can also be submitted to the administrator, although court approval will be required before an administrator can make a distribution to unsecured creditors (unless it is a distribution from the prescribed part). All creditors submit a claim by sending particulars of it to the liquidator (or administrator) by way of a 'proof of debt'. A creditor may make a claim in respect of a contingent or unliquidated amount provided that it arises prior to the date on which the company went into administration or liquidation or it arises from an obligation to which the company may become subject after the insolvency by reason of any obligation incurred before the company entered liquidation or administration. Interest that accrued prior to the insolvency date can form part of the amount of the creditors' provable debt.

Time limits may be set for receipt and processing of claims before interim dividends are paid. If the creditor misses the deadline he or she will be entitled to receive previous interim dividends (so as to 'catch up') once he or she has proved his claim. Once the office holder has realised all the company's assets he or she will give notice of his or her intention to declare a final dividend.

The liquidator (or administrator) may reject a proof in whole or in part but must provide reasons to the creditors. A creditor may appeal to the court against a rejection within 21 days of receiving notice of it.

Claims trading

There are no specific provisions dealing with the purchase, sale or transfer of claims against the debtor and no prescribed forms for notifying the insolvency office holder of the trade. If a third party acquires a claim at a discount it will be able to prove for the face value of the claim (the discount is simply a matter between the creditor selling the claim and the acquirer). However, a creditor will not be able to circumvent the automatic and self-executing rules on insolvency set off once it is triggered. Therefore, where set off applies (see question 17), a party will only be able to sell its net balance. In large and complex insolvencies, such as *MF Global*, the office holder may propose a protocol for notifying him or her of trades.

Interest

Interest that accrued from the insolvency date can be claimed – but is highly subordinated. Once a company in liquidation or administration has paid all provable debts in full, the Insolvency Act provides that creditors with provable debts are eligible to receive interest on those debts for the period from the start of the insolvency process to the date the debt was paid. The current rate of statutory interest is either 8 per cent per annum or the interest rate applicable under the original contract, the greater amount prevailing.

Modifying creditors' rights

32 May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

The court does not have general jurisdiction to change the priority of creditors' claims, which are determined by statute. However, where realisations are made from assets subject to a floating charge, an insolvency office holder must set aside a percentage of such realisations (known as the prescribed part) for distribution to unsecured creditors who would otherwise have ranked in priority below the holder of the floating charge.

Rule 4.218 of the Insolvency Rules sets out a list of winding-up expenses and payment priority. Pursuant to section 156 of the Insolvency Act, the court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the expenses incurred in the liquidation in such order of priority as the court thinks just. However, the court's power only extends to being able to vary the order of priority of the winding-up expenses set out in the aforementioned list. Rule 2.67 sets out similar provisions governing expenses incurred in an administration.

Priority claims

33 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

An office holder will apply the proceeds of the realised assets and pay creditors in a specified order depending upon the source of the proceeds, that is, whether they come from fixed charge realisations, floating charge realisations or the realisations of uncharged assets.

Other than the costs of preserving and realising the fixed charge assets (including the office holder's costs relating to those assets), there are no priority claims that rank ahead of secured creditors with a fixed charge in relation to the proceeds of sale of those assets.

Certain priority claims rank ahead of floating charge holders and these are paid out of the proceeds of sale of the assets secured by the floating charge. These priority claims are preferential debts and payments to unsecured creditors out of the 'prescribed part'. Preferential debts are now split into two categories, ordinary preferential debts and secondary preferential debts. Ordinary preferential debts include sums owed to the occupational pension schemes in respect of unpaid contributions and remuneration owed to employees to a set amount. Where relevant, they also include bank and building society deposits that are covered by the Financial Services Compensation Scheme (FSCS). Secondary preferential debts consist of the part of deposits that are not eligible for FSCS protection either because they exceed the cover level or because they were made through a branch of an (otherwise) eligible credit institution located outside the EEA. Ordinary preferential debts rank equally amongst themselves before secondary preferential debts which also rank equally amongst themselves. Debts due to the government do not form part of the categories of preferential debts.

The 'prescribed part' is an amount ring-fenced from the company's net floating charge proceeds (up to a maximum of £600,000), which applies when a floating charge was granted after 15 September 2003. This prescribed part is available to unsecured creditors. Case law has clarified that a floating charge holder cannot participate in the prescribed part as an unsecured creditor regarding any shortfall under its floating charge, as this would effectively deprive the unsecured creditors of a substantial part of their already capped benefit. The only way in which a secured creditor could participate in the prescribed part is by releasing its security.

An administrator, liquidator or receiver may apply for an order that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits. However, the court will only grant such order in exceptional circumstances.

The costs and expenses of the liquidator or administrator are paid out of assets subject to a floating charge (so far as the assets of the company are insufficient), taking priority over the claims of the floating charge holder.

Creditors who can establish valid retention of title and other proprietary claims (such as where they are beneficiaries under a trust) rank outside the order of insolvency claims and will, where possible and in accordance with certain legal rules, have their property (or its monetary equivalent) returned to the extent this is still possible.

Employment-related liabilities in restructurings

34 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

Reorganisation

In a reorganisation outside of formal insolvency proceedings, normal rules applicable to employment and the termination of employment contracts apply.

Liquidation

In a compulsory liquidation, contracts of employment will automatically terminate. Dismissals which take effect on the making of a winding-up order by a court involve a breach of contract by the company for which the employee is entitled to claim damages, effectively by means of a proof of debt in the liquidation.

In a voluntary liquidation, the entry by the employer into liquidation does not automatically terminate the contracts of employment. Given that a liquidator only has limited powers to carry on the business of a company, it is likely that employment contracts will be terminated. An employee may have a contractual claim (eg, for wrongful dismissal) and a statutory right to claim for redundancy or unfair dismissal. In practice, any dismissal or termination of employment contract in an insolvency situation is most likely to be by reason of redundancy and hence for a potentially fair reason under employment legislation. Claims for unfair dismissal or redundancy will rank as ordinary unsecured claims in the insolvency.

Administration

Administration does not automatically terminate employment contracts as a matter of law. Following appointment, administrators have 14 days to decide whether to continue to employ individual employees. Failure to take positive action to dismiss will result in the automatic 'adoption' of employment contracts after the expiry of the 14-day period and employees are then entitled to be paid 'qualifying liabilities' which include salary, holiday pay, sick pay, payments in lieu of holiday and contributions to occupational pension schemes. Qualifying liabilities are administration expenses and payable in priority to the administrator's remuneration.

Where contracts of employment are not adopted (and hence terminated), employee claims will generally rank as unsecured claims in the administration, save that employees retain a preferential claim in respect of unpaid wages owed for the four-month period prior to the date of administration, capped at £800. Insolvency office holders will have liability for all employee PAYE and National Insurance contributions from the date of appointment.

When an administrator sells part or all of a business in administration, he or she must have regard to the TUPE, which will dictate which of the employees is entitled to automatically transfer to the purchaser of the business, such that the employee's contract continues as if the new purchaser were the original employer. If a relevant employees' contract is terminated, both the purchaser or the seller company (in administration) could be potentially liable for all resulting employment claims.

Pension claims

35 What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

Certain limited unpaid contributions into occupational pension schemes and contributions deducted from the employee's pay are categorised as preferential debts and will rank ahead of floating charge holders in the event of a company's insolvency. Where there is an occupational pension scheme and the employer company enters a formal insolvency process (eg, liquidation, administration or administrative receivership) and there is a deficiency in the scheme, then a section 75 debt (named after section 75 of the Pensions Act 1995) is triggered immediately prior to the employer's insolvency. The section 75 debt is designed to provide a simple debt obligation on an employer and ranks as an ordinary unsecured debt in the employer's insolvency.

If an administrator adopts any employment contracts (see question 34), liabilities under those contracts incurred after adoption will be paid as an administration expense. Such liabilities include contributions to occupational pension schemes.

The Pension Protection Fund (PPF) provides compensation for defined benefit occupational pension scheme members on an employer's insolvency. The Pensions Regulator has 'moral hazard' or 'anti-avoidance' powers to make third parties liable to provide support or funding to a defined benefit occupational pension scheme in certain circumstances. The Pensions Regulator is able to issue a contribution notice to an employer, or a person associated or connected with the employer. If transactions or reorganisations are structured for the purpose of avoiding or, other than in good faith, reducing pension liabilities, those involved are potentially at risk of being required to make a contribution into the scheme equal to the debt that would otherwise have been payable. The Pensions Regulator can also issue a financial support direction (FSD), which requires a party to put in place financial support (broadly, funding or guarantees) and maintain the financial support throughout the life of the scheme. FSDs may be issued against the participating employers or certain parties that are 'connected' or 'associated' with the employer. A party might be at risk of an FSD if the employer participating in the scheme was a service company (ie, a company with accounts showing its turnover principally derived from providing services to other group companies) or it was insufficiently resourced (did not have sufficient assets to meet a prescribed percentage of the debt in relation to the scheme, and at that time there was a connected or associated person who did have sufficient resources). The rules governing who can be associated or connected with an employer are very complex, but generally all wholly owned companies in a group are associated, and significant shareholders (over one-third) will have control and so be associated with the company and its subsidiaries.

In *Bloom v The Pension Regulator* [2013] UKSC 52, the Supreme Court held that an FSD issued against a company that is already in administration was a provable debt as essentially, the relevant facts making the company susceptible to becoming the target of such direction had arisen prior to the insolvency and was thus consistent with the underlying regime imposing the liability.

Environmental problems and liabilities

36 In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Liability for environmental problems in insolvency proceedings can be found under criminal liability, civil liability and administrative liability (ie, to 'clean up'). There is a plethora of legislation both at the domestic level and derived from European Union legislation that sets out environmental duties and responsibilities and deals with breaches of such duties. The three significant areas of environmental protection in the UK are: (i) the contaminated land regime (with the Environmental Protection Act 1990); (ii) the environmental permitting regime (with the Environmental Permitting (England and Wales) Regulations 2010); and (iii) the water pollution regime (with the Water Resources Act 1991). A company's environmental liabilities (including health and safety related liabilities) will continue regardless of whether the company is solvent or in an insolvency process.

A debtor's officers and directors are liable for the full range of environmental legislation that governs the respective debtor's business. Depending on the legislation, liability can attach to the debtor company and to directors and officers personally. Generally, the prosecutor would need to prove that the individual director or officer knowingly caused or permitted the offence.

Ordinarily, insolvency office holders should not incur liability for offences or torts committed by the debtor prior to the insolvency and any fines, etc, issued prior to the insolvency would rank as an unsecured debt. Following the insolvency, the office holder will be acting in a management role similar to that of directors and will be subject to the duties (and potential liabilities) which go with that role. One potential risk for an office holder is to be required to clean up contaminated land. Should fines or clean-up costs be imposed when a company is in insolvency such costs may still rank as a provable debt (if they can be attributed to steps taken prior to the insolvency). Alternatively, such costs could rank as expenses of the insolvency if they are attributable to something done during the period after insolvency. This will be a matter of fact in each case. Whether an insolvency office holder would be held personally responsible will depend on the particular statute under which the offence is committed and the office holder's conduct. For example, the Environmental Protection Act 1990, dealing with contaminated land, includes a specific protection for insolvency office holders and specifies that no personal liability will attach to them for remedial costs unless a substance was present on the contaminated land as a result of any act done or omission made by the office holder that it was unreasonable for a person acting in that capacity to do or make. This exclusion is, however, not set out as regards other forms of liability (not in relation to contaminated land) where office holders could therefore in theory still be at risk of personal liability.

A liquidator can disclaim onerous property (see question 21) and therefore will be able to disclaim contaminated land and therefore avoid liability following the disclaimer becoming effective.

A secured creditor could become liable for environmental issues if it enforces a mortgage and becomes a mortgagee in possession. Under environmental legislation, a mortgagee in possession is an 'owner' and therefore liability could attach. In relation to an unsecured creditor, it is difficult to see how he or she could become liable (unless he or she acts in a different capacity to that of unsecured creditor).

A third party may be liable for environmental liabilities where for example it caused the environmental damage following the principle that the polluter pays.

Liabilities that survive insolvency proceedings

37 Do any liabilities of a debtor survive an insolvency or a reorganisation?

Where a debtor uses a CVA or a scheme to reorganise, the terms of the CVA or scheme will determine the treatment of the debtor's liabilities (eg, the extent to which they are compromised and the extent to which they will survive).

Where a purchaser buys the assets from an insolvent debtor, liabilities remain with the debtor, apart from certain employment liabilities that may transfer to the purchaser in accordance with TUPE (see question 34).

Distributions

38 How and when are distributions made to creditors in liquidations and reorganisations?

In liquidations, a distribution will be made when sufficient funds are available to justify it. An administrator can also make distributions to preferential, secured and unsecured creditors (but only with the sanction of the court in the case of unsecured creditors unless it is a distribution of the prescribed part). Distributions can be made on an interim and a final basis. In the case of a reorganisation, the terms of any distribution will usually be set out in the restructuring agreement, the scheme or in the CVA proposals, as appropriate.

Transactions that may be annulled

39 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

There are two main types of transaction that may be set aside by a liquidator or administrator under the Insolvency Act. These are transactions at an undervalue (section 238) and preferences (section 239).

A transaction at an undervalue is a transaction entered into for no consideration or for consideration that is significantly less than the consideration provided by the company. A liquidator or administrator can apply to the court for an order restoring the position to that which it would have been in the absence of such a transaction. It is a defence to a claim if the company entered into the transaction in good faith for the purpose of carrying on the business of the company, and there were reasonable grounds for believing that the transaction would benefit the company.

A company grants a preference where it does something, or allows something to be done, that puts a creditor, surety or guarantor in a better position than it would otherwise have been in if the company went into insolvent liquidation. The court will, however, only make an order restoring the position to what it would have been if the company was influenced by a desire to put that other person in that better position. This desire to prefer is assumed where the parties are 'connected' (as defined in the Insolvency Act).

The court will not make any order unless, at the time of entering into the transaction at an undervalue, making the preference or granting the floating charge, the company was unable to pay its debts, or became unable to pay its debts as a consequence of the transaction. Insolvency is, however, presumed in the case of a transaction at an undervalue entered into with a connected person.

In addition to transactions at an undervalue and preferences, certain floating charges will also be invalid under section 245 of the Insolvency Act, except to the extent of any valuable consideration (being money, goods or services supplied; or a discharge or reduction of any debt or interest). No application to court is required.

Separately, an administrator or a liquidator may apply to the court to set aside an extortionate credit transaction. Further, a liquidator, administrator or a 'victim' of the transaction, may challenge any transaction that is entered into at an undervalue where the purpose of making the transaction was to put assets beyond the reach of a person who is making or may make a claim against the company (section 423 of the Insolvency Act).

Under English law, there are no specific legislative provisions that allow for transactions to be annulled as a result of a reorganisation (unless such reorganisation utilises an administration process).

Proceedings to annul transactions

40 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

The 'suspect period' for a transaction at an undervalue or a preference given to a connected party is the two years prior to the 'onset of insolvency'. With respect to a preference given to an unconnected party, the suspect period is six months prior to the onset of insolvency.

The suspect period for the avoidance of floating charges is 12 months prior to the onset of insolvency for a floating charge created in favour of an unconnected party and two years prior to the onset of insolvency for a floating charge created in favour of a connected party.

The provisions setting out what constitutes the onset of insolvency are detailed, but, in summary, relate to the commencement of either administration or liquidation proceedings. Where liquidation is preceded by an administration, the onset of insolvency is the date of commencement of the administration proceedings.

The three types of transactions outlined above can only be challenged in an administration or a liquidation, and not in any other form of restructuring, and the challenge can only be made by the administrator or the liquidator.

The timescale for challenging a transaction defrauding creditors is not limited except for the usual limitation periods unrelated to insolvency. A liquidator, administrator or a 'victim' of the transaction may challenge such a transaction.

Directors and officers

41 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

The company's officers and directors will not generally be personally liable for obligations of their corporations unless they have entered into personal guarantees. However, the company's officers can be held to be personally liable to contribute to the company's assets for any one of the following reasons:

- misfeasance or breach of any fiduciary or other duty;
- fraudulent trading: section 213 of the Insolvency Act provides that where it appears that any business of the company has been carried on with intent to defraud creditors or for any fraudulent purpose, the court may declare that any persons who were knowingly parties to the carrying on of business in that manner are liable to contribute to the company's assets. This section goes beyond directors and officers and applies to anyone who has been involved in carrying on the business of the company in a fraudulent manner. Actual dishonesty must be proved. Both a liquidator and an administrator can bring this action; and
- wrongful trading: section 214 of the Insolvency Act applies only to directors, former directors and 'shadow directors' and only where such a director continues to trade after a time when he or she knew, or ought to have concluded, that there was no reasonable prospect of the company avoiding insolvent liquidation, or insolvent administration (see also question 13).

The remedies for some of the above claims that may be brought against the directors are designed to be compensatory for the liabilities incurred by the company.

The company's officers can also be criminally liable under sections 206 to 211 of the Insolvency Act for fraud, misconduct, falsification of the company's books, material omissions from statements and false representations. They are also liable to disqualification from being a director of any company for up to 15 years under the Company Directors Disqualification Act 1986. A director can also be disqualified in Great Britain if he or she has been convicted of (amongst others) an offence in connection with the promotion, formation, management, liquidation or striking off of a company outside Great Britain. Lastly, environmental and health and safety legislation may provide for personal liability on directors and officers.

Directors owe a duty to act in the best interests of the creditors (as opposed to the shareholders) in the 'twilight period' (ie, when a company is insolvent or on the brink of insolvency). Previously a common law duty, this duty now also appears in section 172(3) of the Companies Act 2006.

Groups of companies

42 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

In principle, each corporate entity has its own existence and the corporate veil will only be rarely pierced so the circumstances where a parent or affiliated company could be liable for its subsidiaries or affiliates are few. There are certain, limited, exceptions to this principle, for example as relates the powers of the UK Pensions Regulator (see question 35) or in relation to certain environmental, health and safety or antitrust matters.

A parent company can be held liable for the acts of a subsidiary pursuant to the law of agency; however, there is no presumption that a subsidiary is the agent of the parent company. In very limited circumstances the English courts will permit the piercing of the corporate veil to allow action to be taken against those who control a company.

A parent company may also be liable for the acts of its subsidiaries under the torts of conspiracy and negligence. In particular, there can be a primary, direct duty of care on a parent company to employees (and potentially others) affected by the activities of a subsidiary under the tort of negligence. A parent could also be held liable if it is considered a person instructing an unfit director – this could be the case where the parent is taken to have exercised the requisite amount of influence over a director who, as a result of acting on the parent's directions or instructions, got disqualified under the Company Directors Disqualification Act 1986.

A parent company could be held liable for fraudulent trading or, if it has acted as a shadow director, for wrongful trading under sections 213 and 214 of the Insolvency Act respectively.

The concept of distributing a group company's assets pro rata without regard to the specific corporate entities infringes the fundamental concept that each company has its own legal entity and that creditors are creditors of the respective company with which they have contracted, and not creditors of a group. This fundamental concept will be lifted in cases of fraud or where there is a deliberate intention to put assets beyond the reach of creditors.

Insider claims

43 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

There are no equitable subordination rules as such in English insolvency law, as is the case in certain other European jurisdictions. The rules for distribution of an insolvent estate are set out in the Insolvency Act and Insolvency Rules, and shareholders are last in the order of distribution in respect of their share capital, after unsecured creditors have been satisfied in full. Non-arm's length creditors will rank pari passu with the remainder of the unsecured creditors unless they have security, in which case they will rank in accordance with the security ranking.

Creditors' enforcement

44 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

A secured creditor can potentially enforce his or her security outside of court proceedings either by the appointment of a receiver or an administrative receiver. A receiver is appointed over specified assets charged by way of a fixed charge. An administrative receiver is appointed where the secured creditor has a charge over the whole or substantially the whole of the company's assets and accordingly has wider powers to run the company, although his or her primary duty will be to the secured creditor. As a result of the Enterprise Act 2002, the use of administrative receivership has been abolished in all but certain limited circumstances for floating charges created after 15 September 2003. The administrative receiver, although an agent of the company, is primarily concerned with the recovery of sufficient assets to pay out to the debenture holder. The almost inevitable consequence of the appointment of an administrative receiver is that the company will go into liquidation as all or nearly all its assets are likely to be realised to repay the secured creditor.

A secured creditor with a qualifying floating charge may also appoint their choice of administrator (which may be done using an out-of-court procedure).

A mortgagee may take physical possession of the property subject to the mortgage, and (where such property is not subject to consumer protection legislation) such possession does not require a court order. Similarly, pursuant to the Financial Collateral Arrangements (No. 2) Regulations 2003, should the security subject to the arrangement become enforceable, the parties may agree that the collateral-taker has the right to appropriate (ie, become the absolute owner of the collateral). However, in certain circumstances relief from forfeiture may be available (and the appropriation may be set aside).

Corporate procedures

45 Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

In addition to a members' voluntary liquidation, a company may be dissolved under sections 1000 and 1003 of the Companies Act 2006, without the need for a formal liquidation procedure if it is dormant and has no assets or liabilities.

Companies that have been dissolved under these sections, as well as companies that have been dissolved following liquidation, may be restored to the Register of Companies on a court application by an interested party within six years of the date of dissolution. A court application may be made at any time for the purpose of bringing proceedings against the company for damages for personal injury.

The court will make an order for restoration if at the time of the dissolution the company was carrying on business or in operation, if (in the case of a voluntary striking off) the company did not comply with the procedural requirements for dissolution or, in other cases, if the court considers it just to do so. A common ground to restore a company is where an asset has become available to the company (eg, a tax refund) that can only be claimed by the company.

Conclusion of case

46 How are liquidation and reorganisation cases formally concluded?

In the case of a voluntary liquidation, once the company's affairs are fully wound up the liquidator must send final accounts showing how the liquidation has been conducted to creditors. After the account has been laid, the liquidator will send a copy of the account to the Registrar of Companies. The company is then deemed to be dissolved at the expiry of three months.

In the case of a compulsory liquidation, if the liquidator is not the official receiver, once the liquidation is complete, the liquidator must present his or her report of the winding up to the creditors. The liquidator must then notify the Registrar of Companies that the final meeting of creditors has been held or that the final account has been sent out. The company is deemed to be dissolved three months after the Registrar of Companies registers this notice. If the liquidator is the official receiver, the liquidation will end three months after the official receiver notifies the Registrar of Companies that the liquidation is complete. Alternatively, if the company has insufficient assets to cover the costs of the liquidation and it appears to the official receiver that the affairs of the company do not require any further investigation, the official receiver may apply to the Registrar of Companies for early dissolution of the company in liquidation.

There are various exit routes from administration. If the objective of the administration is achieved, the administration must be terminated. However, an administration can also be converted into a creditors' voluntary liquidation or the company could be dissolved.

CVAs, schemes and informal reconstructions, if successful, will end in accordance with their terms.

International cases

47 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Recognition and assistance for foreign insolvency proceedings

There are various tools available to a foreign office holder to obtain recognition of the foreign insolvency proceeding in England, depending on the circumstances of the foreign proceeding: under Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings (the EC Regulation); Regulation (EU) 2015/848 of the European Parliament and of the Council on Insolvency Proceedings (the Recast Regulation) – this regulation is in force at the time of writing although the majority of its provisions will only apply from 26 June 2017; under the Cross-Border Insolvency Regulations 2006 (the CBIR); under the common law; and under section 426 of the Insolvency Act. Following a withdrawal by the UK from the European Union, these options are likely to be different – however, much will depend on the exit negotiations and any replacement arrangements put in place. English proceedings may be required to establish the foreign office holder's authority to deal with assets in England. Recognition of a foreign insolvency office holder's position will, in itself, confer standing on the office holder to represent the foreign company in the English courts. The office holder may bring proceedings in the English courts in the name of the foreign company and, generally, administer the assets of the foreign company present in England.

The EC Regulation has direct effect in all member states of the European Union with the exception of Denmark. Under the EC Regulation insolvency proceedings are to be opened in the jurisdiction where a debtor has his or her COMI. Such insolvency proceeding will then be automatically recognised as a main proceeding under the EC Regulation in all member states (except for Denmark). In jurisdictions where a debtor has an establishment, secondary or territorial proceedings can be opened which again will be recognised throughout the European Union (save for Denmark). For further detail on the EC Regulation, see the European Union chapter.

The CBIR implemented the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain (ie, excluding Northern Ireland). The CBIR entitle a foreign insolvency representative to apply directly to the British courts to commence British insolvency proceedings, to participate in British insolvency proceedings, and to seek recognition and relief for foreign insolvency proceedings. Foreign proceedings will be recognised as 'foreign main proceedings' where insolvency proceedings have been opened in the jurisdiction where the debtor's COMI is located. Like in the EC Regulation there is a rebuttable presumption that a debtor's COMI is in the place of its incorporation. If insolvency proceedings have been opened in a jurisdiction where the debtor has an establishment only the insolvency proceedings will be designated 'foreign non main proceedings'. Relief is automatic in the case of recognition as a foreign main proceeding and includes an automatic stay and discretionary in the case of a foreign non main proceeding. To the extent there is a conflict between a provision in the EC Regulation and a provision in the CBIR, the relevant provision of the EC Regulation will prevail.

Under the common law, English courts have traditionally promoted the concept of 'modified universalism'. Universalism is the concept that insolvency proceedings in relation to a debtor should apply worldwide, so that there is only ever one main insolvency proceeding in which all creditors are entitled to participate in. 'Modified universalism' qualifies the concept of universalism by giving local courts the discretion to evaluate the fairness of home country procedures and, where necessary, protect the interests of local creditors.

Section 426 of the Insolvency Act allows a 'relevant country or territory' (the Channel Islands, the Isle of Man or any country or territory designated by the Secretary of State – mostly Commonwealth countries but with certain notable exceptions, such as India) to apply to the English courts for assistance. This assistance is wide-ranging and can include the making of an administration order.

Foreign creditors

Foreign creditors will be able to provide evidence of their claims in an English liquidation in the normal way. However, if there is a concurrent liquidation of the same company in the foreign jurisdiction, then a creditor proving its claim in England will only be entitled to share in any distribution once any amount received in the foreign proceedings have been taken into account. Foreign currency debts are converted into sterling under mandatory provisions of the Insolvency Act.

Recognition of judgments (not judgments opening insolvency proceedings)

Again, there are a number of tools available to obtain recognition of a judgment: the EC Regulation; the common law; and the Brussels Regulation recast (1215/2012). In addition, regard should be had to the Civil Procedure Rules and the different tools available to litigators in England to enforce a foreign judgment (such as the Foreign Judgments (Reciprocal Enforcement) Act 1933.

Update and trends

The UK has voted to leave the European Union on 23 June 2016. The leave vote does not immediately change the legal backdrop of the restructuring market. No change to the status of EU-derived law in the UK results directly from the leave vote or from the service of the article 50 notification. The UK will remain a member state until it concludes an agreement in relation to its withdrawal from the EU or the two-year article 50 notification period expires (whichever occurs first) (Brexit). Unless replacement legislation is given effect before Brexit, we expect that there will no longer be automatic recognition of UK insolvency proceedings in other EU member states. Reliance will need to be had on each member state's domestic law – as was the case before the EC Regulation on Insolvency Proceedings came into existence in 2002. As regards recognising foreign insolvency proceedings, the UK already has avenues that foreign office holders can use to obtain recognition. While the impact of Brexit on the use of schemes is difficult to predict, we believe these are unlikely to be impacted by Brexit in a material way. This is on the assumption that schemes continue to be enforceable in any relevant EU member states. The details of Brexit consequences for the legal framework of the restructuring and insolvency sphere will be analysed once the specific terms of Brexit are known.

Under the EC Regulation, judgments that concern the course and closure of insolvency proceedings and compositions approved by that court shall be recognised without further formalities. Automatic recognition is also available for judgments that derive directly from the insolvency proceedings and which are closely linked to them (even if they are handed down by another court).

The common law rule that judgments in personam are recognised only where a defendant is present in the foreign jurisdiction when proceedings are initiated, is a claimant or counterclaimant in the proceedings or has submitted to the jurisdiction of the foreign court also applies in an insolvency context (see *Rubin and another v Eurofinance SA* and *New Cap Reinsurance Corporation (in liquidation) and another v Grant and others* [2012] UKSC 46).

The Brussels Regulation recast (1215/2012) came into effect on 10 January 2015 and is in essence a revised version of Brussels Regulation (EC 44/2001) on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Brussels Regulation recast applies to litigation commenced on or after 10 January 2015, and judgments given in proceedings commenced on or after 10 January 2015. The old Brussels Regulation continues to apply only to judgments given (pre or post-10 January 2015) in litigation that was commenced pre-10 January 2015. The Brussels Regulation and its recast provide rules for the recognition and enforcement of foreign judgments of contracting states. The Brussels Regulation and its recast do not apply to bankruptcy proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.

The FCA Regulations restrict the ability of the court to recognise a foreign insolvency order. Regulation 15A prevents a court from making a recognition or enforcement order under section 426 of the Insolvency Act (or the common law) that would be prohibited by the regulations.

International insolvency treaties

See above. The UK is party to the EC Regulation and has adopted the UNCITRAL Model Law on Cross-Border Insolvency.

COMI

48 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The EC Regulation provides that main insolvency proceedings are to be opened in the member state which that company has its COMI. There is a rebuttable presumption that a company's COMI is where its registered office is located. This is slightly modified in the EC Regulation recast that states that it is not possible to rely on the rebuttable presumption where a debtor has moved its COMI in the preceding three months. In the case of *Interedil (Interedil Srl v Fallimento Interedil Srl and Intese Gestione Crediti SpA* (C-396/09)) the European Court of Justice (ECJ) confirmed that COMI must be interpreted in a uniform way by EU member states and by reference to EU law and not national laws. Therefore the English courts will be bound to interpret COMI in a way that is consistent with the interpretation given by the ECJ.

Where a company's registered office and place of central administration are in the same jurisdiction, the registered office presumption set out in the recitals to the EC Regulation cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of assets belonging to the debtor and the existence of contracts for financial exploitation of those assets in an EU member state, other than that in which the registered office is situated, are not sufficient factors to rebut the registered office presumption. This is unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's central administration is located in that other EU member state. Factors that have been held to be relevant to determine a debtor's COMI (in addition to the rebuttable registered office presumption) are: location of internal accounting functions and treasury management, governing law of main contracts and location of business relations with clients, location of lenders and location of restructuring negotiations with creditors, location of human resources functions and employees as well as location of purchasing and contract pricing and strategic business control, location of IT systems, domicile of directors, location of board meetings and general supervision. The relevant date to determine a company's COMI is the date when the request to open the proceedings is made (*Re Staubitz-Scheiber* (C-1/04) and *Interedil* (see above).

COMI is determined on an entity-by-entity basis.

The Model Law, as applied in the United Kingdom by virtue of the CBIR (see above at question 47) also uses the concept of COMI. The Model Law (like the EC Regulation) does not define COMI but notes that the concept derives from the EC Regulation.

Cross-border cooperation

49 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

Yes, provided certain standing requirements are met – see further in question 47. On occasion, courts have refused to recognise foreign proceedings. For example, *Re Stanford International Bank Ltd (in liquidation)* [2010] EWCA Civ 137, the Court of Appeal refused to recognise a US receiver on the basis of its consideration of where the company had its COMI (using an interpretation of COMI that was consistent with its interpretation under the EC Regulation). Instead, the court recognised the appointment of an Antiguan liquidator as foreign main proceedings. In the case of *Global Distressed Alpha Fund 1 LP v PT Bakrie Investindo* [2011] EWHC 256 (Comm), the High Court held that it had no power to hold that an English law guarantee was discharged by the guarantor's Indonesian debt reorganisation plan. It should be noted that this case is very specific on its facts as the law on the discharge of guarantees is clear.

While not directly relevant to the laws of England and Wales, the Privy Council held (in a case on appeal from Bermuda) in the case of *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2014] UKPC 36 that while there was a common law power to cooperate and assist a foreign liquidator in his or her conduct of insolvency proceedings in a different jurisdiction, such power does not extend to providing a liquidator with a power that he or she did not have in his or her home jurisdiction.

The English courts have in recent years tended to row back from an earlier tendency to grant cooperation and relief based on the common law. As such, there is now a more limited relief available in England than a decade ago – despite this, where relief is possible to be granted under specific legislation the English courts will be willing to do so.

Cross-border insolvency protocols and joint court hearings

50 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Insolvency protocols have been used in cross-border insolvencies between the United Kingdom and the United States to harmonise proceedings, for example, in 1991 in the *Maxwell Communications Corporation* case.

In the *Lehman Brothers* case, it was clear that due to the volume and size of the claims involved, and the international dimension of the business, international cooperation would be paramount. In 2009, Lehman Brothers administrators in several jurisdictions signed a protocol that focused on cooperation and exchange of information. Crucially, the English administrators did not sign the protocol. In a report to creditors, the English administrators said it was not in the best interests of the English Lehman Brothers entity to 'be party to or bound by such a broad arrangement'. Under the changes to the EC Regulation the use of protocols is specifically sanctioned so it remains to be seen whether such formal legislative blessing of the concept will result in more protocols being implemented.

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Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

The European Union is a unique economic and political partnership among 28 European countries that together cover much of the continent. The EU was created in the aftermath of the Second World War. The first steps were to foster economic cooperation, the idea being that countries that trade with one another become economically interdependent and so more likely to avoid conflict. The result was the European Economic Community (EEC), created in 1958, and initially increasing economic cooperation between six countries: Belgium, Germany, France, Italy, Luxembourg and the Netherlands. Since then, a huge single market has been created and continues to develop. The following countries are currently members of the EU: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom (as at the time of writing, the UK remains part of the EU – see 'Update and trends').

At the EU level, there are a number of different legislative frameworks in operation in the insolvency context, but by far the most important is the EC Regulation on Insolvency Proceedings (Council Regulation (EC) No. 1346/2000) (the EC Regulation). This came into force on 31 May 2002 and will continue in effect until 26 June 2017 when the majority of the provisions of the Recast to the EC Regulation (the Recast) (which came into force on 25 June 2015) become effective. There is separate legislation for more niche subject matters, such as insurance and credit institutions, which together complement the EC Regulation.

The EC Regulation applies to those insolvency proceedings commenced in the EU (except for Denmark) that are listed in Annex A to the EC Regulation. The EC Regulation does not seek to harmonise the substantive insolvency law of the different EU member states but aims to establish common rules on cross-border insolvency proceedings, based on principles of mutual recognition and cooperation.

It distinguishes between two types of proceedings: main insolvency proceedings (main proceedings) and territorial or secondary proceedings. Main proceedings are opened in the courts of the member state within the territory of which the debtor has its 'centre of main interests' (COMI). The EC Regulation does not contain a definition of 'COMI' but the recitals to it state that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. In the case of *Interedil Srl v Fallimento Interedil Srl and Intese Gestione Crediti SpA* (C-396/09) (*Interedil*) the European Court of Justice (ECJ) confirmed that COMI must be interpreted in a uniform way by EU member states and by reference to EU law and not national laws. Where a company's registered office and place of central administration are in the same jurisdiction, the registered office presumption set out in the recitals to the EC Regulation cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of assets belonging to the debtor and the existence of contracts for financial exploitation of those assets in an EU member state, other than that in which the registered office is situated, are not sufficient factors to rebut the registered office presumption, unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's central administration is located in that other EU member state.

The ECJ has held that the date on which a debtor's COMI is decided is the date when the request to open the proceedings is made. Main proceedings will encompass all of the debtor's assets, regardless of where they are situated, and will affect all of the debtor's creditors.

Secondary and territorial proceedings can be opened in a member state other than the one where the debtor's COMI is located provided that the debtor has an 'establishment' in that jurisdiction. An establishment is defined in the EC Regulation as a place of operations where the debtor carries out a non-transitory economic activity with human means and goods. Secondary proceedings can only be opened once main proceedings have already been opened and are currently (under the EC Regulation) restricted to winding-up proceedings (this restriction is lifted in the Recast). Territorial proceedings can be opened where main proceedings have not yet been opened and are not restricted to winding-up proceedings. The situations in which territorial proceedings can be opened are, however, limited to situations in which there are objective factors preventing main proceedings from being opened or where territorial proceedings in a particular member state are requested by a creditor who is based in such member state or whose claim arises from a debtor's establishment in that member state. In the event that main proceedings are opened, existing territorial proceedings are converted into secondary proceedings. Both secondary and territorial proceedings are restricted to the assets of the debtor situated in the territory of that member state. The office holders in the main proceedings and the secondary proceedings have a duty to communicate and cooperate with each other.

The EC Regulation is confined to provisions that govern jurisdiction of insolvency proceedings and judgments that are delivered directly on the basis of insolvency proceedings and are closely connected with such proceedings. If an action is not closely connected with insolvency proceedings (even if brought by an insolvency office holder or against an insolvent company), different regimes may apply, such as the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation of the European Parliament and the Council No. 1215/2012 (the Brussels Regulation) – which is a recast of Council Regulation (EC) No. 44/2001) and came into effect on 10 January 2015. The EC Regulation and the Brussels Regulation are designed to complement each other – with insolvency proceedings being specifically excluded from the ambit of the Brussels Regulation. The Brussels Regulation recast applies to litigation commenced on or after 10 January 2015, and judgments given in proceedings commenced on or after 10 January 2015. The old Brussels Regulation continues to apply only to judgments given (before or after 10 January 2015) in litigation that was commenced before 10 January 2015. The Brussels Regulation and its recast provide rules for the recognition and enforcement of foreign judgments of contracting states.

The Recast came into force on 25 June 2015. However, as noted above, the majority of its provisions will not apply until 26 June 2017. Although large sections of the EC Regulation have been rewritten, the cornerstone underpinning the EC Regulation, namely to provide a mechanism for who is to govern the insolvency without harmonising substantive insolvency law across member states, will remain. While the current text will remain in force until 26 June 2017, the new text will be persuasive should there be any questions of interpretation.

Under the Recast, where a company's registered office has shifted in the three months preceding the filing for proceedings, the rebuttable presumption that COMI is at the same place as the company's registered office will no longer apply. Instead, evidence will need to be provided to demonstrate where a company's COMI is located. Another of the changes is to remove the requirement for secondary proceedings to be winding-up proceedings. The revision also bolsters the duty to cooperate between office holders and the insolvency courts and introduces the concept of a group coordinator whose task it will be to devise a group coordination plan for members of a group that are in insolvency proceedings. The group coordination plan should recommend a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies and in particular is to contain proposals for measures to be taken in order to re-establish the economic performance and financial soundness of the group, settle intra-group disputes and reach agreements between the insolvency practitioners of the insolvent group members. The group coordination plan must, however, not include any recommendations as to consolidation of proceedings or insolvent estates. Other changes introduced by the Recast include a broadening of the types of proceedings that can constitute main proceedings, to include more pre-insolvency rescue processes, and the introduction of the concept of 'synthetic' secondary proceedings whereby local creditors can be protected without the need for secondary proceedings to be commenced.

There is no single criterion to apply to determine if a debtor is solvent in the European Union, as this is a matter for each member state to determine. In general, some member states have a cash flow-only insolvency test while others have a cash flow and balance sheet test.

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

The rules in this context vary between member states. Under the EC Regulation, main proceedings are to be opened by the courts of the member state in which the debtor has its COMI. Secondary or territorial proceedings are to be opened by the courts where the debtor has an establishment (see question 1). Any restrictions are a matter for individual member states.

Excluded entities and excluded assets

3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

The entities that are excluded from customary insolvency proceedings, and the legislation applicable to such entities, differ between member states. However, the EC Regulation does cater for certain specific exclusions under EU-level directives described in further detail below.

At the domestic level

It is common in many continental jurisdictions for customary insolvency proceedings not to apply to the insolvency or reorganisation of individuals or entities acting in a personal, non-commercial capacity and specific separate regimes will apply to them. By contrast in other jurisdictions (Germany, for example) any natural or legal person in those jurisdictions is subject to the customary insolvency and reorganisation laws.

At the EU level

As mentioned in question 1, the EC Regulation does not apply to the winding up of credit institutions or insurance undertakings, which are instead governed by Council Directive 2001/24/EC on the reorganisation and winding up of credit institutions (the Credit Institutions Directive), which entered into force on 5 May 2001, and Council Directive 2001/17/EC on the reorganisation and winding up of insurance undertakings (the Insurance Undertakings Directive), which entered into force on 20 April 2001. As directives, each member state had to transpose the provisions of the directive into national law.

The Credit Institutions Directive

The aim of this directive is to facilitate reorganisations of or, if impossible, the winding up of branches of the same credit institution as a single legal entity. This directive makes special provision for the single reorganisation or winding up of a failed credit institution within the EU to be commenced in the credit institution's 'home member state'. Unlike the EC Regulation, there is no scope for any independent or secondary proceedings. The Credit Institutions Directive had to be implemented by member states by 5 May 2004.

The Insurance Undertakings Directive

Like the Credit Institutions Directive, the aim of this directive is to ensure that there is a single set of reorganisation measures or insolvency proceedings for insurance undertakings with their head office in the EU. Again, the proceedings are to be commenced in the home member state of the insurer. The Insurance Undertakings Directive had to be implemented by member states by 20 April 2003.

Public enterprises

4 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

Each member state within the EU has its own provisions for the insolvency of a government-owned enterprise, and there is no harmonised system within the EU. In a number of member states, provided the government-owned enterprise is a private limited company, there is no difference in procedure compared with the insolvency of a privately owned entity. The insolvency of a government-owned enterprise would fall within the scope of the EC Regulation.

In some member states (for example, Italy) public entities are exempted from insolvency, or insolvent companies owned by public agencies are not prevented from carrying on business, or both.

Protection for large financial institutions

5 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

There have been a number of legislative initiatives (in particular after the onset of the financial crisis in 2008) at the EU level to attempt to provide more protection for large financial institutions and provide for a way that these could be rescued or reorganised in an orderly way. Set out below are the main pieces of legislation dealing with this topic. Various sector-based pieces of legislation complement the picture (for example, rules on capital requirement).

The Financial Conglomerates Directive

The directive on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (Council Directive 2002/87/EC) (the Financial Conglomerates Directive), came into force on 11 February 2003 and introduced a prudential regime for financial conglomerates moving away from a purely sector-based approach to regulation and looking at systemically important institutions holistically. The directive provides for enhanced cooperation processes (including information sharing) between cross-sector and cross-border supervisors of financial conglomerates, including the appointment of a single lead regulator to act as coordinator and exercise supplementary supervision of each financial conglomerate. In addition, the directive sets out supplementary capital adequacy requirements for certain entities within a financial conglomerate as well as supplemental supervision of risk concentrations.

The Financial Conglomerates Directive has been amended, in particular by Council Directive 2011/89/EU, which entered into force on 9 December 2011. Member states had to implement the majority of the provisions into national law by 10 June 2013.

On 22 December 2014 the Joint Committee of the European Supervisory Authorities published new guidelines on the convergence of supervisory practices relating to the consistency of supervisory coordination arrangements for financial conglomerates. The guidelines aim to clarify and enhance cooperation between the competent authorities on a cross-border and cross-sectoral basis, to supplement the functioning of sectoral colleges where a cross-border group has been identified as a financial conglomerate, and to enhance the level playing field in the financial market and reduce administrative burdens for firms and supervisory authorities.

In June 2016, the EU Commission launched a consultation on the performance of the Financial Conglomerates Directive within the framework of the regulatory fitness and performance programme. The consultation will inform the EU Commission's evaluation of the Financial Conglomerates Directive, to assess whether the current regulatory framework is proportionate and fit for purpose, and delivering as expected considering its objective of identifying and managing risks that are inherent to financial conglomerates to ensure financial stability. At the time of writing, the consultation was expected to close on 20 September 2016.

The Single Supervisory Mechanism and the Single Resolution Mechanism

In response to the recent Eurozone debt crisis, the EU institutions agreed to establish a Single Supervisory Mechanism and a Single Resolution Mechanism for banks, based on the European Commission roadmap for the creation of an EU banking union (Banking Union). Banking Union applies to member states that are part of the Eurozone, but non-Eurozone member states can also join. As part of the initiative, Regulation (EU) 806/2014 (the SRM), which establishes uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms and Regulation (EU) 1024/2013 (the Single Supervisory Mechanism Regulation) on the policy of prudential supervision on credit institutions, were adopted.

The SRM creates a centralised resolution system for dealing with failing banks and on 31 December 2015 implemented the EU-wide Bank Recovery and Resolution Directive (see below for further detail) in the Eurozone. The regulation has direct effect and prevails over national law. The SRM confers special authority and powers to a new EU-level authority, the Single Resolution Board (the SRB). The SRB will assess whether an individual bank is failing, or is likely to fail, and prepare for that bank's resolution by devising a resolution scheme, which will provide a framework for the use of resolution tools and the Single Resolution Fund (the SRF), which can be used, among other things, to fund the resolution of failing banks, or the compensation of shareholders and creditors.

The Bank Recovery and Resolution Directive

In June 2016, the EU Commission introduced a framework for the recovery and resolution of credit institutions and significant investment firms that are considered to be 'too big to fail': the Bank Recovery and Resolution Directive (Directive 2015/59/EU of the European Parliament and of the Council of 15 May 2014 (the BRRD)). The majority of the provisions of the BRRD entered into force on 2 July 2014. The deadline for member states to adopt and publish implementing legislation and regulations was 31 December 2014.

The BRRD is aimed at providing national authorities with common powers and instruments to pre-empt bank and significant investment firm crises and to resolve any financial institution in an orderly manner in the event of failure, while preserving essential bank operations and minimising taxpayers' exposure to losses. The BRRD establishes a range of instruments to tackle potential bank or significant investment firm crises at three stages: preparatory and preventative, early intervention, and resolution.

At the preparatory stage, the BRRD requires firms to prepare (and to annually update) recovery plans (also often referred to as 'living wills') and competent authorities to prepare resolution plans based on information provided by firms. The BRRD also reinforces authorities' supervisory powers.

At the early intervention stage, the BRRD is intended to give powers to supervising authorities to take early action to address upcoming problems. Such powers include requiring a firm to implement its recovery plan (living will) and replacing existing management with a special manager.

At the resolution stage, the BRRD gives supervising authorities powers to ensure the continuity of essential services and to manage a firm's failure in an orderly way. These tools include a sale of (part of a) business, the establishment of a bridge institution (a temporary transfer of good assets to a publicly controlled entity), an asset separation (the transfer of impaired assets to an asset management vehicle) and a bail-in measure (the imposition of losses, with an order of seniority, on shareholders and unsecured creditors). The sale-of-business tool entails the sale of all or part of the failing entity to a private party. The bridge-institution tool involves selling good assets or essential functions of the entity and separating them into a new bridge entity. The asset-separation tool entails the bad assets of the firm being put into a 'bad bank' (this tool may only be used in conjunction with another resolution tool to prevent the failing entity benefiting from an unfair competitive advantage). The bail-in tool is effectively a process of internal recapitalisation, whereby, for instance, certain eligible liabilities of the failing entity are cancelled, written down or converted into equity, or the principal or outstanding amount of eligible liabilities is cancelled or reduced (this does not apply to certain excluded liabilities such as financial collateral arrangements and liabilities to employees). The aim of the bail-in tool is to shift the costs of a failing entity from the taxpayer to the creditors and shareholders. The BRRD also requires member states to set up a resolution fund to ensure that the resolution tools can be applied effectively.

The BRRD provides several safeguards to protect the position of shareholders and creditors of a failed entity in the event that the resolution authority decides to use resolution tools. One of these is the 'no creditor worse off' principle. This principle means that the writedown or conversion of capital instruments of a failing entity, or the application of another resolution tool on a failing entity, may not result in its shareholders or creditors being worse off than they would have been had the entity been wound up under normal insolvency proceedings. Compliance with this 'no creditor worse off' principle is assessed after the completion of the resolution phase. The resolution authority must appoint an independent third party that will assess whether shareholders and creditors are worse off. If that is the case, then such shareholders and creditors have the right to be compensated for their losses (the compensation will be paid from the SRF).

In October 2015 the EU Commission issued a press release stating that it had decided to refer six member states (the Czech Republic, Luxembourg, the Netherlands, Poland, Romania and Sweden) to the ECJ over their failure to implement the BRRD into national law.

Recovery and resolution for non-banks

On 5 October 2012, the European Commission published a consultation paper on a possible recovery and resolution framework for financial institutions other than banks. The institutions concerned are financial market infrastructures (central counterparties and central securities depositaries, insurance and reinsurance firms and payment systems (such as TARGET2 and CHAPS)) and other non-bank entities such as payment institutions and electronic money institutions. The consultation closed in December 2012. In October 2013 the European Parliament passed a resolution on recovery and resolution plans for non-bank institutions. Among other things, the European Parliament urged the European Commission to prioritise recovery and resolution of central counterparties and of those central securities depositaries that are exposed to credit risk.

On 9 February 2016, then EU Commissioner Jonathan Hill gave a speech on priorities for an approach to resolution for central counterparties, stating that the EU would align work in this area with the work being taken forward as part of the G20 agenda. On 7 March 2016, the EU Commission published a list of planned initiatives for 2016, which envisaged that legislation on the recovery and resolution of central counterparties would be adopted in the fourth quarter of 2016.

Banking sector structural reform

On 29 January 2014 the Commission adopted a legislative proposal for a regulation on the structural reform of the banking sector. The regulation is to introduce measures improving the resilience of EU credit institutions. Banks falling within the scope of the proposed regulation will be prohibited from conducting proprietary trading and may be required to separate the performance of certain risky activities from the performance of banking activities deemed to be more socially useful, such as deposit-taking. On 19 June 2015, the Council of the EU agreed its stance for negotiations with the European Parliament in relation to the proposal, stating that the proposed regulation would apply only to banks that are either deemed of global systemic importance or exceed certain thresholds in terms of trading activity or absolute size. The proposal has been debated both in the European Parliament's Committee on Economic and Monetary Affairs (ECON Committee) and the Council and has been heavily criticised. Negotiations between the Commission, the Council and the European Parliament will begin as soon as the European Parliament has determined its position.

Secured lending and credit (immoveables)

6 What principal types of security are taken on immoveable (real) property?

Each member state within the EU has its own provisions for the creation of security, both in type and procedure required (including any steps to perfect such security). There is no harmonised system for the creation of security within the EU. However, generally, in each EU member state it is possible to take a mortgage or fixed charge over immoveable (real) property and such security is capable of, and will usually cover fixtures and fittings relating to the immoveable (real) property. There is usually a registration requirement for the security to be effective.

Secured lending and credit (moveables)

7 What principal types of security are taken on moveable (personal) property?

As noted in question 6, each member state has its own provisions for the creation of security and there is no harmonised system for the taking of security within the EU. However, common types of security include:

- liens;
- possessory pledges;
- non-possessory pledges (in some jurisdictions, the concept of the pledge has been refined so that the security can exist but physical delivery, a characteristic normally associated with a pledge, is not required in order for the security to be effective);
- chattel mortgages – similar in nature to the possessory pledge;
- security assignments – an assignment of personal property to the secured party;
- fixed charges – providing security over a particular asset or class of assets;
- floating charges (or equivalent) – security over all of the assets and undertakings of the chargor; and
- reservation of title.

Other types of security include:

- rights of privilege granted by law;
- special liens only given to secure medium or long-term bank facilities;
- assignments of receivables; and
- cash collateral charges.

Effect of insolvency proceedings on security rights

The EC Regulation specifically addresses third parties' rights in rem and states (article 5(1)) that the opening of insolvency proceedings in one EU member state will not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets belonging to the debtor that are located in a member state other than the one in which the proceedings are commenced.

The Financial Collateral Arrangements Directive

Council Directive 2002/47/EC on financial collateral arrangements (the Financial Collateral Arrangements Directive) came into force on 27 June 2002. The purpose of the Financial Collateral Arrangements Directive was to simplify the process of taking financial collateral across the EU by introducing a minimum uniform legal framework. As a directive, each member state had to transpose the provisions into national law by 27 December 2003. Financial collateral under the directive is made up of cash, financial instruments and credit claims. The directive provides for rapid and non-formalistic enforcement procedures designed in part to limit contagion effects in the event of default by one of the parties to the arrangement. Member states may not make the creation, perfection, validity, enforceability or admissibility of a financial collateral arrangement dependent on the performance of any formal act. In addition, member states have to ensure that the collateral taker is able to realise financial collateral in one of the following manners: if it concerns financial instruments, by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations; if it concerns cash, by setting off the amount against or applying it in discharge of the relevant financial obligations; and if it concerns a credit claim, by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations. Appropriation is possible only if this has been agreed in the arrangement. The directive also stipulates that certain insolvency provisions do not apply. Financial collateral arrangements may not be declared invalid or void or be reversed on the sole basis that they have been concluded or that the financial collateral has been provided on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order or decree making that commencement; or in a prescribed period prior to, and defined by reference to, the commencement of such proceedings or measures or by reference to the making of any order or decree.

In the case of *Private Equity Insurance Group v AS Swedbank* C-156/15, following a request for a preliminary ruling from the Supreme Court of Latvia, Advocate General Szpunar gave an opinion on whether financial collateral is limited to collateral provided in securities payment and settlement systems; the proper interpretation of the requirement for control; and whether the collateral taker can realise financial collateral notwithstanding the commencement or continuation of winding up proceedings, thereby essentially overriding pari passu distribution to creditors.

Unsecured credit

8 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

The treatment of unsecured creditors in an insolvency process varies between member states. In general, unsecured creditors in the EU have limited remedies against debtors because of their unsecured status. To have any recourse to a debtor's assets, prior to the commencement of formal insolvency proceedings, a creditor would generally have to bring its own proceedings in a local court and obtain a judgment debt against the debtor, which, if not complied with, may give scope for recourse against the debtor's assets themselves. The treatment of unsecured creditors in the context of pre-judgment attachments varies between member states. In many jurisdictions, it is open to creditors to obtain a pre-judgment attachment or freezing order over some or all of a debtor's assets in order to prevent the relevant assets being dissipated pending a trial or resolution of a claim or claims. As a precaution, however, such an order is usually made subject to the provision of some kind of security or bond to protect the debtor in the event that it is later established that the attachment or freezing order was granted incorrectly.

In many jurisdictions, however, it is open to certain creditors in possession of relevant rights to assert a possessory lien or other similar claim, which would circumvent the requirement to bring legal proceedings. It is also possible in some jurisdictions for creditors to avail themselves of the benefit of retention of title provisions.

On 17 May 2014, Regulation (EU) 655/2014 established the European Account Preservation Order (EAPO). The EAPO can be used by a creditor to freeze some or all of the funds within any bank account held by a debtor located in another member state within the EU than that of the creditor. An EAPO operates to stop the withdrawal or transfer of the funds of a bank account beyond the amount specified in the order. EAPOs are to be used in cross border claims as an alternative to other methods of preservation available in the individual member states. Regulation (EU) 655/2014 will apply from 18 January 2017 to those member states which have not opted out (the United Kingdom has opted out of the regime).

Voluntary liquidations

9 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

The procedure for, and effects of, a voluntary liquidation vary between member states. For a solvent company, the usual position for member states in the EU is that the members can put the company into liquidation by resolving to do so through a general meeting. For an insolvent company, the usual position is that the directors must apply to the court to commence the liquidation process and the debtor is required to show that it is unable to pay its debts as they fall due or that its liabilities exceed its assets or both.

While the rules vary between member states, in certain member states (for example, France) commencing a voluntary liquidation case will cause a moratorium to arise, preventing creditors from starting or continuing any proceedings against the debtor while it is in a process and in some jurisdictions, the debtor will be put under the control of a liquidator or other insolvency office holder. In some jurisdictions any secured creditors will have an unrestricted right to exercise their security during this process but in others such rights are restricted or subject to certain conditions, depending on the type of security in question and the particular type of proceeding the debtor is in.

Involuntary liquidations

10 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

The requirements for, and effects of, the involuntary liquidation process vary between member states. Generally, in order for a creditor to make a successful petition for the involuntary liquidation of a debtor, the creditor is required to demonstrate that the debtor is unable to pay its debts as they fall due or that the debtor's liabilities exceed its assets.

Voluntary reorganisations

11 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

Voluntary reorganisations can be classified as 'insolvency proceedings' under the EC Regulation, provided that the particular type of reorganisation is specified in the annexes to the EC Regulation (for example, the *sauveguard* procedure in France is included in Annex A to the EC Regulation and therefore falls within its ambit). While the relevant requirements vary between member states, the general requirement is for the debtor to show that it is likely to become insolvent in the near future if steps are not taken to restructure its business and generally the debtor will also be required to show that there is a real expectation that the business can be rescued or that the attempt to reorganise the company and its affairs will ultimately result in a better outcome for its creditors.

An English law scheme of arrangement is a major exception to this by allowing for a 'cram down' of minority creditors if it is not possible to obtain unanimous creditor consent to proposals for reorganisation. Notwithstanding this, the scheme of arrangement has not been designated as an insolvency process for the purposes of the EC Regulation (including the Recast).

When the new text comes into force in June 2017 (see question 1) the scope of the EC Regulation will be expanded to include collective proceedings, including interim proceedings, which are based on a law relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation, the debtor is totally or partially divested of its assets and an insolvency office holder is appointed or the debtor's assets and affairs are subject to the control or supervision by a court or a temporary stay of individual enforcement proceedings is granted by a court or by operation of law in order to allow for negotiations between the debtor and its creditors, provided that these proceedings provide for suitable measures to protect the general body of creditors and are preliminary to one of the proceedings that fall within the scope of the EC Regulation if no agreement is reached. The scope will thus be expanded and allow more interim and rescue proceedings to be designated to fall within the scope of the EC Regulation. Each member state has designated which procedures fall within the scope of the Recast.

Voluntary reorganisations do not necessarily have to be implemented through any formal restructuring procedure and therefore there is significant variation in terms of the prerequisites to implementation. Voluntary reorganisation can be implemented as a result of informal negotiations with creditors outside of the usual formal restructuring procedure; such informal arrangements will be governed by the laws of the relevant jurisdiction or the laws and terms of agreements being compromised. In some jurisdictions, however, the formal requirements may be relatively strict.

The effect of a debtor's voluntary reorganisation on the debtor itself and its creditors varies between member states. Some potential scenarios include the management remaining free to run the business or an administrator or other insolvency office holder being appointed.

Involuntary reorganisations

12 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

While the position varies between member states, the general position is that a creditor cannot instigate an involuntary reorganisation (as opposed to an involuntary liquidation; see question 10) of the debtor. In Germany, however, a creditors' meeting may instruct the insolvency office holder to produce a reorganisation plan.

The effects of the commencement of an involuntary reorganisation vary between member states.

Mandatory commencement of insolvency proceedings

13 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

The position as to whether an obligation to file for insolvency exists, at which point it arises and the potential liabilities that can be incurred if such obligation is not met varies significantly between member states. There is no statutory requirement in England and Wales to commence insolvency proceedings for example (although the potential for director liability for wrongful trading effectively imposes such an obligation in given circumstances, albeit not an express one), whereas in Germany there are stringent mandatory insolvency filing rules for directors including clear time limits.

The position on liabilities varies between member states. Where there is a failure to meet an obligation to file for insolvency, the potential consequences can include personal liability for losses caused by such failure, a fine or imprisonment for directors of the company or both. The consequences of carrying on business while insolvent vary according to each member state. In some jurisdictions, civil liability may attach to the directors, for example, in England for wrongful trading. In other member states a failure to file for insolvency when the relevant insolvency test is met may result in criminal liability.

Doing business in reorganisations

14 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?

The rules vary among member states. Where a reorganisation is implemented under the supervision of the court a debtor will be able to carry on its business subject to court-imposed conditions. Depending on the jurisdiction and the particular process, an insolvency office holder could be appointed (either by the court or out of court) to run the debtor's business and there will be rules specific to the relevant jurisdiction and process governing the way in which the office holder may run the business and his or her powers and duties.

The rules regarding the conditions that apply to the use or sale of the assets of the business vary between member states and depend on the type of insolvency procedure the debtor is undergoing.

In various jurisdictions creditors who supply goods or services after the commencement of a formal reorganisation procedure will have priority over other creditors (France, for example) but this will often depend on the specific arrangements made with those particular creditors and the relevant local law.

The roles of the creditors and the court in supervising the debtor's business vary between member states and depend on the particular insolvency process that the debtor is in. The creditors do not generally have a formal supervisory role in the proceedings but will often have voting power depending on the relevant insolvency process and the relative size of a creditor's stake. In many jurisdictions an insolvency office holder appointed by the court will supervise the debtor's business activities on the court's behalf.

The powers that directors and officers can exercise after insolvency proceedings have been commenced vary according to both the type of insolvency process and member state. For example, in an English administration process, a director may no longer exercise a management power without the consent of the administrator. In a French safeguard proceeding on the other hand the directors retain management and control of the company.

Stays of proceedings and moratoria

15 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

The rules on stays of proceedings and moratoria vary between member states. Under the EC Regulation, the effect of insolvency proceedings on the continuation of proceedings by individual creditors is expressly a matter for the law of the member state where those proceedings are opened. The exception to this is that the effect of insolvency proceedings on a pending action relating to an asset or right where the debtor has been divested of that asset or right will be governed by the law of the member state where the relevant action is pending. Under the Recast, arbitration proceedings are specifically included within this exception, which codifies the existing position in a number of member states.

The ability may vary between local courts, and a court could impose a stay on transfers by the debtor of its property, a freeze on creditor enforcement action and judicial proceedings against the debtor or a stay on other creditor rights.

The circumstances and process in which creditors may obtain relief from such prohibitions varies between member states.

Post-filing credit

16 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

Post-filing credit procedures vary significantly between jurisdictions and the EC Regulation does not specifically address this issue.

Set-off and netting

17 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

The rules on set-off and netting in this context vary between member states, and the EC Regulation states that the conditions under which set-offs may be invoked shall be determined by the laws of the member state in which proceedings are opened.

Notwithstanding the variation in the rules on set-off across the EU, the EC Regulation does contain a specific provision relating to set-off, which seeks to preserve each member state's laws on set-off, primarily by stating that 'the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of the claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim'. Contractual netting is not specifically addressed under the EC Regulation.

Sale of assets

18 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The procedure for the sale of assets during reorganisations or liquidations varies between member states. However, the EC Regulation provides that a disposal of an immoveable asset, a ship or an aircraft subject to registration in a public register, or any registered securities, in each case after the opening of insolvency proceedings, will be governed by the law of the member state where the particular asset or register is located.

The relevant documentation effecting the reorganisation will provide for the terms under which the assets or the whole of the business are disposed of.

The question of whether or not assets are purchased 'free and clear' or subject to encumbrances will depend on the relevant local legislative framework. The Council Directive 2001/23/EC on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (the Acquired Rights Directive) aims to safeguard and protect the rights of employees on a 'change of employer' and provides that in certain situations where there is a transfer of a business, the rights and obligations under a contract of employment will also transfer automatically. As a directive, each member state had to transpose the provisions contained in the Acquired Rights Directive into national law. On 10 April 2015, the European Commission launched a public consultation at EU level, with representatives of employers and employees, on the possible consolidation of three EU directives on worker information and consultation, one of which was the Acquired Rights Directive. However, most responses to the consultation opposed a revision or recasting of the directives, arguing that the existing directives work well for both employers and workers. At the time of writing, it is understood that the proposed consolidation will not be going ahead.

The position on the permissibility of credit bidding in insolvency sale processes varies between member states.

Intellectual property assets in insolvencies

19 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

Where the IP right is a right that has been registered (or is pending registration) at EU level, rather than on a national level (eg, a 'Community trademark' or 'Community patent'), the EC Regulation provides that such a right may only be included in the debtor's main insolvency proceedings (not in secondary or territorial proceedings, even where no main proceedings have commenced). The law of the member state where main proceedings are opened will therefore determine the insolvency office holder's rights in relation to that IP right. Other IP rights can be included in secondary or territorial proceedings.

The rules in some jurisdictions (Italy, France and Germany, for example) prohibit the automatic termination of contracts upon an insolvency (which would include agreements containing IP rights) and render void any clauses purporting to achieve this effect. In other jurisdictions (England, for example) it is possible to provide for an agreement to terminate automatically on insolvency, but its validity and effectiveness will greatly depend on the drafting of the clause.

The rules regarding whether an insolvency office holder can continue to use IP rights granted under an agreement with the debtor vary between member states.

The power of an insolvency office holder to terminate an IP agreement varies between member states.

The Recast specifies that for the purposes of the EC Regulation, a European patent with unitary effect, a Community trademark or any other similar right established by Union law may be included only in main proceedings. The Recast also states that European patents are treated as being situated in the member state for which they are granted, and copyright and related rights are treated as being situated in the member state where the owner has its habitual residence or registered office.

Personal data in insolvencies

20 Where personal information or customer data collected by an insolvent company is valuable to its reorganisation, are there any restrictions in your country on the use of that information in the insolvency or its transfer to a purchaser?

The EU rules on data protection have their origins in Directive 95/46/EC of the European Parliament and of the Council of

24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the Data Protection Directive), which has been transposed into national law by individual member states. As a directive, each member state had to transpose the provisions into national law by 24 October 1998.

A data controller is required to comply with the data protection principles set out in the Data Protection Directive, as transposed into national law, when processing any personal data. The first such data protection principle is that personal data must be processed fairly and lawfully. Where valuable customer data are collected by the insolvent company, it is one of the assets that an insolvency office holder is able to realise for the benefit of creditors. Member state data protection laws will apply and an office holder may require a buyer of the data to comply with all the seller's obligations under those laws and to provide an indemnity to the seller and the office holder against any liability for failure to have complied. This may be supported by an agreed form 'fair processing' notice, which the buyer will be required to send to each customer to inform the customer that the buyer is now the data controller and of any new purposes for which the customer's personal data will be processed by the buyer.

As the Data Protection Directive sets out minimum standards to be transposed into national law, the Data Protection Directive has not been implemented consistently and there may be additional requirements under different member state laws. A new EU Regulation on data protection will apply directly in all member states from May 2018, at which point it will repeal the Data Protection Directive; however, national data protection laws on areas not covered by the Regulation may continue to apply.

Rejection and disclaimer of contracts in reorganisations

21 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

The rules governing the disclaimer and rejection of unfavourable contracts vary between member states. In certain jurisdictions an insolvency office holder is permitted to disclaim onerous contracts without the need for a court order (for example, England) while in other jurisdictions it may be possible to apply to the insolvency court to terminate any contract where the debtor has outstanding obligations if the court is of the view that this constitutes a convenient outcome for the insolvency proceedings (for example, in Spain). Special arrangements are usually in place in employment contracts and these will vary between jurisdictions.

The rules regarding contracts that may not be rejected and the procedure to reject a contract vary between member states.

The effects of breach of contract post-insolvency vary between each member state and often there is a distinction to be drawn between contracts entered into by the insolvency office holder (where a breach may result in damages with high priority ranking) or contracts entered into by the company prior to insolvency (where a breach may only result in an unsecured claim against the company).

Arbitration processes in insolvency cases

22 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

The Recast specifically states that the effects of insolvency proceedings on pending arbitral proceedings concerning an asset or a right that forms part of a debtor's insolvency estate are to be governed solely by the law of the member state in which the arbitral tribunal has its seat.

The rules governing the effect of insolvency proceedings on individual creditor proceedings vary between member states. Generally, the use of arbitration proceedings in EU member state insolvency proceedings is relatively limited. Once insolvency proceedings are commenced, the moratorium that normally arises will generally restrict other actions and the use of other legal processes, including arbitration therefore making arbitration sometimes not available as a process.

The rules governing whether arbitration proceedings can be continued differ. In England, for example, once a company enters into administration, the administrator or the court must give permission for other legal proceedings to be commenced or continued against the company. In contrast, in Germany the commencement of insolvency proceedings does not lead to automatic cessation of arbitration proceedings (although the insolvency administrator will be the right party rather than the insolvent company).

Successful reorganisations

23 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

The mandatory features of a voluntary reorganisation have been covered in greater detail in question 11.

Generally, the different classifications of preferential, secured and unsecured creditors is used. The number and value of those creditors that will be required to instigate a reorganisation can range from a bare majority to 75 per cent.

In some jurisdictions it is possible for non-debtor parties to be released from liability but the rules are different in each EU member state.

Expedited reorganisations

24 Do procedures exist for expedited reorganisations?

The procedural elements will be dictated by the law of the jurisdiction where proceedings are commenced. Practically speaking, a large proportion of reorganisations are implemented as a result of informal negotiations with key creditors outside of a formal restructuring framework and therefore the parties to the discussions and the particular circumstances of the debtor and creditor base dynamic will dictate the timetable. In some jurisdictions a reorganisation can be planned and implemented very quickly (for example, England) although no separate procedure is required for the expedited process. In other jurisdictions, a formal procedure for an expedited reorganisation exists (for example, France).

Unsuccessful reorganisations

25 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

This is more a practical than a legal question. In general, any proposed reorganisation will fail if the requisite support of each of the various different creditor or stakeholder classes is not obtained. In some jurisdictions the court may be willing to grant an interim stay on creditor actions to allow a reorganisation to be implemented.

The rules will vary between jurisdictions but the effects on the debtor if the reorganisation plan is not approved can be wide-ranging, including an agreement from key creditors to a temporary relaxation of the debtor's obligations, or the debtor entering into liquidation or another form of insolvency process.

Insolvency processes

26 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

The procedural requirements of the various types of insolvency proceedings that exist in different member states (including, eg, in respect of notices to be provided to creditors, what meetings should be held, the ambit of information provided to creditors or any creditors' committee, etc) vary between member states.

The EC Regulation contains specific provisions relating to the provision of information to creditors and the lodgement of creditors' claims in relation to insolvency proceedings covered under the EC Regulation. The Recast also provides for a standard claim form to be introduced across the EU. This will be available to any 'foreign creditor' (being a creditor having its habitual residence, domicile or registered office in a member state other than the member state of the opening of proceedings) wishing to lodge a claim (although this is not compulsory).

Once insolvency proceedings have been commenced, the office holder or the court must inform all known creditors in all member states, including in such notice necessary information on the procedure for making claims, the relevant time limits for making such claims and any penalties for late filing of claims. Creditors are notified by either personal notice or advertisement and a creditors' meeting is normally held early on in the process.

In the majority of member states, a further meeting with creditors will be held to consider and approve the claims of creditors as well as a final meeting in which the final accounts of the debtor are approved and the liquidation ends. In some cases a reorganisation plan will be presented during the liquidation and a separate creditors' meeting may be convened in order to discuss the plan and vote on it.

Creditors do not normally have standing to pursue any remedy of the debtor against third parties, however, in some jurisdictions it is open to creditors (normally through the creditors' representative and depending on the type of insolvency process the debtor is in), to bring direct proceedings against former directors or shadow directors of the debtor in their personal capacity for losses they have incurred as a result of the director's or shadow director's conduct, as opposed to the insolvency office holder making such a claim on behalf of the debtor.

Whether a reorganisation plan can provide for the release of liabilities owed by third parties who are not part of the debtor group will vary between insolvency processes and member states.

Enforcement of estate's rights

27 If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

The rules on whether creditors may pursue the remedies of a debtor's estate vary between member states. In Spain, for example, where an insolvency office holder decides not to exercise a particular remedy open to him or her that is in the interests of the estate, the creditors may file an application to seek such a remedy. While the rules relating to third-party funding of litigation are different in each member state, often an alternative route is for the creditors to group together to provide funding for the costs of the insolvency office holder or the estate (as applicable) incurred in exercising the remedy, making the relevant claim or taking the relevant action.

Creditor representation

28 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

The rules governing creditor representation vary between member states. In a number of member states (England, Germany, Italy and Austria, for example) there will often be a creditors' committee that assists and supervises the insolvency office holder in the exercise of his or her duties. The creditors' committee will be appointed by the competent court or by the creditors as a group directly, where permitted. If a creditors' committee is formed the committee is free to retain its own advisers but there is no EU-wide rule as to how the costs of such advisers are funded.

Insolvency of corporate groups

29 In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

Under the EC Regulation, it is possible to open main proceedings in relation to each individual company. There is a limited duty of cooperation of office holders in the main and secondary proceedings but there is no express duty of insolvency office holders of main proceedings to cooperate where the companies are part of a corporate group. Generally speaking, the assessment of where a debtor's COMI is located is applied on an entity-by-entity basis, and therefore different rules apply to different entities in respect of their insolvency proceedings, but the rules in some member states (Spain, for example) allow group companies to make joint filings for insolvency in certain circumstances.

The English decision *In the matter of Nortel Networks* (2009) (where the group operated through companies incorporated in a number of EU jurisdictions but the filing was made in England on the basis of an English COMI), recognised that the best course of action may sometimes be a coordinated approach to group insolvency. Practically speaking, group insolvencies are generally managed in this way but this approach will only work if the companies have a common COMI, allowing for the appointment of a common insolvency office holder.

As regards a creditor of a number of group entities, the English courts confirmed in *Re Alitalia Linee Aeree Italiane SpA* (2011) that a creditor of a company can lodge a claim in both that company's main and secondary proceedings. The priority of that creditor's ranking in any distribution will however differ depending on the jurisdiction of the relevant proceedings. There are some instances where the courts of one jurisdiction will consider applying the order of priority of another jurisdiction (for example, in the English case of *MG Rover*), but this is generally exceptional and will not happen unless there is a significant benefit to the administration and realisation of value. In *Comité d'entreprise de Nortel Networks and others* (2011), the ECJ ruled that, where a company is in both main and secondary proceedings, the courts of member states in which main and secondary proceedings have been opened both have concurrent jurisdiction to determine which of the company's assets fall within the secondary proceedings. Where both courts purport to exercise this jurisdiction, the first decision in time will be binding.

The rules in the context on whether assets can be transferred from an insolvency administration in one country to an administration in another vary between member states.

The fact that the EC Regulation does not currently provide for group insolvencies has been recognised and addressed in the Recast. This introduces a separate chapter dealing with the insolvency of members of a corporate group. The chapter deals with two aspects: first, it increases the cooperation that is to take place between members of a company that are in insolvency procedures. Second, it establishes the concept of a group coordination plan for members of a group of companies.

As regards cooperation, the Recast enhances cooperation between insolvency office holders as well as courts supervising respective insolvencies. An insolvency office holder appointed over one member of a corporate group is to cooperate with an insolvency office holder appointed to another member of the same group to the extent that such cooperation is appropriate to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to such proceedings, and does not entail any conflict of interest. The use of agreements or protocols between insolvency office holders is officially envisaged and blessed. The intended aim of the cooperation is that information which may be relevant to the other proceeding is immediately communicated and that possibilities of restructuring the group are explored and, where such possibilities exist, these are coordinated with respect to the proposal and negotiation of a coordinated restructuring plan. In addition, an office holder appointed in insolvency proceedings for one member of a corporate group is given rights aimed at encouraging a group-wide rescue.

As regards the group coordination plan, any insolvency office holder appointed over a group member of companies can request the court having jurisdiction of the insolvency of that group member to open group coordination proceedings. (Where multiple courts are asked to open group coordination proceedings the court first seised is to have jurisdiction.) The request is to be accompanied by: a proposal on who is to be nominated the group coordinator; an outline of the proposed group coordination plan; a list of the insolvency practitioners appointed in relation to group members and, where relevant, the courts involved in the insolvency proceedings of the group members; and an outline of the estimated costs of the proposed group coordination and an estimation of the share to be paid by each group member. A court seised with a request to open group coordination proceedings shall open these if it is satisfied that: the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members; no creditor of the group member anticipated to participate is likely to be financially disadvantaged by such participation; and the proposed coordinator is eligible under the law of a member state to act as an insolvency practitioner. The proposed group coordinator may not be one of the insolvency office holders appointed in respect of other group members and must not have a conflict of interest in respect of the group members, their creditors and the insolvency office holders appointed over group members. When opening group coordination proceedings the court must appoint a coordinator, decide on the outline of the coordination and decide on the estimation of costs and the share to be paid by each group member.

The group coordinator so appointed is to: identify and outline recommendations for the coordinated conduct of the insolvency proceedings; and propose a group coordination plan that recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies. In particular, the plan may contain proposals for: measures to be taken in order to re-establish the economic performance and financial soundness of the group; the settlement of intra-group disputes as regards intra-group transactions and avoidance actions; and agreements between the different insolvency office holders. However, the coordination plan must not include recommendations as to any substantive consolidation of proceedings or estates. The remuneration of the coordinator is to be 'adequate, proportional to the tasks fulfilled and reflect reasonable expenses'. The coordinator must also establish the final statement of costs and the share to be paid by each group member.

An insolvency office holder of any group member may object to the inclusion in the group coordination proceedings of the proceedings in respect of which it has been appointed, or to the person to be appointed as group coordinator. National law is to dictate the approval requirements (if any) that an insolvency office holder will need to obtain to decide whether or not to participate in the group coordination plan. Where an office holder decides not to participate, the group coordination proceedings will not have any effect on that group member. Where an office holder has agreed to be part of the group coordination proceedings, he or she will need to consider the coordinator's recommendations but is not obliged to follow them or the group coordination plan (but would need to give reasons why he or she is not following the plan).

Appeals

30 What are the rights of appeal from court orders made in an insolvency proceeding? Does an appellant have an automatic right of appeal or must it obtain permission to appeal? Is there a requirement to post security to proceed with an appeal and, if so, how is the amount determined?

The rules governing rights of appeal vary between member states, and are a matter for the law of the member state where the insolvency proceedings are opened. In England, for example, court orders made in insolvency proceedings follow the ordinary course for appeals.

Claims

31 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

In certain jurisdictions the creditor's claim is submitted to the court (for example, Austria, where creditors file their claims with the court, and these are then accepted or rejected by the insolvency office holder), whereas in others (England, for example) claims are submitted directly to the insolvency office holder for review and processing.

The rules in the majority of jurisdictions provide for reasonably stringent time limits applicable to the submission of claims. Failure to submit a claim within the prescribed time limits may, in some jurisdictions, result in the debt owed to the relevant creditor or creditors being extinguished and any security rights lost.

In those jurisdictions where claims are submitted to the court, the court will generally hold a hearing to review the claims and rule on them. In those jurisdictions where claims are submitted to the insolvency office holder directly, the office holder will review, assess and process the claims and notify the creditors of the result.

The majority of jurisdictions allow for an appeal against the rejection of a claim, however, the requirements differ from jurisdiction to jurisdiction.

Under the EC Regulation, each creditor, wherever domiciled in the EU, has the right to assert claims against the debtor's assets in each relevant insolvency proceeding.

Typically, EU jurisdictions allow for a transfer of insolvency claims. The requirements vary between member states as to the necessity to disclose the transfer of the claim.

The rules regarding whether claims for contingent or unliquidated amounts can be recognised and how the amounts of such claims are determined vary between member states. Similarly, whether a claim acquired at a discount can be enforced for its full value will depend on the rules in member states. The question of interest accrued post-insolvency varies between member states and the EC Regulation does not address this point. In England, for example, post-insolvency interest is subordinated until provable debts have been paid.

Under the Recast, a single EU-wide standardised claim form is to be introduced. Any foreign creditor (being a creditor having its habitual residence, domicile or registered office in a member state other than the member state of the opening of proceedings) may lodge its claim using this standard claim form, which will indicate, among other things, the creditor's name and address, the nature and amount of the claim, details of any interest being claimed, whether any preferential status is claimed, whether security in rem or a reservation of title is alleged in respect of a claim and whether any set-off is claimed and the amount net of the set-off. If a creditor lodges its claim by means other than the standardised claim form, the claim must contain the information that would be contained in the standard claim form. Claims will be able to be lodged in any of the official languages of the EU although the creditor may be required to provide a translation into any official languages of the state of the opening of the proceedings or into another language that the member state has accepted. Each member state must indicate whether it accepts any official EU language other than its own for the purposes of accepting claims. Claims are to be lodged in the period stipulated by the law of the member state of the opening of the proceedings, but in the case of a foreign creditor, that period must be at least 30 days from the publication of the opening of proceedings in the insolvency register of the state of opening of the proceedings.

In addition, under the Recast, where the court, insolvency office holder or debtor in possession has doubts in relation to a claim, he or she is to give the creditor the opportunity to provide additional evidence on the existence and the amount of the claim.

Modifying creditors' rights

32 May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

The claims that are to be lodged against a debtor's estate and the ranking of claims vary between member states and are matters for the law of the state where the insolvency proceedings are commenced.

The ability of the courts to vary the priority of creditor claims varies between member states. In England, for example, the power available is limited to changing the order of a specific list of insolvency expenses. There may be challenges to the security of a purported secured creditor that, if successful, could result in a secured creditor's claim being deemed to be unsecured. However, this is not strictly a reordering of a predefined order of distribution but a reclassification of where a particular creditor sits in that ranking, based on an assessment of the relevant facts.

Priority claims

33 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

The majority of jurisdictions afford some measure of priority for certain tax and other governmental claims. The majority of jurisdictions also provide that the costs of the insolvency process and the insolvency office holder's fees and expenses are paid out first. Whether these claims have priority over all secured creditors, or only some, varies between member states.

Under the EC Regulation each creditor, wherever domiciled in the EU, has the right to assert claims with regard to the debtor's assets in each pending insolvency proceeding (ie, in main and secondary proceedings). This right extends to each member state's taxation and social security authorities but does not give these claims automatic priority status. A taxation authority enjoying priority status as a preferential creditor under its domestic laws is likely to be able to prove only as an ordinary unsecured creditor in proceedings in other member states.

Employment-related liabilities in restructurings

34 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

The provisions for dealing with employees' salaries during a restructuring or liquidation vary between member states. Generally, most countries have some form of protection in place for ensuring that there are funds available to pay (part of) outstanding salaries. Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (the Employment Insolvency Directive) protects employees who have a claim for unpaid remuneration against an employer who is in a state of insolvency. The directive requires member states to establish guarantee institutions that guarantee payment of employees' claims and, where appropriate, severance pay on termination of employment relationships. Member states are permitted to set ceilings on (and time limits for) the payments made by the relevant guarantee institution.

Some jurisdictions protect employees' rights arising after insolvency proceedings have commenced, whereas others require provision only to be made for claims arising before proceedings were opened.

In some jurisdictions there is a requirement for a certain amount of money to be ring-fenced for employees or that an employee's claim is to be ranked as preferential.

In addition, the Acquired Rights Directive provides that in certain situations where there is a transfer of a business, the rights and obligations under a contract of employment will also transfer automatically (see question 18). This can mean that the employee claims (even for back pay) transfer to the (presumably solvent) transferee/purchaser and so are reflected in a lower price paid for the relevant business (and so with less assets available for other creditors). However, where the transfer takes place during insolvency proceedings that have been opened in relation to a transferor but not 'with a view to the liquidation of the assets of the transferor', and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency office holder determined by national law), member states may provide that the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings shall not be transferred to the transferee, provided that such proceedings give rise to protection for employees equivalent to that set out in the Employment Insolvency Directive. This is the approach taken in England and Wales, for example.

If the insolvency proceedings have been opened 'with a view to the liquidation of the assets of the transferor', the Acquired Rights Directive allows member states to exclude employee liabilities from transferring altogether.

Pension claims

35 What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

The provisions for dealing with pension-related claims against employers in insolvency proceedings vary among member states. Member states have very different approaches to pensions, regardless of whether they are internal to the company or guaranteed by a third-party insurer (for example, in Germany). In the latter case the insolvency of the employer company should not therefore affect the protection of the pension fund. Some jurisdictions include pension liabilities as preferential claims, in others in the absence of any special circumstances, pension-related claims rank as an unsecured debt. Other jurisdictions deal with pensions by way of a statutory guaranteed fund (for example, Germany). There is no EU-wide regulation on how a pension deficit (whether it is an actuarial deficit or unpaid pension contributions) is to be treated in the ranking of insolvency claims.

The Employment Insolvency Directive requires member states to ensure that necessary measures are taken to protect the interests of employees and previous employees in respect of rights conferring on them immediate or prospective entitlement to benefits under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes. The interpretation of this requirement has been considered by the ECJ in the cases of *Robins v Secretary of State for Work and Pensions* (C-278/05) and *Hogan v The Minister for Social and Family Affairs, Ireland and the Attorney General* (C-398/11). These cases confirm that the Employment Insolvency Directive does not necessarily require accrued pension rights to be funded by member states themselves or to be funded in full, but does seem to require that employees and former employees must receive no less than 50 per cent of their accrued old-age benefits where both the employer and pension scheme are insolvent. The amount of any state pension to which an employee or former employee is entitled cannot be taken into account when calculating what proportion of their accrued old-age benefits they should receive under the Employment Insolvency Directive. The Court of Appeal in England and Wales recently made a reference to the ECJ on whether the limits under the UK statutory Pension Protection Fund (PPF) comply with the requirements of article 8, given that the PPF includes a cap on compensation that can result in some cases in it being much less than 49 per cent (*Hampshire v PPF* [2016] EWCA Civ 786).

Environmental problems and liabilities

36 In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Much of individual member state law in respect of environmental liabilities is derived from EU legislation. The EU has a designated environmental policy set out in articles 191 to 193 of the Treaty on the Functioning of the European Union. EU policy is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

Most EU environmental legislation centres on the concept of placing liability on the 'operator' of a particular plant. EC Directive 2008/1/EC concerning integrated pollution prevention and control provides for the imposition of obligations for compliance with its substantive provisions on the 'operator' being any natural or legal person who operates or controls the installation or whether this is provided for in national legislation to whom decisive economic power over the technical functioning of the installation has been delegated. Directive 2000/76/EC on the incineration of waste, Directive 1999/13/EC on the limitation of emissions of volatile organic compounds because of the use of organic solvents in certain activities and installations, and, with slight modifications, Directive 96/82/EC on the control of major accident hazards involving dangerous substances and Directive 1999/31/EC on the landfill of waste all use the concept of placing liability on the operator. Under Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, provision is made for non criminal liability for clean-up costs. This directive also requires member states to take measures to encourage the use by operators of appropriate insurance or other forms of financial security and the development of financial security instruments and markets in order to provide effective cover for financial obligations under the directive to cover their potential insolvency.

As these legislative measures are set out in directives they required each member state of the European Union to implement the legislation into domestic legislation.

The EC Regulation does not deal with the impact of environmental liabilities on insolvency and therefore each member state must enact appropriate legislation in this regard (drawing on the above directives and their national implementation). The rules between member states vary and often also vary depending on the type of insolvency process or the identity of the person who caused the environmental liability (eg, whether it was caused by the company pre-insolvency or by the company while in an insolvency process), or both, and whether, for example, an office holder can disclaim a contract where environmental liability attaches.

Liabilities that survive insolvency proceedings

37 Do any liabilities of a debtor survive an insolvency or a reorganisation?

The rules in respect of the survival of liabilities in an insolvency or reorganisation vary between member states. Where the debtor is reorganised pursuant to some form of insolvency plan (for example, a scheme of arrangement under English law or an insolvency plan under German law), the debts of the debtor will usually survive only to the extent specified in the scheme of arrangement or insolvency plan. Certain insolvency procedures do not, however, bind certain types of creditors (typically secured or preferential) unless they vote in favour of the procedure. The treatment of employment liabilities upon the transfer of the debtor's business and assets is the subject to the Acquired Rights Directive (see question 18).

Distributions

38 How and when are distributions made to creditors in liquidations and reorganisations?

The rules governing the distribution of proceeds from the realisation of assets will be dictated by the insolvency laws in the relevant member states.

In liquidations, once claims have been admitted or rejected and preferential and secured claims have been dealt with, provided there are sufficient assets left to pay unsecured creditors, the remaining funds will be distributed pari passu to all unsecured creditors.

In most jurisdictions, reorganisations are treated differently. Distributions will then be made in accordance with the terms of the plan agreed with creditors.

Under the EC Regulation and in order to ensure equal treatment of creditors, the distribution of assets is coordinated by the office holder of the main proceedings under the 'hotchpot' rule. This rule requires that where a creditor, after the opening of the main insolvency proceedings by any means (including enforcement) obtains total or partial satisfaction of its claim out of the assets of the debtor situated in another member state, it must return what it has obtained to the liquidator. This is strengthened by the rule that a creditor who has obtained a dividend on its claim will share in distributions made in other proceedings only where creditors of the same ranking have in those proceedings received a dividend in the same proportion of their claims. This procedure ensures dividends are paid evenly to creditors regardless of the number of jurisdictions in which they have lodged claims. The EC Regulation also attempts to protect the interests of all creditors by empowering the liquidator in the main proceedings to lodge the claims of all creditors in any secondary proceedings where it serves the creditors' interests. Any surplus of assets in the secondary proceedings, after payment of all claims provable under local law, must be remitted to the insolvency office holder in the main proceedings.

Transactions that may be annulled

39 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

The rules relating to the validity or unenforceability of legal acts detrimental to creditors vary between member states and are a matter for the law of the state where the insolvency proceedings are opened.

Typically, transactions at an undervalue can be set aside, although the relevant period during which a transaction will be vulnerable to challenge prior to the insolvency process varies widely between member states. It is also very common that transactions preferring one creditor over another are vulnerable to challenge, particularly when debts have been paid that have not yet fallen due. Most jurisdictions also make specific provisions for the avoidance of transactions motivated by fraud.

The usual result of a transaction being annulled is that the property in question is required to be returned to the company or its insolvency office holder. In some jurisdictions, however, the court has very wide discretion as to the orders that can be made, which may go beyond simply requiring return of the property.

Proceedings to annul transactions

40 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

The rules relating to the voidability or unenforceability of legal acts detrimental to the creditors vary between member states and are a matter for the law of the state where the insolvency proceedings are opened.

Directors and officers

41 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

The laws governing liability of directors will generally be those of the jurisdiction of incorporation in circumstances where insolvency proceedings are commenced in that jurisdiction. In a scenario where a company's COMI is different from its place of incorporation, the directors will need to be aware of potential liabilities in both jurisdictions. In the recent case of *Kornhaas v Dithmar* [2015] EUECJ C-594/14, the ECJ ruled that the provisions of German company law that (broadly) require directors to file for insolvency within 21 days of a company becoming unable to pay its debts fall within the scope of article 4 of the EC Regulation on Insolvency Proceedings. This meant that the directors of an English incorporated company with its COMI in Germany and that had been placed into insolvency proceedings in Germany could be liable under these provisions to make payments under German law.

Generally, it is possible for directors and officers to be liable to contribute to the debtor's assets but because of the concept of limited liabilities, this is normally limited to where the director's conduct falls below the requisite standard.

Directors can sometimes be made personally liable for pre-insolvency actions. The types of claim for which a director can be liable range from failing to place the company into insolvency at the appropriate time, to fraud. The most common claim, however, is of negligence. There is some variation of the rules between member states as to who can bring claims against directors. In most jurisdictions it is the debtor itself, but in other jurisdictions creditors can bring claims directly against directors for losses they have suffered. Another common claim is that the directors wrongly allowed the debtor to continue to trade despite the fact that the debtor was in a precarious position.

Directors are also exposed to a range of criminal sanctions arising from their conduct prior to insolvency. In some jurisdictions, directors can also subsequently be disqualified from acting as directors for a given time or indefinitely.

Groups of companies

42 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Each member state has its own legislation regulating if (and how) a parent or affiliated corporation can be responsible for the liabilities of subsidiaries or affiliates. In general, the starting point is that each corporate entity is self-standing and, because of the principle of limited liability, not responsible for the actions or insolvency of any other group company. This can, however, change in certain circumstances; for example, in England, an affiliated company may be held liable to contribute to a company's pension deficit where certain conditions are met.

Whether a court can order a distribution of group company assets pro rata without regard to the assets of the individual corporate entities involved varies between member states. In some member states, in highly exceptional circumstances a court may order this. For example, in the English case of *Re Bank of Credit and Commerce International SA (No. 3)* the court approved liquidators entering into a pooling agreement stating that it was 'satisfied that the affairs of BCCI SA and BCCI Overseas are so hopelessly intertwined that a pooling of their assets,

Update and trends

On 23 June 2016, the UK voted to leave the European Union. The vote to leave does not immediately change the legal backdrop to the UK's relationship with the EU. The UK will notify its intention to leave the EU by following the process set out in article 50 of the EU Treaties. Following service of the article 50 notification, the UK will remain a member state until it concludes an agreement in relation to its withdrawal from the EU or the two-year article 50 negotiation period expires (whichever occurs first) (Brexit). On Brexit, the EU will consist of 27, rather than 28, member states – the UK having left. EU legislation as it applies to the EU member states will be unaffected by Brexit (unless as part of the Brexit negotiations, legislation is amended to cater for Brexit). The relationship between the UK and the EU following Brexit will depend on the negotiations between the UK and the EU member states.

The EU Commission has launched an insolvency initiative, aimed at setting common standards across restructuring and insolvency law in member states, and providing tools that would allow viable businesses in distress to be rescued and honest but bankrupt individuals to be given a second chance. On 2 March 2016, the Commission published an inception impact assessment on the initiative. The Commission ran a public consultation on this for 12 weeks, which closed on 14 June 2016, seeking stakeholders' views on key insolvency aspects in the EU to ensure that national insolvency frameworks work well, in particular in a cross-border context. This is a follow-up to the Commission Recommendation of 2014 on a new approach on business failure and insolvency, and is in line with the 2015 Capital Markets Union action plan. The Commission intends to present a legislative proposal on insolvency by the end of 2016.

with a distribution enabling the like dividend to be paid to both companies' creditors, is the only sensible way to proceed. It would make no sense to spend vast sums of money and much time in trying to disentangle and unravel'. In other member states (Austria, for example) regardless of whether group companies are considered to be one economic entity, the principle of legal separation is to be respected in all circumstances and the transfer of assets between several insolvent debtors (even within the same group) is prohibited.

Insider claims

43 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

The principle of equitable subordination exists in a number of member states (for example, Austria whereby certain debts (for example, repayment of loans made when the company is in 'crisis') owed to a shareholder are subordinated in a company's insolvency). Different member states, however, have different rules governing the extent of such subordination. In Germany, for example, shareholder loans and shareholder claims resulting from comparable transactions are subordinated in a company's insolvency irrespective of whether they qualify as equity substitution; in addition, repayments made and collateral granted in relation to such shareholder loans within the relevant look-back period are subject to clawback rights.

Creditors' enforcement

44 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

The rules in this context vary between member states. In some jurisdictions it is possible for assets to be seized outside of court proceedings. In England, for example, in some situations a secured creditor can appoint an administrative receiver who, while an agent of the debtor, has as his or her primary duty an obligation to recover sufficient assets to repay the debenture holder.

Creditors can also avail themselves of certain 'self-help' remedies against the assets of the debtor themselves, for example, by way of the exercise of a lien, a retention of title clause or the appropriation of assets (potentially by way of a pledge). These remedies are considered in further detail in questions 7 and 8.

Corporate procedures

45 Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

In general, there are procedures for the liquidation or dissolution of a corporation outside of the insolvency process, particularly where the company's constitutional documents or by-laws (as applicable) provide for this. Some possible scenarios include the company expiring at the end of a fixed duration or being wound up after achieving the purpose for which it was established or where it can no longer achieve the purpose for which it was established.

There are some provisions of European law in specific contexts that would be relevant (cross-border mergers, for example), but these are not of general application.

Conclusion of case

46 How are liquidation and reorganisation cases formally concluded?

In nearly all jurisdictions, liquidation proceedings will end with a court hearing or meeting at which the final accounts of the company will be approved.

Reorganisation cases usually come to an end either when the dividends agreed to under the plan have been distributed or if the debtor goes into liquidation having been unable to comply with the terms of the plan.

On request from the liquidator in the main proceedings, a court in another member state must stay secondary proceedings unless the request is of manifestly no interest to creditors in the main proceedings. Where secondary proceedings can be closed by means of a rescue plan, the liquidator in the main proceedings may propose the plan under the law of the state where those proceedings are opened, otherwise the closure by rescue plan shall not become final without the consent of the liquidator.

International cases

47 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Recognition and relief

The EC Regulation governs cross-border insolvency proceedings for member states of the EU (see question 1). Under the EC Regulation, insolvency proceedings opened in a member state where a debtor has its COMI will be automatically recognised as main proceedings in all member states (except for Denmark). In jurisdictions where a debtor has an establishment, secondary or territorial proceedings can be opened, which again will be recognised throughout the European Union (save for Denmark). The judgment opening main proceedings produces the same effects in any member state as under the law of the state of the opening of proceedings (unless secondary proceedings are opened in accordance with the terms of the EC Regulation in a different member state). The recognition or relief currently available in EU countries concerning insolvency proceedings opened in a country outside the EU will depend on the individual approach taken by each country.

Treatment of foreign creditors

The EC Regulation specifies that any creditor who has his or her habitual residence, domicile or registered office in a member state other than the state of the opening of proceedings (including the tax authorities and social security authorities of member state) have the right to lodge claims in the insolvency proceedings. The treatment of foreign creditors outside the scope of the EC Regulation depends on the laws in each member state.

Recognition of foreign judgments

Under the EC Regulation, judgments that concern the course and closure of insolvency proceedings and compositions approved by that court shall be recognised without further formalities. Automatic recognition is also available for judgments that derive directly from the insolvency proceedings and that are closely linked to them (even if they are handed down by another court). The EC Regulation however only deals with insolvency matters (see question 1). Recognition of a foreign non insolvency related judgment may be available under the Brussels Regulation (see question 1) which provides rules for the recognition and enforcement of foreign judgments of contracting states.

The Brussels Regulation and its recast do not apply to bankruptcy proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. In recent cases before the English courts, parties have argued (relying on foreign expert opinions) that an English law-governed scheme of arrangement should be recognised in other European Union member states because of the provisions of the Brussels Regulation. (A scheme of arrangement is not listed in the Annex to the EC Regulation and does not fall within the scope of the EC Regulation, hence does not benefit from automatic recognition in other member states.) Courts in other member states may need to consider the recognition in particular of schemes of arrangement and the scope of the Brussels Regulation in the future.

Additionally, member states may have special rules for the recognition of foreign judgments and in particular whether registration of these may be required.

International treaties

Although various EU member states are considering adoption of the Model Law, it has only been implemented by Greece, Poland, Romania, Slovenia and the United Kingdom.

The provisions of the EC Regulation are similar in many respects to the Model Law so within the EU, cross-border recognition operates along similar lines.

COMI

48 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The EC Regulation does not contain a definition of 'COMI' but the recitals to it state that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. The EC Regulation applies the concept of COMI to each individual debtor and not to a group of companies, which can all have individual COMIs.

In the case of *Interedil*, the ECJ confirmed that COMI must be interpreted in a uniform way by member states and by reference to EU law and not national laws. Where a company's registered office and place of central administration are in the same jurisdiction, the presumption that COMI is at the debtor's registered office cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of assets belonging to the debtor and the existence of contracts for financial exploitation of those assets in a member state, other than that in which the registered office is situated, are not sufficient factors to rebut the registered office presumption, unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's central administration is located in that other member state.

To address concerns over 'bankruptcy tourism', the Recast contains provisions whereby if a debtor's registered office has shifted in the three months preceding the filing for insolvency proceedings, the existing rebuttable presumption will no longer apply. In such cases, the debtor will need to produce evidence about COMI to show where it is located. Factors that have been held to be relevant to determine a debtor's COMI (in addition to the registered office presumption) are: location of internal accounting functions and treasury management, governing law of main contracts and location of business relations with clients, location of lenders and location of restructuring negotiations with creditors, location of human resources functions and employees, domicile of directors, location of board meetings and general supervision. The relevant date to determine a company's COMI is the date when the request to open the proceedings is made (*Re Staubitz-Scheiber* (C-1/04) and *Interedil* (see above)).

COMI is determined on an entity-by-entity basis although within the boundaries of member states it is open to member states to make legislation permitting a group of companies to file for insolvency with the same court.

Cross-border cooperation

49 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

The EC Regulation requires that the office holders in main proceedings and secondary proceedings have a duty to communicate certain information to each other and to cooperate in general (see question 29), for example the secondary proceedings office holder must give the main proceedings office holder an opportunity to submit to it a proposal on how the assets in the secondary proceedings should be used. In practical terms such cooperation is made difficult by the lack of a central

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database across the EU where insolvency proceedings and related court orders are logged. The Recast provides for a national and an interlinked EU-wide database of insolvency proceedings, which will go some way to alleviate this shortcoming.

Outside the court system, office holders in different jurisdictions can also agree to bilateral or multiparty protocols. This type of cooperation has been seen in the multi-jurisdictional administration of Lehman Brothers, where the administrators across a number of jurisdictions attempted to put in place bilateral arrangements for the provision of information or services. The negotiation process was time-consuming and fraught with difficulty.

The Recast addresses these points and provides for enhanced cooperation and formalises the use of protocols (see question 29).

Cross-border insolvency protocols and joint court hearings

50 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

As mentioned in question 1, the EC Regulation was designed to assist with cross-border cooperation between the member states of the EU.

An example can be found in the case of *In the matter of Nortel Networks* (2009) before the English courts, referred to in question 29. The English court found in this case that it had jurisdiction to send letters of request to courts in other member states, requiring notification of an application to open secondary proceedings. The court held that the duty in the EC Regulation on liquidators to cooperate with each other should extend to a wider obligation to cooperate between courts exercising control of insolvency proceedings.

The Recast addresses this point and formalises the use of protocols (see question 29).

France

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Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

The provisions relating to French insolvency proceedings are codified under articles L610-1 to L680-7 of the French Commercial Code and have been recently reformed by Law No. 2015-990 of 6 August 2015 (the Macron Law) which came into force on 8 August 2015 (some provisions, however, will only become effective at a later date).

Aspects relating to cross-border insolvencies are governed by the EU Regulations No. 1346/2000 and 2015/848 on insolvency proceedings (the EU Insolvency Regulations).

The French insolvency test is a pure cash-flow test, defined as the debtor's inability to pay its debts as they fall due with its immediately available assets, taking into account available credit lines and moratoria.

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

The courts having jurisdiction over insolvency proceedings will differ depending on whether the debtor conducts a civil or commercial activity. In theory, for commercial debtors (such as limited companies, close corporations, partnerships, limited liability companies or individuals conducting trade activities), the court of first instance is the commercial court located where the debtor has its registered office.

Pursuant to the Macron Law, starting from 1 March 2016 specialised commercial courts have jurisdiction over insolvency proceedings opened against companies which meet the following criteria:

- number of employees exceeding 250 and a turnover exceeding €20 million either at the level of the company against which the insolvency proceedings have been opened or at the level of the group of companies which is controlled by the company against which the insolvency proceedings have been opened; or
- turnover exceeding €40 million either at the level of the company against which the insolvency proceedings have been opened or at the level of the group of companies controlled by the company against which the insolvency proceedings have been opened.

These specialised commercial courts will also have jurisdiction over insolvency proceedings opened in France by foreign companies pursuant to the EU Insolvency Regulations rules.

Pursuant to the EU Insolvency Regulations, foreign entities with no registered offices in France may file a petition for the start of main insolvency proceedings in the court that has jurisdiction where their centre of main interests (COMI) is located.

When the COMI of the debtor is located in another member state (other than Denmark), secondary proceedings can be commenced in France if the debtor has an establishment in France.

For civil debtors (companies of a civil nature and farmers), the relevant court of first instance will be the civil court. The same principles apply to the location of this court as for the commercial court above.

During insolvency proceedings, an insolvency judge is appointed by the court. Such insolvency judge is given certain jurisdictional powers and is in charge of many procedural matters relating to the proceedings (such as the acknowledgment or rejection of most debt claims filed in the insolvency proceedings).

Excluded entities and excluded assets

3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

Insolvency proceedings set out in the French Commercial Code apply to:

- self-employed individuals;
- corporate entities, whether of a commercial or civil nature;
- merchants; and
- farmers and craftsmen (individuals registered with the *Répertoire des Métiers*, the specific registry for craftsmen).

The only persons excluded from these proceedings are individuals who are not self-employed (employees or civil servants), entities regulated by public law, which are not subject to any specific insolvency proceedings because of their particular status, entities which are not registered with the commercial register and do not have a legal personality (such as *sociétés en participation, sociétés de fait, sociétés en formation*) and the new type of company entitled *société de libre parteneriat* created by the Macron Law.

Article L611-3 et seq relating to mandat ad hoc and conciliation proceedings are available to corporate entities, merchants and craftsmen, but not to farmers or self-employed individuals, who are subject to specific preventive measures.

Public enterprises

4 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

The procedures followed in the insolvency of a government-owned enterprise will differ depending on whether such enterprise is governed by public law or by private law. Although with respect to some enterprises there is an uncertainty as to whether they are governed by public or private law, it is generally established that: (i) government-owned entities taking the form of industrial and commercial bodies (EPICs) are governed by public law and (ii) companies controlled by public entities (such as state or local authorities), taking the form of a state company, a nationalised company, a semi-public company or a local public company, are governed by private law.

EPICs are not subject to the insolvency proceedings applicable to private law companies and the French legislator has not created any equivalent insolvency proceedings for this type of enterprise. Furthermore, pursuant to article L2311-1 of the General Code on Ownership of Public Entities, EPICs' assets and funds cannot be attached or seized. Nevertheless, instead of implementing the usual methods of enforcement, creditors of EPICs may rely on the specific payment procedure against public entities provided in article 1-II of Law No. 80-539 of 16 July 1980. The objective of this procedure is to enforce a judicial decision ordering a public entity to make a payment for the benefit of one of its creditors.

Publicly owned companies governed by private law may be either wholly owned by public entities (such as a state company, a nationalised company or a local public company) or partly owned by public entities (such as a semi-public company). These types of company are subject to the same insolvency proceedings as the other private commercial companies (although in very limited situations, the assets of some of these companies cannot be seized if they have a public service purpose).

Protection for large financial institutions

5 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

On 26 July 2013, France enacted specific legislation aimed at dealing with the financial difficulties of certain credit institutions and investment firms. This legislation has been recently modified by Ordinance No. 2015-1024 dated 20 August 2015, in order to adapt French law to the European Bank Recovery and Resolution Directive. Pursuant to this legislation, credit institutions and investment firms having a balance sheet that exceeds a certain threshold must prepare – and update each year – a recovery plan to be implemented in the event of financial difficulties (without the support of the French state) and notify such plan to the French banking regulator, the *Autorité de contrôle et de régulation* (ACPR), which in turn is required to prepare a resolution plan for such institutions. If the recovery plan is deemed insufficient, the ACPR may request the institution to modify it and, later, to implement further measures, notably reducing the risk exposure, recapitalising quickly, changing the business or financial strategy, or modifying the legal structure. The ACPR is also given broad powers in order to deal with the financial difficulties of defaulting institutions, including 'bail-in' measures consisting of cancelling or writing off shareholders' equity and cancelling, writing off or converting subordinated debt into equity. Other measures that can be implemented by the ACPR include appointment of a temporary administrator; dismissal of executive officers; transfer of all or part of the assets or business of the defaulting institution; restriction or prohibition on the distribution of dividends; issue of new shares; restriction or prohibition on the carrying out of certain transactions; and payments by the deposit guarantee fund, such fund being financed by contributions by the financial and banking sector. This legislation aims to strengthen the framework for the management of financial crises and at prioritising a restructuring of institutions facing financial problems prior to any grant of public aid.

Secured lending and credit (immoveables)

6 What principal types of security are taken on immoveable (real) property?

The most usual type of security taken over immoveable property in France is a mortgage or a lender's lien.

Secured lending and credit (moveables)

7 What principal types of security are taken on moveable (personal) property?

The most common type of security taken over moveable property is a pledge (known as *gage* in respect of tangible assets and *nantissement* in respect of intangible assets). Other types of security are: express contractual provisions relating to retention of title (in the case of asset sales), assignment of receivables by way of security (known as *Dailly* assignments), delegation of receivables, cash collateral and, more recently, security trusts.

Unsecured credit

8 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

Prior to the start of safeguard or insolvency proceedings, provided the debt is overdue, an unsecured creditor may try to obtain an attachment order and to seize one or more of the debtor's assets. In general, unless the seizure is completed prior to the start of safeguard or insolvency proceedings against the debtor, such seizure is stayed during the insolvency or safeguard proceedings. An attachment order can be obtained on an expedited basis.

In the course of safeguard or insolvency proceedings, secured and unsecured creditors will generally be subject to the same rules with respect to the prohibition of payments and the stay of proceedings in relation to pre-insolvency claims (see questions 14 and 15).

No special procedures apply to foreign creditors in this respect.

Voluntary liquidations

9 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

An insolvent debtor is required to file a request for the start of insolvency proceedings with the relevant court within 45 days of the date on which it became insolvent (see question 1), unless, on the debtor's request, a conciliator is appointed in the same time period. In order to file for liquidation proceedings, the debtor must show that it is insolvent and that recovery is obviously impossible.

If the court orders the immediate liquidation of the debtor's assets, it will appoint a liquidator and proceed with the sale of the debtor's assets on a piecemeal basis by way of private sale or auction.

Alternatively, where there are prospects that all or part of the assets can be sold as a going concern to a third party, the insolvency court may authorise a temporary continuation of operations for up to six months. In large cases, a judicial administrator will be appointed by the court in addition to the liquidator. Such judicial administrator will be in charge of managing the debtor company and proceeding with the sale of the business during the temporary continuation of the debtor's operations.

The commencement of voluntary liquidation proceedings imposes a stay of payments on the debtor and a stay of proceedings on creditors. In addition, the commencement of the liquidation renders all debts of the insolvent company immediately due (unless a sale of the debtor's business is contemplated during the liquidation proceedings, in which case, the debts will become due upon the expiry of the temporary continuation of the debtor's operations).

Generally, the creditors must file a statement of their claims within two months of the date the court judgment ordering the liquidation of the debtor's assets was published in the Official Gazette for Civil and Commercial Announcements. The time allocated to creditors to declare their claims is extended to four months for creditors residing outside mainland France.

Involuntary liquidations

10 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

Any unpaid creditor may file an application for the start of liquidation proceedings against a debtor. The creditor must show that it has already tried to obtain payment of its overdue debt (for example, by attempting to seize the debtor's assets) and that the debtor is unable to meet its debts as they fall due. The creditor must also prove that the debtor's recovery is obviously impossible. Liquidation proceedings can also be started at the initiative of the public prosecutor.

The effects of involuntary liquidations are similar to those of voluntary liquidations.

Voluntary reorganisations

11 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

Out-of-court workout proceedings

When a debtor company finds itself in financial difficulties but is not yet insolvent according to the French insolvency test (see question 1), it can ask the court to appoint an insolvency practitioner (in the capacity of *mandataire ad hoc*) to help the management negotiate an amicable restructuring with all or part of its creditors, suppliers and possible new sponsors in the framework of a *mandat ad hoc*. The scope of the *mandataire ad hoc*'s mission is fixed on a case-by-case basis by the court and there is no statutory limitation to the length of the mission of the *mandataire ad hoc*, which is therefore determined and extended, where needed, by the court. The role of the *mandataire ad hoc* is only to make suggestions and to persuade creditors to negotiate with the debtor. He or she has no coercive powers. A *mandat ad hoc* is informal, confidential and purely contractual in nature. The commencement of a *mandat ad hoc* does not impose a stay of payments on the debtor nor a stay of proceedings on creditors. At any moment, the *mandat ad hoc* proceedings may be converted into conciliation proceedings in order to benefit from the features of the formal approval of the restructuring agreement in conciliation proceedings (see below).

Alternatively, the debtor may seek from the court the appointment of a conciliator in the framework of *conciliation* proceedings to negotiate a voluntary arrangement with key stakeholders, such as creditors, suppliers and possible new sponsors. Conciliation proceedings are also available to an insolvent debtor if the insolvency occurred no more than 45 days before the appointment of the conciliator. The conciliation process is informal, confidential and purely contractual in nature, and does not impose a stay of payments on the debtor nor a stay of proceedings on creditors. If, during the conciliation proceedings, a creditor serves a demand or brings an action against the debtor, the court responsible for the conciliation proceedings has the power to grant the debtor a grace period of up to two years pursuant to article 1244-1 et seq of the French Civil Code (save for claims of tax and social security authorities and institutions). The initial term of the conciliator's mission is determined by the court, within a four-month limit (which can be extended once, for up to one month).

The purpose of both *mandat ad hoc* and *conciliation* proceedings is for the debtor to come to a voluntary arrangement with its creditors that puts an end to its difficulties and ensures the continued operations of its business. Such voluntary arrangement may include a rescheduling or waiver of debts, and sometimes provisions relating to the company's corporate structure (modification of share capital or by-laws, undertaking to sell certain assets, etc). In conciliation proceedings, the conciliation agreement reached may be either:

- certified by the court at the request of all parties to the conciliation agreement, thereby giving it the enforceability of a judgment while keeping it confidential; or
- formally approved by the court at the debtor company's request (homologation). The conciliation then enters the public record.

The formal approval of the conciliation agreement requires the court to be satisfied that the debtor company is not (or as a result of the agreement ceases to be) insolvent; the agreement appears to be such as to ensure the solvent continuation of the debtor's business; and the agreement does not prejudice the interests of those creditors not parties thereto. Such formal approval of the conciliation agreement entails the following specific consequences:

- funds, goods or services made available to the debtor company pursuant to a formally approved conciliation agreement (otherwise than through subscribing to a share capital increase) will benefit from a lien taking priority over most other claims in the event of subsequent safeguard, reorganisation or liquidation proceedings – the 'new money' priority;
- the conciliation agreement will not, in the event of subsequent insolvency proceedings, be void or voidable on the grounds of suspect period rules (see question 39); and
- debt deferrals that may be imposed on creditors during a subsequent safeguard or judicial reorganisation proceedings (see below) may not be imposed with respect to claims that have received the benefit of the 'new money' priority.

If the debtor company fails to perform its obligations under the conciliation agreement, any party to the conciliation agreement may request the court to terminate it. Likewise, the opening of safeguard, reorganisation or liquidation proceedings against the debtor company results in the termination of the conciliation agreement.

The following restriction applies with respect to the *mandat ad hoc* and conciliation proceedings: any contractual provisions which, as a result solely of the opening (or a request for the opening) of *mandat ad hoc* or *conciliation* proceedings, would restrict the debtor's rights or increase its obligations, will be deemed to be null and void.

Safeguard proceedings

The legal representatives of a company that is not yet insolvent and that experiences difficulties that it cannot overcome may apply to the court for the opening of solvent reorganisation proceedings, called safeguard proceedings. The judgment commencing safeguard proceedings opens a six-month 'observation period' (renewable for up to a total maximum period of 18 months) during which the company will negotiate with its creditors a rescheduling or waiver of debts that arose prior to the start of the safeguard proceedings in the framework of a safeguard plan. The court will appoint a judicial administrator to supervise or assist the debtor company's management in the drawing up of the safeguard plan and a creditors' representative in charge of collecting statements of claims and verifying the debtor's liabilities. Members of the creditors' committee may also present their own alternative safeguard plan.

Safeguard proceedings are listed among insolvency proceedings within the meaning of the EU Insolvency Regulations.

During the observation period, the debtor company enjoys a stay of payments and proceedings, as set out in question 15.

The safeguard plan is drawn up and possibly approved as set out in question 23.

Expedited safeguard proceedings (accelerated safeguard proceedings or financial accelerated safeguard proceedings) may also be opened following conciliation proceedings, as described in question 24.

Reorganisation proceedings

A debtor company that is insolvent must apply for the opening of insolvency proceedings within 45 days of the occurrence of insolvency, unless it has requested the appointment of a conciliator or the opening of liquidation proceedings (see question 9).

If the court considers that the business may be continued as a going concern, it will order a two-month 'observation period' that can be extended up to a total maximum period of 18 months during which a court-appointed judicial administrator will investigate the affairs of the debtor and make proposals for the reorganisation of its business.

At the end of the observation period, the court will make an order either for the continuation of the debtor's operations by way of a reorganisation plan (the features of which are similar to those of a safeguard plan; as in the case of safeguard proceedings, members of the creditors' committee may also present their own alternative reorganisation plan) or the sale to a third-party purchaser of its assets as a going concern by way of a sale plan.

The reorganisation plan is drawn up and possibly approved as set out under question 23. Features of a sale plan are set out in question 18.

Involuntary reorganisations

12 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

Out-of-court restructuring and safeguard proceedings

Under French law, creditors cannot request the appointment of a *mandataire ad hoc* or a conciliator or request the court to order the commencement of safeguard proceedings.

Reorganisation proceedings

Any unpaid creditor may file an application for the commencement of reorganisation proceedings against the debtor. The creditor must show that it has already tried to obtain payment of its debt, and that the debtor is insolvent according to the French insolvency test (see question 1). Reorganisation proceedings can also be started at the initiative of the public prosecutor.

Effects of involuntary reorganisation proceedings are identical to those of reorganisation proceedings opened at the request of the debtor company itself.

Mandatory commencement of insolvency proceedings

13 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

Insolvency proceedings must be commenced if the debtor is insolvent (see question 1).

The managing directors of the debtor company are required to file for insolvency proceedings (whether in the form of reorganisation or liquidation proceedings) within 45 days of the date of insolvency, unless they have asked the court to appoint a conciliator (see question 11).

If the managing directors of the debtor company fail to file for insolvency within the required time period, they can be held personally liable in tort for the whole or part of the company's debts, since failing to apply for insolvency proceedings can be considered to be an act of mismanagement. The Macron Law has specified that these provisions will only apply if the failure to file for insolvency proceedings within the required time period is intentional.

If a company carries on business while insolvent, certain transactions entered into and certain payments made by the company may be declared void by the court during subsequent insolvency proceedings – see question 39 with respect to the 'suspect period'.

Doing business in reorganisations

14 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?

Out-of-court restructuring

There is no restriction on the conduct of the debtor's business during the course of *mandat ad hoc* or *conciliation* proceedings except to the extent that restrictions are provided for by the agreement entered into with the creditors.

There are no specific provisions relating to supervision of the business of the debtor while the voluntary arrangement entered into with creditors is in force. The creditors must ask for the termination of the voluntary arrangement in the event that the debtor does not comply with its duties under the arrangement, if any.

See question 16 with respect to the 'new money' priority under conciliation proceedings.

Safeguard and reorganisation proceedings

During the observation period of safeguard and reorganisation proceedings, the debtor's management usually remains in charge. In safeguard proceedings, the court-appointed judicial administrator is tasked with either overseeing or assisting the management of the debtor's affairs. In reorganisation proceedings the judicial administrator is tasked with assisting the management or, in rarer cases, taking over the management.

The debtor continues its operations while preparing the restructuring proposals to be submitted to its creditors. The conduct of the debtor company's operations is, however, affected by the key effects of the opening of the proceedings, which include the following:

- the debtor is prevented from making payments in respect of any debts incurred prior to the judgment opening the safeguard or reorganisation proceedings;
- all actions and proceedings against the debtor are stayed insofar as they relate to the payment by the debtor of a sum of money, or the termination of a contract for payment default (see question 15);
- secured creditors are not entitled to enforce their security interests over the debtor's assets;
- no further security may be granted over the debtor's assets; and
- all transactions outside of the ordinary course of business, including the disposal of assets, must be authorised by the insolvency judge.

Finally, claims that come into existence after the commencement of the safeguard or reorganisation proceedings and that are incurred for the purpose of the proceedings, or in exchange for goods or services provided to the debtor during the observation period, must be paid on their due date. Failing timely payment, they enjoy a priority (known as the 'post-filing claim' priority) that will take priority over most other claims (see question 33).

Stays of proceedings and moratoria

15 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Safeguard and reorganisation proceedings

Secured and unsecured creditors are subject to a stay of proceedings during the observation period, insofar as they relate to the payment by the debtor of money, or to the termination of a contract for payment default. Therefore, secured creditors cannot foreclose during the observation period.

In addition, all proceedings against the debtor that were begun before the court decision ordering the start of the safeguard or reorganisation proceedings are stayed. They may only continue during the safeguard or reorganisation proceedings for the purposes of fixing the amount of the creditor's claim.

Proceedings may only be commenced during safeguard or reorganisation proceedings if they concern the payment of sums of money due by the debtor after the commencement of the insolvency proceedings for the purpose of the proceedings or in exchange for goods or services provided to the debtor during the observation period.

Liquidation proceedings

During the course of liquidation proceedings, most secured and all unsecured creditors are subject to a stay of proceedings in conditions similar to those applicable to the stay of proceedings in safeguard and reorganisation proceedings.

Post-filing credit

16 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

Mandat ad hoc or conciliation proceedings

During *mandat ad hoc* or *conciliation* proceedings, a debtor may obtain secured or unsecured loans or credit.

In addition, in conciliation proceedings only, new financing granted to the debtor company (other than by way of equity) under a conciliation agreement formally approved by the court (see question 11) will enjoy priority over most other claims, with the exception of the 'super-privileged' claim of employees covering all outstanding claims of employees in relation to the 60 days of work before the commencement of the insolvency proceedings (this does not apply in safeguard proceedings as the debtor is deemed solvent) and the insolvency expenses, in the event that insolvency proceedings are subsequently commenced against the debtor (the 'new money' priority).

Safeguard and reorganisation proceedings

During the observation period of safeguard or reorganisation proceedings (see question 11), a debtor may obtain new financing subject to such new credit being authorised by the insolvency judge and to the extent that it is necessary to the operations of the debtor company during the observation period.

The priority given to such credit depends on whether a liquidation or a reorganisation, through a sale or a reorganisation plan, is ordered by the court at the end of the observation period. As a rule, such authorised new credit granted to the debtor after the opening judgment take priority over most all pre-filing debts (with the exception of the super-privileged claim of employees, the insolvency expenses and the new money priority). However, in the event of a liquidation, such financing will rank after claims secured by security interests over immoveable property as well as special security interests over moveable property that entail a retention right for the creditor (see question 33).

Set-off and netting

17 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

If the creditor and the debtor have reciprocal receivables that arose prior to the opening judgment, set off is automatic.

Set-off may occur post-filing only if the two debts are unquestionable, of a fixed amount, due and linked. Debts are linked when they share a high degree of 'commonality'. Such 'commonality' can result from the following situations: the debts arise from a single contractual relationship; or the debts do not arise from a single contractual relationship but share a sufficient economic 'link'.

The restrictions set out above do not apply to close-out netting provisions under financial arrangements covered by Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, as implemented in French law by Ordinance No. 2005-171 of 24 February 2005 (article L211–36 et seq of the French Monetary and Financial Code).

Sale of assets

18 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Conciliation proceedings

The conciliator may upon request by the debtor and after consultation with the creditors, arrange a partial or total sale of the business that could be subsequently implemented in the context of further safeguard, reorganisation or liquidation proceedings.

Safeguard proceedings

During the observation period of safeguard proceedings (see question 11), the debtor is generally permitted to sell its assets in the ordinary course of business. Disposals out of the ordinary course of business require the authorisation of the insolvency judge.

Safeguard proceedings are designed to allow the debtor company to restructure and to continue its operations. Accordingly, a safeguard plan cannot provide for the sale of all of the debtor company's assets. However, during the observation period or as part of the safeguard plan, the court may make an order for the sale of certain assets, either on a piecemeal basis or as a going concern if such assets form an autonomous branch, provided that the debtor company can continue its operations. If the court orders the sale of a branch, it will occur pursuant to the rules applicable to the sale plan (see below).

Reorganisation proceedings

During the observation period of reorganisation proceedings (see question 12) the debtor is generally permitted to sell its assets in the ordinary course of business. Disposals out of the ordinary course of business require the authorisation of the insolvency judge.

At the end of the observation period, when the debtor company proves unable to draw up a reorganisation plan providing for the continuation of its operations, the court may approve the transfer to a third party of all or part of the assets as a going concern by way of a sale plan (see below).

Liquidation proceedings

If the court orders the liquidation of the debtor's assets, a liquidator is appointed and the debtor is divested of all rights pertaining to the disposal of assets.

The role of the liquidator is to collect and liquidate all the debtor's assets with a view to maximising proceeds. The debtor's business can be sold as a whole or in part in the framework of a sale plan (see below) or its assets may be sold on a piecemeal basis either at public auction or by private sale.

Sale of assets by way of a sale plan

A sale plan is a restructuring plan that provides for the transfer to a third-party buyer of assets, contracts and jobs of the debtor company. By law, the sale plan must achieve three objectives: the continued operations of the transferred business, the preservation of jobs and the repayment of creditors.

The sale plan is an asset deal and not a share deal. Accordingly, the debts of the debtor do not transfer to the purchaser of the business. The main exception is that financings that were granted to the debtor to acquire assets and that are secured by security interests (pledge or else) over those same assets automatically transfer to the purchaser of the business. Other debts remain with the debtor.

All offers are submitted to the judicial administrator or liquidator, where applicable, who in turn submits them to the insolvency court who will, after having consulted the debtor and the workers' council, select the offer most likely to ensure the continued operations of the business, the highest level of employment and the payment of creditors. The court may also order that the purchaser will not be authorised to sell the business during a certain period.

In practice, bids for the purchase of the debtor's business must all be sent to the debtor or to the judicial administrator or liquidator by a certain date fixed by the latter. Offers will then be examined by the insolvency practitioner and will be presented to the court with the insolvency practitioner's recommendation as to which offer to approve.

There are no 'stalking horse' bids in the sale plan process. Also, there is no possibility of implementing a proper credit bid since French law does not authorise a creditor seeking to purchase assets from the debtor's estate to make payment of the purchase price by reducing the amount of its claim against the debtor: this would be in breach of the legal ranking of creditors for the distribution of sale proceeds.

Once the sale plan is approved by the insolvency court and the assets are transferred to the purchaser, the court official settles the debtor's liabilities with the available sale proceeds according to the waterfall of claims (see question 33) and the company is dissolved.

Intellectual property assets in insolvencies

19 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

Licences to use IP rights cannot automatically terminate upon the debtor company becoming the subject of safeguard or insolvency proceedings. However, such licence agreements may be terminated during the safeguard or insolvency proceedings like any other agreements if the conditions set out in question 21 below are met.

Once the debtor's agreement with an IP licensor or owner is terminated, for any reason, the judicial administrator cannot continue to use the IP for the benefit of the estate.

Personal data in insolvencies

20 Where personal information or customer data collected by an insolvent company is valuable to its reorganisation, are there any restrictions in your country on the use of that information in the insolvency or its transfer to a purchaser?

Use of personal information or customer data in insolvency proceedings

Use of personal information or customer data in insolvency proceedings is permitted as long as this use complies with the statement initially made to the French National Commission for Data Protection and Liberties (CNIL). Indeed, according to Law No. 78-17 on Information Technology, Data Files and Civil Liberties, dated 6 January 1978, a company that intends to process personal information or customer data informs and seeks prior authorisation from the CNIL.

Transfer of personal information or customer data to a purchaser

Transfer in France or in a Member State of the European Union

The transfer of personal information or customer data to a purchaser inside the European Union is generally allowed.

However, if the data process initially implemented has not been declared to and/or authorised by the CNIL, the sale of personal information or customer data shall be held null and void (Cass Com 25 June 2013,12-17.037).

The transfer of client accounts records held by banks and records related to credit or loan management held by banks to third parties is forbidden (*Délibération CNIL* No. 1980-022, dated 8 July 1980 and *Déclaration* 13 dated 10 August 2016).

Transfer outside Europe

Transfer of personal information or customer data outside the European Union is forbidden unless the said transfer is to countries that are considered by the European Commission to offer a sufficient level of data protection. In this case, the insolvent company has to inform the CNIL of the contemplated transfer.

The insolvent company can also request an authorisation from the CNIL to transfer the personal information in cases where:

- the purchaser commits himself or herself to respect Law No. 78-17 by a standard contractual clause; and
- the purchaser adopts the Binding Corporate Rules, which is a code of good practices of a group of companies.

The person concerned has to be informed of the transfer of information to a foreign country.

The transfer of customer data (except for customer data collected by banks, health companies, education institutes and insurance companies) implemented in the above-mentioned cases is allowed and does not need to be declared to the CNIL (*Délibération CNIL* No. 2012-209 dated 21 June 2012, norm 48).

Rejection and disclaimer of contracts in reorganisations

21 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

As a rule, unfavourable contracts to which the debtor company is a party cannot be rejected or disclaimed during the observation period of the safeguard or reorganisation proceedings.

However, the judicial administrator may apply to court to terminate an agreement to which the debtor company is a party, provided that the judicial administrator can establish that the termination of the agreement is 'necessary to safeguard the debtor company' and it does not 'excessively prejudice' the other party's rights. In such case, the agreement terminates upon the court's decision.

Once safeguard or judicial reorganisation proceedings have been opened against a debtor, the contractual counterparty may require the judicial administrator to specify whether the contract will be continued or not. The judicial administrator must reply within one month. If he or she does not reply, then he or she is deemed to have refused to continue the contract and such contract is automatically terminated. If, however, the judicial administrator has decided to continue the contract, the original contractual provisions will apply. If, once the judicial administrator has decided to continue the contract, the debtor breaches such contract, the contract will be automatically terminated (unless the contractual counterparty agrees to continue such contract once it has been breached by the debtor). However, if the contractual counterparty is a landlord acting with respect to a lease agreement entered into by the debtor in relation to the premises where its activity is carried out and the debtor breaches such contract, the tenancy may only be automatically terminated after a period of three months starting from the judgment opening the safeguard or reorganisation proceedings. If the breach is remedied within such period, no automatic termination may occur.

Arbitration processes in insolvency cases

22 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

Insolvency proceedings may not be arbitrated and therefore the court cannot direct the parties to an insolvency dispute to submit it to arbitration. Arbitration proceedings that were commenced before the start of the safeguard, reorganisation or insolvency proceedings may only continue during the safeguard or insolvency proceedings for the purposes of fixing the amount of the creditor's claim and provided that the creditor filed a statement of claim and that the court-appointed creditors' representative, and, as the case may be, the judicial administrator, or the person appointed to supervise the implementation of the plan, have been asked to appear in the arbitration court.

Arbitration proceedings may only be commenced during safeguard or insolvency proceedings if they concern the payment of sums of money due by the debtor after the start of the safeguard or insolvency proceedings. Otherwise, arbitration proceedings are stayed during the safeguard or insolvency proceedings, insofar as they relate to the payment by the debtor of a sum of money or to the termination of a contract for payment default, and may resume only for the purposes of fixing the amount of the debt owed by the debtor.

Successful reorganisations

23 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

Safeguard plan and reorganisation plan

The safeguard or reorganisation plan must provide for the continued operations of the debtor company in the long term, the settlement of the debtor's liabilities and the preservation of employment.

For companies with more than 150 employees or with an annual turnover in excess of €20 million, the judicial administrator will be required to organise, for the purposes of negotiating a safeguard or reorganisation plan, two creditors' committees:

- the credit institutions committee, made up of financial institutions, similar entities and any holder of a claim acquired from either such a financial institution, such a similar entity or from any supplier of goods or services; and
- the main suppliers' committee, made up of suppliers of goods and services holding at least 3 per cent of the outstanding amount of trade liabilities.

In addition, all the holders of bonds issued by the debtor, irrespective of whether the bond issues are governed by French of foreign law, will be consulted by the judicial administrator in a bondholder's general meeting. However, no separate bondholder committee is established.

The members of the creditors' committee may also present their own alternative safeguard or reorganisation plan, in addition to the one prepared by the debtor's management. However, bondholders are not members of the creditors' committee and therefore will not be able to also propose such alternative plans.

Proposals made to the creditors' committees and the bondholders' general meeting may include waivers of debts, a rescheduling of debts over a period of up to 10 years, a change of control, a sale of certain business units, and, in limited liability companies, a debt-for-equity swap.

The plan must take into account subordination agreements and may provide for a differentiated treatment of creditors if differences in situations warrant it. Each member of the creditors' committee must inform the administrator of the existence of any subordination agreement, any agreement restricting its vote and any arrangement providing for the total or partial payment of its claim by a third party. The judicial administrator shall then submit to such creditor the method for the computation of its voting rights in the creditors' committee. In the event of a disagreement, the creditor or the judicial administrator may request that the matter be decided by the president of the relevant commercial court in summary proceedings.

Each committee and, where there are bondholders, the bondholders' general meeting will have to approve the plan by a positive vote of their members representing at least two-thirds of the aggregate claims of those who vote (irrespective of whether they are secured or unsecured creditors). In addition, any restructuring involving a change in the capital structure (including a debt-for-equity swap) will require the approval of the company's shareholders. The Macron Law has introduced two procedures in this respect providing for an eviction of the shareholders of an insolvent company under judicial reorganisation proceedings if the following cumulative conditions are met:

- the relevant company under reorganisation proceedings has more than 150 employees or it controls a group of companies with a number of employees exceeding 150;
- the cessation of business of such company would materially adversely affect the national or local economy and the local employment; and
- a change in the share capital structure of the company is the only reliable solution to avoid the aforementioned material adverse effect.

The two options provided by the Macron Law with respect to the eviction of shareholders of such companies are:

- the appointment by the insolvency court of a judicial representative who has the power to vote in favour of a share capital increase of the insolvent company in lieu of the dissenting shareholders (it being specified that such share capital increase may be implemented either by a cash injection or by by a debt-for-equity swap); or
- the forced sale in favour of entities that undertake to comply with the reorganisation plan of the shares held by the majority shareholders or the minority shareholders of the insolvent company that have a blocking voting right and who refuse to approve the change in the capital structure of the insolvent company.

If both committees and the bondholders' general meeting approve the safeguard or reorganisation plan, the court then officially approves the proposed plan after checking that it is compatible with the interests of all creditors. This decision will make the plan binding on all the creditors, including members of the committees who did not vote or who voted against the proposals.

The consultation of the committees and the approval of the safeguard or reorganisation plan must occur within six months of the opening of the proceedings. Should the creditors' committees reject the proposals or fail to accept within a six-month period, the consultation of the creditors' committees is terminated and all creditors will be consulted individually (see question 38).

In addition, creditors that are not members of the committees (or all creditors when the company does not reach the thresholds for creditors' committees to be set up) will be consulted in relation to a rescheduling or partial waiver of the debts that arose before the start of the safeguard or reorganisation proceedings. Such creditors may be made subject to a uniform rescheduling of debts over a period of up to 10 years (see question 38), save for creditors benefiting from a 'new money' priority with respect to financing provided in the context of a conciliation agreement that has been formally approved by the court.

Sale plan

See question 18.

Expedited reorganisations

24 Do procedures exist for expedited reorganisations?

French law provides for two types of expedited safeguard proceedings: the accelerated safeguard proceedings and the accelerated financial safeguard proceedings. The common features of these two proceedings are the following:

- prior conciliation proceedings are required in order for the debtor to be able to file for one of these expedited proceedings and a safeguard plan must have been prepared that is likely to be supported by creditors representing a two-thirds majority of the debtor's total indebtedness (either secured or unsecured);
- the criteria for a debtor to be eligible for accelerated safeguard and for accelerated financial safeguard proceedings are: either to produce consolidated financial statements or to have its financial statements produced by a certified accountant, or certified by an auditor, and to meet one of the following thresholds: more than 20 employees, a turnover in excess of €3 million or an aggregate balance sheet in excess of €1.5 million; and
- unlike 'ordinary' safeguard proceedings, the special safeguard proceedings may be opened even if the debtor is insolvent, subject to not having been insolvent for more than 45 days prior to the debtors' request for opening of the prior conciliation proceedings.

The main differences between the accelerated safeguard proceedings and the accelerated financial safeguard proceedings are as follows:

- the safeguard plan must be submitted to:
  - the creditors' committees which in the case of accelerated safeguard will include both the financial institutions committee and the main suppliers committee (which have to be formed regardless of whether the debtor meets the criteria specified in question 23 with respect to the committees in the ordinary safeguard proceedings); and in the case of accelerated financial safeguard will include only the financial institutions committee; and
  - the bondholders' general meeting (where there are bondholders); and
- the maximum duration of the accelerated safeguard proceedings is three months, while the maximum duration of the accelerated financial safeguard proceedings is one month (with a possibility for the court to extend the financial safeguard proceedings by one additional month).

Unsuccessful reorganisations

25 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

Out-of-court restructuring

Failure to reach an agreement in the framework of mandat ad hoc or conciliation proceedings will, in practice, often result in the start of safeguard or insolvency proceedings if the insolvency test is met (see question 1). Accelerated safeguard or financial accelerated safeguard may also be opened by the debtor after conciliation proceedings if the conditions specified in question 24 above are met.

If a conciliation agreement has been certified or formally approved in the context of conciliation proceedings and the debtor has not complied with its duties under that agreement, the creditors who are party to the agreement may request that the agreement is terminated and that insolvency proceedings are opened if the debtor is insolvent.

Safeguard and reorganisation proceedings with creditors' committees

When creditors' committees are set up and the committees fail to approve the draft plan within six months from the opening of the safeguard or reorganisation proceedings or the court does not approve the safeguard or reorganisation plan approved by the committees, creditors are then consulted on an individual basis. In such framework, even if creditors refuse the debtor's proposals, the court may make them subject to a uniform rescheduling of their claims over up to 10 years, with no statutory minimum for the first two annual instalments and a minimum 5 per cent of the total liabilities (principal and interest) from the third instalment, although the repayment of a debt under the safeguard or reorganisation plan cannot start before the original contractual maturity (see question 38). Such debt deferrals, however, may not be imposed with respect to claims benefiting from the 'new money' priority.

Safeguard proceedings

At any time during the observation period of the safeguard proceedings or if no safeguard plan is approved by the court by the end of the observation period, the debtor, a creditor or the public prosecutor may request the opening of reorganisation or liquidation proceedings, subject to the debtor company being insolvent, and in the case of liquidation proceedings, the absence of any prospects of recovery.

During the observation period, the debtor company may also request the conversion into reorganisation proceedings if the approval of a safeguard plan is manifestly impossible and if the termination of the proceedings would lead to insolvency in the short term.

If the court approves a safeguard plan and the debtor defaults on its obligations, the court may, after having consulted the Public Prosecutor, terminate the plan and, if the debtor is insolvent, order the opening of reorganisation proceedings or (if there are no prospects of recovery) liquidation proceedings.

Reorganisation proceedings

At any time during the observation period of the reorganisation proceedings or if no reorganisation plan is approved by the court by the end of the observation period, the debtor, a creditor or the public prosecutor may request the opening of liquidation proceedings.

If the court approves a reorganisation plan and the debtor defaults on its obligations, the court may, after having consulted the public prosecutor, terminate the plan and, if the debtor is insolvent and if there are no prospects of recovery, order the opening of liquidation proceedings. In the case of a sale plan, the court terminates the plan if the third-party purchaser defaults on its obligations.

Insolvency processes

26 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

Notices informing creditors of the start of insolvency proceedings are sent to all known creditors. In addition, all major decisions taken by the court during the course of the safeguard or insolvency proceedings are published in the Official Gazette for Civil and Commercial Announcements. Other key elements of the proceedings (such as the list of claims acknowledged in the safeguard or insolvency proceedings) are filed with the clerk office of the court and may be accessed by the creditors.

The court-appointed officials (judicial administrator, creditors' representative and liquidator) have various duties to report to the court the conduct of the proceedings, in conditions set out in the French Commercial Code.

A creditor may request to be appointed as a supervisor at the beginning of the proceedings. This will entitle him or her to request all the documents sent to the judicial administrator and the creditors' representative, enabling him or her to be kept closely informed of any developments in the proceedings (see also question 27).

Meetings are held during the safeguard or reorganisation proceedings as part of the consultation process involving creditors' committees and the bondholders' general meeting (see question 23).

No release of liabilities owed by third parties who are not part of the debtor group can be provided for in the reorganisation plan.

Enforcement of estate's rights

27 If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

The creditors appointed by the court as supervisors may bring claims on behalf of the debtor company against third parties if the judicial administrator, liquidator or creditors' representative fail to do so for the benefit of all of the debtor's creditors (eg, a claim on the grounds of mismanagement). The proceeds of actions taken by the supervisors belong to the safeguarded or insolvency estate and the supervisors are not granted any priority in respect of those proceeds.

Creditor representation

28 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

See questions 23 and 24. In situations where creditors' committees are set up (and, as the case may be, the bondholders' general meeting is convened), their power and responsibility is to vote on the debtor's plan proposal. Members of the creditors' committees (but not the bondholders' general meeting) may also put forward alternative safeguard or reorganisation plans. See also question 23. In practice, given that each creditor's committee and the bondholders' general meeting may be composed of creditors whose interests are not aligned, each creditor, or class of creditors within a committee or in the bondholders' general meeting, usually retains its own advisers. Their expenses must usually be funded by the creditors themselves.

Insolvency of corporate groups

29 In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

When several entities of a group of companies are the subject of safeguard or insolvency proceedings, such proceedings are independent from one another and are not combined for administrative purposes. However, courts tend to use the criterion of the 'centre of main interests' set out in article 3 of EU Insolvency Regulations to centralise the safeguard or insolvency proceedings of a group of companies before the same court so as to conduct the various proceedings in parallel that may facilitate the coordination of the proceedings and the finding of restructuring solutions. Also, the same judicial administrator or creditors' representative may be appointed with respect to insolvency proceedings opened against companies of the same group. In addition, the Macron Law provides that as of 1 March 2016, the court that has jurisdiction over insolvency proceedings opened against a company that is part of a group of companies will also have jurisdiction over any subsequent insolvency proceedings opened against other companies of the same group. There will be, however, an exception to this rule in cases where one of the companies against which insolvency proceedings are opened at a later stage meets the criteria required for the opening of insolvency proceedings in front of a specialised commercial court – in this situation, any insolvency proceedings already opened by the subsidiaries of such company will be transferred to this specialised commercial court.

The only grounds allowing a court to order the combination of proceedings is where there is a 'commingling of assets' between the parent company and its subsidiaries or when the company subject to insolvency proceedings is held to be a sham. If the court makes a finding of commingling of assets or of the company being a sham, the insolvency proceedings from one company will be extended to the other entity of the group and the assets and liabilities of both companies involved will be pooled for distribution purposes.

Appeals

30 What are the rights of appeal from court orders made in an insolvency proceeding? Does an appellant have an automatic right of appeal or must it obtain permission to appeal? Is there a requirement to post security to proceed with an appeal and, if so, how is the amount determined?

The debtor that is in an insolvency proceeding has the right to appeal a judgment, within 10 days from the notification of the judgment, where the judgment:

- opens or extends the safeguard, reorganisation or liquidation proceedings;
- converts the liquidation proceeding into reorganisation proceedings;
- declares the debtor insolvent; or
- approves, modifies or terminates a safeguard or reorganisation plan.

The debtor can also appeal the judgment that approves or rejects the sale plan, within 10 days of the said judgment.

Finally, the debtor can lodge an opposition to orders of the insolvency judge (except orders related to the appointment or change of insolvency judge) within 10 days of the notification of the order.

He or she can also appeal orders of the insolvency judge related to:

- the verification and admission of creditor claims;
- the replacement of guarantees;
- cash advances from the Tax Office; or
- the sale of the debtor's goods, when the latter is facing liquidation proceedings.

The creditor requesting the opening of the insolvency proceedings can appeal the judgment opening (only if the creditor challenges the date retained by the court as the date on which the debtor company became insolvent) or refusing to open the reorganisation or liquidation proceeding.

The appellant has an automatic right of appeal: he or she does not have to request an authorisation or post security to proceed with an appeal.

Claims

31 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

Generally, creditors must file a statement of their claims in the insolvency proceedings within two months (four months if they reside outside mainland France) from the publication of the opening judgment in the Official Gazette for Civil and Commercial Announcements. When the amount of the claim is contingent or unliquidated, the creditor must declare an assessment of the amount of its claim. Unless the creditors' representative challenges the amount of the claim, it will be admitted on the basis of this assessment. Failure to file a claim within these time limits results in the creditor being unable to take part in the subsequent distributions of cash, save for the case where the debtor has filed such claim of the creditor (the debtor having a legal obligation to file a list of all its creditors and the amount of their claims) in which case he is deemed to have acted on behalf of the creditor. Such creditor may ratify the debtor's filing at any time until the court has made a final decision accepting or rejecting the claim. Also, the court may, in certain circumstances (including the case where the debtor has failed to include such claim in the list of claims it has filed), authorise a creditor to file a claim after the expiry of the original deadline mentioned above.

The creditors' representative will give notice to those creditors whose debts are protected by a registered security interest (essentially mortgages and pledges) or by leasing agreements, at the start of the proceedings. Other creditors (in particular the unsecured creditors) will learn about the start of the insolvency proceedings from the notice published in the Official Gazette.

The creditors' representative will then verify the filed statements of claims. The debtor may submit observations with respect to such claims within 30 days. If the debtor does not submit such observations in the deadline it is barred from subsequently challenging such claims. Any creditor may also challenge a claim made by another creditor. If a claim is challenged by the creditors' representative, the debtor or a creditor, the case will be brought before the court, which will decide whether to accept or reject the claim. Such a decision may be challenged before the Court of Appeal within 10 days of the notification of the decision by the clerk office of the court.

As a rule, a creditor remains free to assign its claims to a third party after the opening of safeguard or insolvency proceedings. However, such transfer must be brought to the judicial administrator's attention by registered post to ensure that the assignee is invited by the judicial administrator to take part in the creditors' committees or the bondholders' general meeting, where applicable. A claim acquired at a discount may be subsequently enforced for its full face value.

Accrual of interest is suspended during safeguard, reorganisation and liquidation proceedings, except with respect to loans providing for a term of at least one year or contracts providing for a payment that is deferred for at least one year. Also, interest can no longer be compounded during the observation period.

Modifying creditors' rights

32 May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

In the framework of a safeguard or a reorganisation plan, the plan must take into account the subordination agreements entered into prior to the commencement of the proceedings (see question 23). In the framework of a sale plan or liquidation proceedings, the rank of a creditor's claim is determined by law (see question 33).

Priority claims

33 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Priorities are determined by many different laws and cannot be set out definitively. However, apart from employee-related claims, priorities in liquidation proceedings are generally as follows:

- costs of the insolvency proceedings;
- the 'new money' priority (for new financing, providing of new goods or services, granted under a formally approved conciliation agreement (see question 11));
- claims secured through security interests over immoveable property, specific security interests over moveable property, in particular security interests to which a retention right is attached;
- claims that have arisen after the judgment opening the insolvency proceedings and which are necessary for the conduct of the proceedings (eg, rental payments to maintain the lease of the premises where assets are located until such assets are sold by the liquidator); and
- other claims according to existing priority rules.

Employment-related liabilities in restructurings

34 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

Employee claims

Employee claims encompass all unpaid salaries and benefits. Employees are exempt from filing a statement of their claims.

Employees' claims are guaranteed by a national insurance fund called the AGS, funded by employers. The AGS guarantees the payment of the employees' claims up to certain caps in safeguard, reorganisation and liquidation proceedings. For all sums paid to employees, the AGS is then subrogated to the rights of the employees against the debtor company. The AGS will therefore be reimbursed, as the case may be, according to the ranking of the employees' claims (eg, the AGS will be ranked first regarding unpaid wages for the 60 days of work preceding the opening of reorganisation or liquidation proceedings).

Termination of employment contracts

In safeguard proceedings, the procedure to terminate employment contracts is the same as outside insolvency proceedings.

In reorganisation proceedings, employees may be made redundant during the observation period if the redundancies are urgent, unavoidable and necessary. The judicial administrator must consult the employees' representatives or works council and inform the labour authorities before submitting a list of positions that the judicial administrator would like to have removed. The insolvency judge must then authorise the dismissals based on such list. The judicial administrator can then make employees redundant in accordance with the list of positions to be removed.

In liquidation proceedings, the liquidator must terminate all employment contracts within 15 days of the date of the judgment ordering the liquidation or at the end of the temporary continuation of the debtor's operations, where applicable. Termination must be preceded by the consultation of the employees' representatives or the works council and the information of the labour authorities.

If the business is sold by way of a sale plan (whether approved in reorganisation or in liquidation proceedings), employment contracts included in the plan approved by the court automatically transfer to the purchaser. Non-transferred employment contracts are terminated by the judicial administrator or liquidator (see question 18).

Pension claims

35 What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

In most cases in France, existing employee pension plans or schemes are externalised (ie, an entity independent from the debtor company is in charge of receiving the contributions and then distributing the pension to the employees when they retire). As a consequence, the insolvency of the debtor company has no impact on the pension plans or schemes. However, in cases where the employee pension plan is internal to the debtor company, as a rule the AGS refuses to guarantee the payment of the pension to the employees, who must therefore file a statement of their claim and will not benefit from any priority ranking. This rule adopted by the AGS is, however, subject to debate, and in at least one decision of the French Supreme Court, dated 25 January 2005, it was considered that the AGS should guarantee payment. This payment will be limited to the maximum amount guaranteed by the AGS (see above at question 34).

Environmental problems and liabilities

36 In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The environmental problems of a company in insolvency proceedings must be controlled by both its managing directors (if they are still in charge of the management of the company) and the insolvency administrator, if it has been granted power to oversee or assist with the management of the company (in safeguard, judicial reorganisation or judicial liquidation proceedings) or by the insolvency administrator if it has taken over the management of the company (in judicial reorganisation or judicial liquidation proceedings). The insolvency administrator must also request an environmental audit during safeguard proceedings or judicial reorganisation proceedings and must ensure that the safeguard or reorganisation plan that is presented to the court takes into account the environmental actions contemplated in such environmental audit.

Liabilities with respect to the environmental problems of a company in insolvency proceedings may be imposed on:

- the debtor's managing directors, by an action for shortfall in the company's assets, which can be brought in liquidation proceedings on the ground that such directors have, by acts of mismanagement, contributed to a shortfall in the company's assets;
- the insolvency administrator, but only in some limited circumstances such as not having taken some urgent measures necessary to ensure the safety of the site (ie, measures needed to prevent an immediate and proven risk for safety and public health) with respect to the pollution caused by the company in insolvency proceedings;
- the shareholders, by an action which has been introduced in French law (article L512-17 of the French Environmental Code) by the Grenelle 2 law (Law No. 2010-788 of 12 July 2010), which provides that a parent company may be required by a court to bear all or part of the remedial costs incurred in relation to a polluting activity by one of its subsidiaries which is in liquidation proceedings if such parent company has committed a fault having caused a shortfall in the insolvent subsidiary's assets;
- the insurance companies, against whom the victims of the pollution caused by the company in insolvency proceedings have a direct action; or
- the Environmental Agency, ADEME, if all other liable persons are unknown, insolvent or defaulting.

Also, in certain circumstances the victims of pollution caused by an insolvent company can be indemnified by specific national or international compensation funds created in relation to certain types of pollution.

Liabilities that survive insolvency proceedings

37 Do any liabilities of a debtor survive an insolvency or a reorganisation?

Generally, no further claims may be brought against the debtor once liquidation proceedings are closed.

In addition, subject to limited exceptions, the purchaser of the debtor's assets in the framework of a sale plan purchases the assets free from any liens or past liabilities (see question 18).

Distributions

38 How and when are distributions made to creditors in liquidations and reorganisations?

Safeguard proceedings

Subject to their acceptance in the safeguard proceedings, pre-filing liabilities are repaid in accordance with the terms and conditions of the safeguard plan approved by the court with the profit generated by the continued operations of the business and, where applicable, the proceeds of the sale of certain assets of the debtor. Debts incurred after the start of the proceedings must generally be paid when due (see question 14).

When the creditors' committees and, where applicable, the bondholders' general meeting, have rejected the restructuring proposals made by the debtor or by members of the creditors' committees (see question 23), the court cannot impose a waiver of debt on creditors. However, it can impose a 'term-out' by which claims are to be repaid in annual instalments over a maximum of 10 years, save for claims benefiting from a 'new money' priority. The first annual instalment is payable at the latest 12 months after the court order imposing the rescheduling of debts, with no statutory minimum for the first two instalments and a minimum 5 per cent of the total liabilities (principal and interest) from the third instalment, although the repayment of a debt cannot start before the original contractual maturity. The same rules apply for safeguard proceedings where no creditors' committees are set up and for creditors that are not members of creditors' committees.

If the debtor does not comply with the obligations provided for by the safeguard plan, the court may order the termination of the plan. If the debtor is insolvent according to the French insolvency test (see question 1), such termination may result either in the start of reorganisation proceedings or liquidation of the debtor if there are no prospects of recovery (see question 25).

Reorganisation proceedings

At the end of the observation period, the court will order either a reorganisation plan or a sale plan.

The rules set out above for distributions made under a safeguard plan also apply to the reorganisation plan. If the debtor does not comply with the obligations provided by the reorganisation plan, the reorganisation plan may be terminated by the insolvency court and liquidation proceedings may be opened.

A sale plan is implemented pursuant to the provisions set out in the French Commercial Code regarding liquidation proceedings. If the court approves a sale plan, the price paid by the third-party purchaser will be allocated to the repayment of the debts pursuant to the priority rules set out in the French Commercial Code (see question 33). In this case, distribution will occur once sale proceeds have been collected and after the statements of all claims have been verified and are final.

Liquidation proceedings

In liquidation proceedings, distributions are made by the liquidator according to priority rules (see question 33) as sale proceeds are collected and after the statements of all claims have been verified and are final.

Transactions that may be annulled

39 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

When a debtor is the subject of insolvency proceedings (whether reorganisation proceedings or liquidation proceedings), the insolvency court can annul certain transactions entered into, and certain payments made, by the debtor during the 'suspect period'. The suspect period is defined as the period between the date on which the debtor is deemed to have become insolvent, as determined by the insolvency court, and the date on which insolvency proceedings are opened. The date of the debtor's insolvency cannot be set earlier than 18 months before the judgment opening the insolvency proceedings or before the judgment formally approving a conciliation agreement (see question 11).

The rationale behind the possibility of setting aside such acts and transactions made during the suspect period is to restore the estate of the debtor and to cancel advantages granted by an insolvent debtor to one of its creditors, to the detriment of the collective interest of all its other creditors.

The French Commercial Code provides for a list of transactions and acts that are set aside by the court when made during the suspect period. This includes in particular:

- disposals of assets without consideration;
- contracts that impose unduly onerous obligations on the debtor;
- payments of debts before they are due;
- payments that are not made: in cash, through specific negotiable instruments, by wire transfer, through Dailly assignments or payments that are made other than by normal commercial means;
- cash collateral ordered by a court (under article 2350 of the French Civil Code), unless it has been ordered by a court decision having the force of res judicata;
- mortgages and pledges granted by the debtor over its moveable or immoveable property that secure debts entered into prior to the granting of such security interests; and
- transfers of assets and rights into a trust, unless such transfer has been made in order to secure a debt entered into in the same time as such transfer of assets.

In addition to the above, French courts have a discretionary power to set aside any transaction if the two following conditions are met:

- the transaction was entered into during the suspect period; and
- the other party knew that the debtor was already insolvent (according to the insolvency test described in question 1) when it made the payment or entered into the transaction.

If an act or transaction is annulled by the court, the creditor will be deprived of its rights and will have no claim under the act or transaction that has been declared null and void.

A claim to annul a payment made, or a transaction entered into, during the suspect period may be brought by the judicial administrator, the creditors' representative, the liquidator or the public prosecutor.

Proceedings to annul transactions

40 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

See question 39.

Directors and officers

41 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

Managing directors (whether officially appointed or de facto directors) of an insolvent company may be held personally liable for the debts of the company if they are found to have mismanaged the company's business – prior to the opening judgment of liquidation proceedings – and if their mismanagement contributed to the shortage of assets in the debtor company.

Criminal and professional sanctions may also apply to corporate officers and directors in certain circumstances.

Groups of companies

42 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

As a general rule, under French law a company is a separate legal entity from other companies of the same group, including its shareholders and subsidiaries. As a result, its assets cannot be affected by insolvency proceedings commenced against other companies, even if these companies belong to the same group. Nevertheless, the corporate veil may be lifted and insolvency proceedings commenced against one company may be extended to another (even if such other company is not insolvent) either on the ground that the debtor company is held to be a fictitious legal entity or that the assets and liabilities of the parent company and those of its subsidiary as so intertwined that they should in fact be considered to be one single entity.

Extension on the ground that the debtor company is a fictitious legal entity

Case law considers that a company is a fictitious legal entity where a separate legal entity exists in form only (ie, the company has no autonomy and does not exist as an independent entity despite the existence of an independent legal structure or has been set up fraudulently, or both). The courts, however, only rarely extend insolvency proceedings commenced against one company to another company on the ground that the company is a fictitious legal entity.

Extension on the ground of mix-up of assets and liabilities

A French court may only hold that there has been a mix-up of two companies' assets and liabilities if it finds that two conditions, theoretically alternative but most of the time used cumulatively, are met: there must be a commingling of accounts and abnormal financial streams (being analysed by case law as systematic transfers of assets or of services without consideration).

This French rule, however, cannot be applied with respect to a company having its registered office in another EU state, according to a decision of the EU Court of Justice dated 15 December 2011 (*Rastelli Davide e C Snc v Jean-Charles Hidoux* C-191/10), which was confirmed by a decision of the French Supreme Court dated 10 May 2012. According to these decisions, insolvency proceedings opened against a French company with its COMI in France cannot be extended on the ground of the French rule mentioned above to a company having its registered office (and its COMI) in another EU state.

See also question 36 with respect to the specific action relating to environmental liabilities whereby a parent company may be required by a court to bear all or part of the remedial costs incurred in relation to a polluting activity of one of its subsidiaries that is in liquidation proceedings.

There are no provisions under French law allowing a court to order a distribution of group company assets pro rata without regard to the assets of the individual corporate entities involved.

Insider claims

43 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

French insolvency law does not specifically address this issue; however, all claims are reviewed and checked by the creditors' representative and the court has the power to reject such claims if deemed invalid. See question 39 with respect to transactions that can be annulled if entered into during the suspect period under certain circumstances, in particular, contracts that impose unduly onerous obligations to the debtor and transactions entered into with a party that had knowledge of the fact that the debtor was already insolvent when it has entered into the transaction.

Creditors' enforcement

44 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Once safeguard judicial reorganisation or liquidation proceedings are started against a debtor, its assets may not be seized (since there is an automatic stay of proceedings in place). This is without prejudice to the rules provided under the EU Insolvency Regulations for assets located in a member state other than France on the date of the opening of the safeguard or insolvency proceedings.

Notwithstanding the above, a creditor that legitimately retains possession of one of the debtor's assets may obtain full payment of its claim in exchange for the release of the asset (subject to the asset being necessary to the debtor's operations). In addition, a creditor secured by a pledge over one of the debtor's assets may, under certain conditions, be granted full ownership of the said asset in payment of its debt in the event of liquidation proceedings.

Corporate procedures

45 Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

A company may be liquidated and wound up outside the scope of insolvency proceedings and outside court proceedings if it is in a position to repay all its debts.

In this case, the shareholders or the court will appoint a liquidator who will be in charge of the distribution of the company's assets and payment of the company's debts. When all distributions have been made and debts paid (which must be done within three years from the start of the liquidation), the shareholders will decide in a general meeting whether the liquidation process should be closed. The corporate entity will only cease to exist when the liquidation is completed. In this event, the liquidator will request that the company be removed from the Trade and Companies' Registry.

Conclusion of case

46 How are liquidation and reorganisation cases formally concluded?

Out-of-court restructurings are formally concluded when:

- parties have agreed on a restructuring agreement (whether in mandat ad hoc or conciliation proceedings), if no approval from the court is required by the parties;
- the conciliation agreement has been either certified by the presiding judge of the court or formally approved by the court (see question 11); or
- at the end of a maximum five-month period of the opening of conciliation proceedings if no agreement has been reached by the parties (see question 11).

Safeguard and reorganisation proceedings are formally concluded upon the approval of the safeguard or reorganisation plan. In addition, once the safeguard or reorganisation plan has been fully implemented, the court official in charge of supervising the implementation of the plan will draft a report confirming the completion of the plan to the court.

Liquidation proceedings are formally concluded when all debts have been repaid, the liquidator has been able to obtain sufficient proceeds in order to repay all debts, the continuation of the liquidation proceedings is impossible due to a shortfall of assets or the continuation of liquidation proceedings is considered to be no longer justified due to difficulties in selling the remaining assets.

If the debtor is in ongoing judicial proceedings, the insolvency court may, however, close the liquidation proceedings, subject to a representative being appointed that must continue the ongoing judicial proceedings on behalf of the liquidated debtor and allocate the proceeds obtained from such proceedings to the creditors of the liquidated debtor.

International cases

47 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Rules concerning insolvency proceedings of companies with their COMI located within the European Union (other than Denmark) are contained in the EU Insolvency Regulations. The EU Insolvency Regulations provide for an automatic recognition in France of insolvency proceedings carried out in another EU member state (save for Denmark). For further information please refer to the EU chapter.

Outside the scope of the EU Insolvency Regulations, insolvency proceedings begun in another country have limited effects in France, until they are officially recognised through an exequatur judgment and are made enforceable in France. Up until then, debtors can be the subject of enforcement measures or insolvency proceedings in France.

Once the foreign insolvency proceedings are recognised in France, the foreign insolvency rules apply. The company's assets and business in France are handled in accordance with these rules. Payments made or transactions entered into during the suspect period defined by the foreign law, prior to the start of the insolvency proceedings, can be challenged. The foreign insolvency proceedings are expected to produce their full effects.

The adoption of the UNCITRAL Model Law on Cross-Border Insolvency has been discussed but, for the time being, no steps have been taken to implement it in France.

COMI

48 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

French courts are using the technique of a 'body of corroborating evidence' in order to determine the COMI of a debtor company or group of companies. The cumulative effect of several of the following pieces of evidence is used:

- the nationality and residence of the directors of the company;
- the location of the board meetings of the company;
- the location from where the strategic and operational management of the company is performed;
- the place where the main negotiations concerning the company are led;
- the location of the main creditors of the company;
- the location of the main assets of the company;
- the law governing the main contracts of the company;
- the place from where the supplies of goods are procured;
- the place where the strategic, operational and financial divisions of a group of companies are located; and
- the location of the majority of the employees of the company or group of companies.

There is, however, no definite line or principle followed or applied by the French courts in their analysis relating to the location of the COMI and the absence of established case law means that French courts may not necessarily apply the same criteria from one court to another when examining similar cases.

Cross-border cooperation

49 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

See question 47 with respect to the recognition in France of foreign insolvency proceedings.

The EU Insolvency Regulations provide for cooperation between an insolvency practitioner appointed in main insolvency proceedings opened in an EU member state and an insolvency practitioner appointed in secondary proceedings opened in another EU member states (article 31 of the 2000/1346 EU Insolvency Regulation and article 41 of the 2015/990 EU Insolvency Regulation).

Judicial administrators can enter into insolvency protocols or other arrangements with foreign courts, although it is not common practice in France and, in any event, it will be decided on a case-by-case basis. To our knowledge, there have been limited examples of such process. One example of a protocol can be found in the *Sendo International* case, where main insolvency proceedings had been commenced in the United Kingdom against the company Sendo International and secondary proceedings had been opened in France. The liquidators of both proceedings had entered into a protocol intended to establish a practical modus operandi in order to enable effective cooperation between the two insolvency proceedings. This protocol notably provided how to proceed with the statements of claims, the debtor's assets as well as the liquidation proceeds (Commercial Court of Nanterre, 29 June 2006, Sendo International). A more recent example can be found in the *Nortel* restructuring where insolvency protocols have been signed between the administrators appointed in the main proceedings (administration) in England with respect to the French Nortel companies and the judicial administrator appointed in the French secondary proceedings.

French courts may refuse to recognise foreign insolvency proceedings based on the following grounds: with respect to EU insolvency proceedings, a conflict with the French international public policy (article 26 of the 2000/1346 EU Insolvency Regulation and article 33 of the 2015/848 EU Insolvency Regulation) or a limitation of personal freedom or postal secrecy (article 25, paragraph 3 of the 2000/1346 EU Insolvency Regulation) and, with respect to other foreign insolvency proceedings (outside the EU), if one or more conditions for exequatur are not met (see question 47 with respect to the exequatur of foreign insolvency judgments). However, there are very rare cases where foreign judgments have not been recognised.

Cross-border insolvency protocols and joint court hearings

50 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

See question 49.

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Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

In principle, the German Insolvency Act governs all bankruptcies and judicial reorganisations in Germany. As regards the restructuring and orderly winding up of financial institutions, the prerequisites and proceedings are primarily stipulated in the Law on Bank Restructuring dated 9 December 2010 (see questions 3 and 5). Furthermore, there are a number of special provisions in the German Banking Act granting certain rights and responsibilities to the German Federal Financial Supervisory Agency (FSA) in the (threatened) insolvency of a financial institution. For example, the FSA can impose a temporary moratorium.

In general, the German Insolvency Act specifies two different criteria for establishing insolvency: illiquidity; and, if the debtor is a legal entity (limited liability company, stock corporation, etc) or a (limited liability) partnership that has solely legal entities as (general) partners, over-indebtedness.

Illiquidity

According to the Insolvency Act, a debtor is illiquid when it is unable to pay its debts as they fall due. A company is deemed to be illiquid if it has ceased making payments. The German Federal Supreme Court decision of 24 May 2005 (IX ZR 123/04) has, however, set out the following qualifications:

- if it can reasonably be expected that the debtor will meet its payment obligations within no more than three weeks from their due date, the company is not considered illiquid;
- if the liquidity shortfall amounts to less than 10 per cent of all due payment obligations the company is only considered illiquid if the shortfall is likely to increase to more than 10 per cent in the near future; and
- if the liquidity shortfall amounts to 10 per cent or more of the due payment obligations illiquidity is assumed, unless there is a high likelihood that the shortfall will soon be covered completely, or almost completely, and the creditors can be reasonably expected to wait. Accordingly, a mere temporary interruption of payments will not constitute illiquidity.

Over-indebtedness

In general, a company will be regarded as being over-indebted whenever the company's total liabilities (including accruals) exceed its total assets (including hidden reserves, which can be taken into account). Until 17 October 2008, where there was a predominant probability that the company's business could be continued, the evaluation of the company's assets was permitted to be undertaken on a going-concern (rather than liquidation) basis. If such valuation on a going-concern basis (and the consideration of hidden reserves) still resulted in a negative net asset value, the company had to file for insolvency (notwithstanding the predominant probability of a continuation of its business). With effect as of 18 October 2008, as a consequence of the financial crisis, the Insolvency Act was modified so that a company is generally no longer regarded as being over-indebted when there is a predominant likelihood that the company's business can continue. This modified over-indebtedness test was supposed to only be in force for an interim period until 31 December 2013. However, in December 2012 the German legislator decided to adopt this modified legal definition of over-indebtedness for an indefinite period.

Threatened illiquidity

In addition, the Insolvency Act establishes the concept of 'threatened illiquidity'. This gives the debtor (but not the creditors) the right to initiate a reorganisation or liquidation under the Insolvency Act when the company's illiquidity is imminent (see questions 9 to 13).

The debtor is deemed to be threatened with illiquidity if it is likely to be unable to meet its existing payment obligations when they fall due. This is particularly the case when it appears that the company is more likely to become illiquid than to recover. In practice, a company threatened by illiquidity is usually also over-indebted.

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

The lower court of the district in which a state court is located has exclusive insolvency jurisdiction for that district.

If the centre of the debtor's business activity is located in another district, the insolvency court of that district will have exclusive local jurisdiction. If more than one court has jurisdiction, the court in which the application for commencement of the insolvency proceeding was first filed will have exclusive jurisdiction.

The competent insolvency court has jurisdiction to deal with all matters connected with the insolvency proceeding. Among other things, the insolvency court can suspend creditors' attempts to enforce against the debtor's assets (save for real property). The position is different where there is a judicial execution of the debtor's real property. The execution in that case can only be temporarily suspended by the court having jurisdiction over the execution, and not by the insolvency court.

Excluded entities and excluded assets

3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

In principle, insolvency proceedings may be commenced by or against any natural or legal person. An unincorporated association that otherwise has no separate legal personality will be deemed to be a legal person. Insolvency proceedings cannot, however, be commenced against any legal entity that is subject to state supervision, if the law of the respective state so provides.

Furthermore, the Law on Bank Restructuring (see questions 1 and 5) provides for specific rules concerning the restructuring and orderly winding up of financial institutions.

In principle, the insolvency proceedings involve all of the assets owned by the debtor on the date when the insolvency proceedings are opened and those acquired by the debtor during the insolvency proceedings. However, there are certain exceptions as regards the assets of natural persons that cannot be enforced over or form part of the insolvency. From a practical point of view, this exemption does not affect corporate insolvencies.

Public enterprises

4 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

German insolvency law does not provide for specific procedures for government-owned enterprises. Hence, the provisions under the German Insolvency Act also apply for such enterprises.

However, insolvency proceedings cannot be commenced against the federal government or a state government, or any legal entity that is subject to state supervision, if the law of the respective state so provides (see also question 3).

Creditors of insolvent public enterprises have the same remedies as creditors of insolvent non-public enterprises (as to the remedies of unsecured creditors, see question 8).

Protection for large financial institutions

5 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

In view of the worldwide financial crisis, the German legislator passed, among others, the Law on Bank Restructuring, which became effective on 1 January 2011. The Law on Bank Restructuring provides specific rules concerning the restructuring and orderly winding up of financial institutions. The rationale of the law is that the financial distress of a bank should primarily be rectified by its stakeholders (ie, in particular its shareholders and its creditors). An intervention by the FSA may only be considered if the stakeholders fail to implement adequate restructuring measures and if the stability of the financial system is otherwise at risk.

The Law on Bank Restructuring provides for two restructuring procedures, both of which can only be initiated by the financial institution itself: a recovery procedure and a restructuring procedure. Both procedures provide a framework for a collective negotiated settlement.

The recovery procedure can be initiated by the management of a distressed bank far in advance of a potential insolvency. The recovery procedure may be commenced after the management gives notice of its need for recovery and presents a recovery plan to the FSA. Such plan must outline the measures proposed to recover the bank, but may not impair any third-party rights.

Alternatively, a restructuring procedure may be initiated if the existence of the bank is endangered and if the collapse of the bank would severely affect the stability of the financial system. The restructuring procedure is shaped along the lines of the insolvency plan procedure under the Insolvency Act (see question 23), meaning that creditors of the financial institution form different creditor groups that vote on the restructuring plan (including the possibility of a cram down). Such a restructuring plan may impair shareholder rights and may also provide for a debt-to-equity swap. Beyond this, the restructuring plan may also stipulate the spin-off of certain parts of the financial institution to an existing or a newly established affiliate.

If the stakeholders are not willing to stabilise the financial institution in distress or if the measures taken do not sufficiently allow for a recovery of the institution, so the stability of the financial system is (still) in danger, the FSA is empowered to nominate a special representative who is assigned certain tasks, responsibilities and rights that the FSA considers necessary to recover the financial institution. In addition, the FSA has the power to force a financial institution to transfer its business in whole or in part to another (public or private) bank.

There is no specific restructuring act for insurance companies. It must, however, be noted that there are some special rules for insolvency proceedings over the estate of insurance companies (section 88 et seq of the German Insurance Supervision Act). For instance, if an insurance company becomes insolvent, only the supervising authority may file an application for the commencement of insolvency proceedings.

Secured lending and credit (immoveables)

6 What principal types of security are taken on immoveable (real) property?

The principal types of security devices that are taken on immoveable (real) property are as follows.

Hypothek

Real property can be charged by way of a *hypothek* (ie, mortgage) as security for payment of a definite sum that equals the secured personal debt. It is not necessary for the creation of a *hypothek* that the owner of the real property is the personal debtor in respect of the claim secured by the charge. The *hypothek* may be certificated or non-certificated. Both forms are registered with the land register, but only the holder of a certificated *hypothek* receives a certificate after registration that enables him to transfer the *hypothek* external to the register by means of written assignment and handing over the certificate.

Grundschuld

A *grundschuld* (ie, land charge) creates a charge on real property for the payment of a definite sum of money. It differs from a *hypothek* because it does not depend on an underlying personal debt and theoretically may exist without one. In practice, the parties usually agree that the *grundschuld* will not be transferred back to the real property owner until all outstanding sums have been repaid.

Secured lending and credit (moveables)

7 What principal types of security are taken on moveable (personal) property?

The principal types of security devices that are taken on moveable (personal) property are:

- retention of title: pursuant to section 449 of the Civil Code, the seller of personal property may retain title over the assets it is selling until the purchase price has been paid;
- fiduciary transfer of assets: a fiduciary transfer of assets is an arrangement pursuant to which a debt is secured on personal property, possession of which is retained by the debtor;
- fiduciary transfer of receivables: a fiduciary transfer of receivables is an arrangement whereby security is granted over receivables owed to the debtor; and
- chattel pledge: a chattel pledge is created by pledging a chattel (or claim) as security for a debt. It is a right in rem to satisfy a claim. A chattel pledge requires that the debtor delivers up possession of the chattel.

In practice, one will often find a combination of these security devices. For instance, suppliers usually supply their products on retention of title terms. However, the terms of supply may entitle the retailer to sell the products in the ordinary course of business, provided that the (future) receivables arising from such sales to customers are assigned to the supplier in advance by fiduciary transfer.

Unsecured credit

8 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

An unsecured creditor must first obtain a judgment in respect of its debt. It can then initiate a judicial execution of the debtor's personal or real property. However, these procedures can be very difficult and time-consuming, especially if the debtor contests the creditor's claim. In principle, an attachment could be obtained in advance of a judgment or execution but only where certain strict requirements have been met. An example would be if the enforcement of the judgment would become impossible or considerably more difficult without such a court order.

Foreign creditors in possession of a foreign judgment would have to apply to a German court for recognition of their judgments before bringing steps to enforce it.

Voluntary liquidations

9 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

Generally, a voluntary liquidation may only be implemented in accordance with general corporate procedures if the debtor is able to discharge all its debts or reach an out-of-court settlement with all its creditors.

Under the Insolvency Act, the debtor may (voluntarily) initiate insolvency proceedings under the Insolvency Act when illiquidity threatens (as defined in the Insolvency Act (see question 1)).

Upon the commencement under the Insolvency Act, the debtor is generally divested of the power to dispose of its assets. An insolvency administrator is then appointed by the court. In this context, it should, however, be noted that the Insolvency Act provides for self-administration proceedings that give the debtor the opportunity to continue to manage and administer the insolvency estate, subject to the supervision of a custodian who usually is an insolvency practitioner. However, self-administration proceedings are not designed to initiate a voluntary liquidation but rather a voluntary reorganisation (see also questions 11 and 14).

Involuntary liquidations

10 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

Insolvency proceedings can only be commenced by the presentation of an application. An application may be presented by a creditor if the creditor can establish that the debtor is unable to pay its debts as they fall due or, in the case of a legal entity or a (limited liability) partnership that has only legal entities as (general) partners, that the entity is over-indebted (as defined in the Insolvency Act (see question 1)). If the creditor's application is well founded, the insolvency court will then give the debtor an opportunity to be heard.

Upon the commencement of the insolvency proceedings, the insolvency administrator immediately takes possession of, and administers, all assets that constitute the insolvency estate. Moreover, the debtor's management will be subject to a positive duty to provide information.

Once the administrator has taken possession of the debtor's assets, he or she is required to prepare a list of the assets comprising the insolvency estate, in which the value of each object is stated. The administrator must also prepare a list of all creditors whose names appear in the books and papers of the debtor, or whose identities are revealed by other statements of the debtor, or who assert their claims in the course of the proceeding. In addition, the administrator is obliged to prepare a statement of affairs. Once all the assets of the estate have been realised and the final distribution has taken place, so that the insolvency proceedings will be closed, the legal entity or partnership will be erased from the commercial register.

Voluntary reorganisations

11 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

If the debtor is a legal entity or a (limited liability) partnership with legal entities only as (general) partners, and it is established that the debtor cannot pay its debts as they fall due or the debtor is over-indebted (as defined in the Insolvency Act (see question 1)), the managing directors of the debtor are compelled by German law to apply for the commencement of insolvency proceedings without undue delay and, in any event, at the latest within three weeks from the date on which the company became insolvent. In addition, the Insolvency Act gives the debtor (but not the creditors) the ability to initiate a reorganisation when illiquidity threatens (as defined in the Insolvency Act (see question 1)). In both insolvency or pending illiquidity, the debtor can combine the application for the commencement of an insolvency proceeding with an application for self-administration proceedings and the submission of a reorganisation plan (the 'pre-packaged' plan). Furthermore, if (merely) an over-indebtedness or a threatening illiquidity (or both) has occurred (as defined in the Insolvency Act (see question 1)), section 270b of the Insolvency Act provides for an early self-administration procedure (the 'protective shield procedure') which establishes a three-month moratorium, thereby providing the debtor with protection from creditor enforcement action and enabling it to establish a reorganisation plan (see question 14).

Aside from the debtor, only the insolvency administrator is authorised to submit a reorganisation plan to the insolvency court. However, the creditors' meeting can instruct the insolvency administrator to prepare a reorganisation plan, which the insolvency administrator has to submit to the court within a reasonable time. The creditors' committee, if one has been appointed, the works council, the spokespersons' committee of the managerial employees, and the debtor, also have an advisory role in the preparation of the plan by the administrator.

Involuntary reorganisations

12 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

As described above, insolvency proceedings may be commenced by a creditor on presentation of an application if it can demonstrate that the debtor is insolvent. An individual creditor does not have authority to submit a reorganisation plan. The creditors' meeting, however, may instruct the insolvency administrator to produce a reorganisation plan. If each class of creditors accepts the plan, and if the insolvency court confirms the plan, it will then come into effect.

Mandatory commencement of insolvency proceedings

13 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

Each managing director, or each member of the management board, of a legal entity (limited liability company, stock corporation, etc), a (limited liability) partnership that has solely legal entities as (general) partners, or an unincorporated company is obliged to file an application for the commencement of insolvency proceedings without undue delay and, in any event, at the latest within three weeks after the date on which the company has become illiquid or over-indebted (as defined in the Insolvency Act (see question 1)). The managing directors are not obliged to apply for the commencement of insolvency proceedings immediately if they can reasonably expect that the illiquidity or over-indebtedness will be remedied within three weeks. However, each managing director is obliged to apply for the commencement of insolvency proceedings whenever it becomes clear that this reasonable expectation will not materialise. This is mandatorily deemed to be the case after the three weeks have lapsed.

Non-compliance with the obligation to apply for insolvency proceedings as described above will expose the managing directors to a personal liability towards the company or its creditors for damages resulting from the delayed initiation of the insolvency proceedings (see question 41). Furthermore, non-compliance with such obligation is an offence under German criminal law, which is punishable with a prison term of up to three years, or a fine.

Furthermore, each managing director or each member of a management board is under a duty to immediately assess the financial situation of the company if there are indications that the company might become unable to pay its debts when they fall due or the company's total liabilities (including accruals) might exceed its total assets.

The obligation to file an application for the commencement of insolvency proceedings does not only apply to the managing directors or management board members of German entities, but also to the corresponding legal representatives of foreign companies that have their centre of main interests (COMI) in Germany.

Furthermore, each shareholder of a limited liability company is obliged to file for insolvency proceedings if:

- the company has become unable to meet its payment obligations or is over-indebted (or both); and
- the company does not have, or no longer has, a managing director.

The same applies to each member of the supervisory board of a stock corporation if the stock corporation does not have, or no longer has, a management board. Non-compliance with these obligations is an offence under German criminal law, which is punishable with a prison term of up to three years, or a fine, unless the shareholder is not aware of the company's illiquidity, over-indebtedness or that the company is without management.

In addition to personal and criminal liability, if a company carries on business while insolvent, certain transactions entered into by the insolvent company might be contested by the insolvency administrator after the commencement of the insolvency proceedings (see question 39).

Doing business in reorganisations

14 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?

As stated above, in insolvency proceedings the right to manage and transfer the debtor's assets passes to the insolvency administrator after the opening of the insolvency proceeding. Therefore, if the managing directors after the opening of the insolvency proceedings transfer an object forming part of the insolvency estate (without the consent of the insolvency administrator), such transfer is legally invalid (subject to certain exceptions). Once the application to open insolvency proceedings has been filed, but before an order has been made opening the insolvency proceedings, the court may appoint a preliminary administrator. Usually, a preliminary administrator has fewer powers than an administrator, although the scope is similar and, if necessary, he or she can dispose of the debtor's assets (in which case he or she is referred to as a 'strong preliminary administrator'). However, he or she is not entitled to sell the entire enterprise or one of its businesses (see question 18). The preliminary administrator's primary role is to continue the business of the debtor. The insolvency court is authorised to order that encumbered assets that are of particular significance for a restructuring must not be released to the secured creditors by the preliminary insolvency administrator. Rather, the secured creditors are only entitled to demand compensation for the loss of value caused by the preliminary insolvency administrator's usage. Liabilities incurred by a strong preliminary administrator (ie, where he or she has been authorised to dispose of the debtor's assets) are deemed to be liabilities of the estate, provided that the insolvency proceeding will actually be opened subsequently.

As far as continued trading of the debtor's business after the opening of the insolvency proceeding is concerned, creditors who supply goods or services are paid as priority creditors of the estate. Examples of priority liabilities of the estate include:

- liabilities incurred by the administrator or otherwise as a result of the administration, disposition, sale and distribution of the insolvency estate; and
- liabilities arising after the opening of the insolvency proceeding from continuing contracts (eg, employment agreements, lease agreements), and contracts which the administrator has adopted.

As referred to in question 11, section 270 of the Insolvency Act provides that the debtor may, under the supervision of an insolvency practitioner, continue to manage the insolvency estate and dispose of assets (a process called self-administration). This is not dissimilar to the debtor-in-possession provisions of Chapter 11 of the US Bankruptcy Code. The prerequisite for the proceeding is that the insolvency court orders self-administration when the debtor applies for the opening of insolvency proceedings. The conditions for the making of such an order are:

- that the debtor has applied for the order; and
- that there are no circumstances which lead to the expectation that such an order will disadvantage creditors.

Self-administration is deemed not to be to the disadvantage of the creditors, if a preliminary creditors' committee (see question 28) unanimously approves the debtor's application.

If the reorganisation plan is successful and the debtor is to continue its business once the insolvency proceeding has come to an end, the plan may provide for the continued supervision of the debtor's performance. That supervisory role is carried out by the insolvency practitioner.

Furthermore, section 270b of the Insolvency Act provides for the protective shield procedure, which puts a moratorium in place on creditor enforcement for a limited period of time. The conditions for opening the protective shield procedure are that:

- the debtor applies for it when an over-indebtedness or a threatening illiquidity (or both) has occurred (as defined in the Insolvency Act (see question 1)); and
- the intended restructuring has reasonable prospects of success.

If these requirements are met, the insolvency court may – without opening preliminary insolvency proceedings – order the moratorium on creditor enforcement for a maximum of three months during which the debtor must, under the supervision of an insolvency practitioner, establish and present a reorganisation plan. A debtor cannot apply for the protective shield procedure if it is already illiquid.

Stays of proceedings and moratoria

15 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Pending legal proceedings

The Civil Procedure Code imposes a stay on proceedings when the court opens insolvency proceedings. If the court has appointed a strong preliminary administrator, so that the debtor is generally prevented from selling assets during this time (see question 14), then the stay of proceedings commences when the court appoints the preliminary administrator.

Once insolvency proceedings have been formally opened, the administrator is in entitled to choose whether to continue with legal proceedings initiated by the debtor pre-insolvency.

Enforcement of claims

Once insolvency proceedings have been formally opened creditors are prevented from enforcing their claims. In certain circumstances, the court could impose a stay on the initiation of enforcement of claims or suspend pending enforcement action prior to the formal opening of insolvency proceedings. Note that, as regards pending enforcement action over immoveables, only the court seized with the claim has the right to suspend such action.

Creditors cannot, in general, apply to the court to lift this moratorium on enforcement action. There are, however, exceptions. Creditors who can show that an asset does not belong to the estate because of a right of segregation may enforce their claim irrespective of the insolvency proceedings. Creditors with a right to separate satisfaction are also exempted; they may claim preferential satisfaction of their claim from the respective asset.

In respect of financial institutions that are subject to the Banking Act, the FSA may temporarily suspend transactions by and against the institution to avoid its insolvency, for example, by ordering a moratorium.

Post-filing credit

16 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

Generally, the insolvency administrator may enter into loans and other credit to secure the necessary financing for a continuation of the debtor's business. Such liabilities incurred by the administrator are treated as priority liabilities of the insolvency estate. As priority liabilities, they will be settled prior to the satisfaction of unsecured creditors, albeit only after the costs of the insolvency proceedings, which are also priority liabilities, and the secured creditors have been satisfied. If a debt is to be incurred that would significantly burden the insolvency estate, the insolvency administrator must obtain the consent of the creditors' committee or, if a creditors' committee has not been appointed, the consent of the creditors' meeting.

To enable a successful restructuring, a reorganisation plan can also give priority to creditors that either:

- make loans or give credit to the debtor or a takeover company during the period of supervision (which follows the ratification of the plan); or

- permit existing loans or credits to continue during this time.

Those liabilities are also priority liabilities. They will not only be paid prior to satisfaction of unsecured creditors already existing, but also to new creditors entering into contractual agreements with the debtor within the period of supervision, while secured creditors will still be paid first. The aggregate maximum amount of such priority credit will be fixed in the plan. Further, such preferential satisfaction requires an agreement between the debtor or takeover company and the respective creditor and written approval by the insolvency administrator.

Set-off and netting

17 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

As a general principle, claims by or against the insolvency estate existing as at the date of the opening of the insolvency proceedings may be set off against each other:

- if the claim of the creditor existed and was due and payable at the time of the opening of insolvency proceedings; and
- if the claim of the estate against which the creditor wishes to effect set-off was also existing at the time of the commencement of insolvency proceedings.

In the event that the claim or cross claim is contingent or not yet due at the date of the opening of insolvency proceedings, the set-off may only be effected once the claim becomes unconditional or due. A set-off will be excluded if the claim of the estate that is to be offset becomes unconditional or due prior to the time that the set-off can be effected by the creditor.

No set-off is permissible if:

- a creditor's claim arises after the opening of the insolvency proceedings;
- a creditor's acquires its claim from another creditor following the opening of the insolvency proceedings (even if the original creditor's claim pre-dated the insolvency);
- a creditor's acquires the right to set off by means of a voidable transaction; or
- a creditor is a debtor of the insolvency estate and has a claim which has to be satisfied from the assets of the debtor which are not affected by insolvency (eg, because of a contract entered into with the debtor who has upon the opening of insolvency proceedings no power to dispose of its assets).

These restrictions on a set-off may not affect:

- the transfer of financial collateral arrangements (as defined in section 1(17) of the Banking Act, for example, cash deposits, pledges or fiduciary transfers of securities); or
- the netting of claims under securities settlement systems (as defined in section 1(16) of the Banking Act) if the netting takes place on the day of the opening of the insolvency proceedings, at the latest.

Sale of assets

18 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Upon the opening of insolvency proceedings, which include either a reorganisation or liquidation, the insolvency administrator is entitled to sell the debtor's assets of the debtor. If the insolvency administrator intends to effect transactions of special significance to the insolvency proceedings, he requires the approval of the creditors' meeting or the creditors' assembly. In particular, such approval is necessary if the entire enterprise, or one of its businesses, is to be transferred.

In practice, most administrators aim to sell the business as a going concern by way of an asset sale as soon as possible to realise the best possible price and to preserve the greatest possible number of jobs. In general, the sale of assets is free and clear of any liability on the part of the buyer, provided that the insolvency proceedings have actually been opened. However, such asset sale does not generally affect creditors with security rights in rem to the assets. As a rule, the insolvency administrator is entitled to dispose of encumbered moveable assets that are in the possession of the debtor and subsequently pay off the secured creditors with the proceeds from the sale. In practice, the insolvency administrator usually provides to the acquirer of the debtor's business (or certain parts thereof) with a release letter from the main secured creditors confirming that the security will be released upon payment of the purchase price. Apart from this, under section 613a of the Civil Code, the sale of a business (as a whole or in part) causes all employment relationships pertaining to this business (or the respective part sold) to be transferred by operation of law to the buyer (unless the employees concerned object to the transfer of their employment).

Subject to creditors' meeting approval, the insolvency administrator is free to pursue 'stalking horse' bids in a sale procedure. In practice, however, such bids do not seem to be of major relevance as the insolvency administrator will usually aim at disposing of the debtor's business as soon as possible, so will not focus too much on preliminary 'stalking horse' bids that could considerably delay the sales procedure (and finally jeopardise the sale of the business as such). If the administrator expects that a number of parties might be interested in acquiring the debtor's business, he or she will initiate an auction process to obtain the best possible price (and preserve the likelihood of a sale in a well-ordered process).

Under the Insolvency Act, a creditor may not credit bid in the sales process (unlike in a security enforcement process initiated by creditors outside of insolvency proceedings). It is possible, however, for the administrator and the acquirer of the debtor's business, who is also creditor, to agree that the consideration owed by the acquirer is (partly) paid by way of a set-off or waiver (subject to creditors' meeting approval). If the acquirer's claims against the debtor are only unsecured insolvency claims (which will be the normal case), these claims will not be considered at nominal value, but will likely be valued at a percentage equalling the expected insolvency quota. As to assigning a claim of a (secured) creditor, there are no restrictions under the Insolvency Act. If a creditor aims to acquire the business of the debtor (ie, the insolvent company), it is, however, more likely that this will be achieved by a debt-to-equity-swap as part of an insolvency plan (see question 23).

Intellectual property assets in insolvencies

19 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

There are no specific statutory provisions dealing with intellectual property rights in insolvency. In the event of the insolvency of the licensee, the insolvency administrator has the right to continue the licence agreement under its present terms or reject its continuation (any claims for damages of the licensor for non-performance being insolvency claims see question 21). Contractual clauses providing for a right of the licensor to terminate the licence agreement upon the opening of insolvency proceedings over the estate of the licensee will, at least according to the prevailing view, be void.

In the event of the insolvency of the licensor, the different types of licences (exclusive and non-exclusive, main licences and sublicences) and intellectual property rights (patents, trademarks, copyrights, etc) need to be reviewed individually to determine whether the licensee is still the owner of a licence and authorised to use it. Generally, the administrator over the estate of the licensor has a right to opt to continue the licence agreement. In respect of an exclusive copyright main licence (for software, films, etc), the High Court of Mannheim held that the choice of non-performance resulted in the licensee's loss of the licence (judgment of 27 June 2003, 7 O 127/03).

A judgment of the Federal Supreme Court (17 November 2005, IX ZR 162/04) shows a possible way to ensure the continuous use of software by the licensee in the event of a licensor's insolvency. In that case, the licence agreement allowed both parties to terminate the agreement if the continuation of the agreement was unacceptable to one party. The agreement further provided for a transfer of the source code of the software developed by the licensor to the licensee under the condition precedent of such termination, the licensee in this event being obliged to pay a one-off compensation to the licensor. In the insolvency proceedings over the estate of the licensor, the insolvency administrator chose not to continue the licence agreement. Therefore, the licensee terminated the agreement. The court held that:

- the insolvency administrator had the right to choose not to further perform the licence agreement;
- because of this, the licensee had the right to terminate the agreement; and
- as the transfer of the source code was already effected before the commencement of insolvency proceedings (though under a condition precedent that was only fulfilled after the commencement of the insolvency proceedings), this transfer was not affected by the commencement of the insolvency proceedings and subsequent actions of the insolvency administrator.

In a recent judgment (21 October 2015, I ZR 173/14), the Federal Supreme Court also stated that, under certain circumstances, insolvency administrators shall no longer be entitled to reject or assume contracts in relation to licence buy-outs once the mutual obligations of the parties to the licence agreement have been fulfilled.

Furthermore, the *M2Trade* (I ZR 70/10 of 19 July 2012) and *Take Five* (I ZR 24/11 of 19 July 2012) judgments of the Federal Supreme Court stated that even if an (insolvent) sub-licensor loses the main licence in an insolvency proceeding over its estate, any sub-licensee will still retain its sublicence (ie, the loss of the main licence does not automatically end the sublicence). In these judgments, the Federal Supreme Court also indicated a tendency to treat all intellectual property right sublicences in the same way. Whether this will also apply to main licences remains unclear.

Personal data in insolvencies

20 Where personal information or customer data collected by an insolvent company is valuable to its reorganisation, are there any restrictions in your country on the use of that information in the insolvency or its transfer to a purchaser?

In addition to the Federal Data Protection Act, the Insolvency Act does not provide for any specific restrictions on using customer data within an insolvency proceeding. Therefore, it is not uncommon that, in particular, the customer base of an insolvent company, which often represents an asset of significant value, is sold as part of an asset deal between the insolvency administrator and a third party (see question 18 regarding asset deals). In this context, it should, however, be noted that in a recent case, the Bavarian Data Protection Authority (DPA) imposed a significant fine (a five-figure amount) on both the seller (ie, the appointed insolvency administrator) and the purchaser in connection with the sale of customer personal data. According to the DPA, customer personal data (eg, customer email addresses, phone numbers, credit card information, etc) as part of an asset deal had been transferred unlawfully (in violation the Federal Data Protection Act), since the insolvency administrator and the purchaser failed to obtain customer consent or, alternatively, give the customers an opportunity to object to the transfer of the personal data.

Rejection and disclaimer of contracts in reorganisations

21 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

Generally, any mutual contracts not having been performed by either party in full at the time of the formal opening of the insolvency proceedings become unenforceable, unless the insolvency administrator chooses to adopt the contract. The counterparty to such contract can require the insolvency administrator to decide without delay whether he adopts the contract. If he does not do so after having received such request, his option to elect a performance of the contract falls away. Any damages incurred by the other party as a result of such avoidance of contract may be filed as an ordinary, unsecured insolvency claim.

Contracts for the sale of goods by the insolvent company that are subject to retention of title remain in place upon request of the purchaser if possession of the goods was transferred to the purchaser prior to the formal commencement of the insolvency proceeding. If, on the other hand, the insolvent company prior to the opening of the proceedings has purchased goods and received possession of such goods subject to retention of title by the seller, the insolvency administrator may postpone his or her decision on the option to maintain the contract until the date of the information hearing (see question 26).

As regards contracts for the lease of real estate if the insolvent company is the tenant, the insolvency administrator may terminate the lease giving the relevant statutory notice period (irrespective of the agreed contractual term). The landlord is not entitled to terminate a contract because of insolvency of the tenant.

Employment contracts where the insolvent company is the employer may be terminated by either party with a notice period of three months irrespective of any contractual provision to the contrary. In the insolvency proceedings, employees can be made redundant with the benefit that severance payments under a social plan are capped at an aggregate maximum amount of two-and-a-half times the monthly salary per employee. However, even after the commencement of the insolvency proceedings, the Employment Protection Act still applies, which may constrain redundancies by the insolvency administrator.

In self-administrations (section 270 et seq of the Insolvency Act (see questions 11 and 14)), the provisions on the performance of mutual contracts in an insolvency scenario also apply allowing the self-administering management of the insolvent company to exercise the insolvency administrator's rights. The self-administering management is, however, supervised by an insolvency practitioner whose consent is required for certain measures.

Where an insolvency administrator (or in the event of a self-administration the debtor) breaches the aforementioned mutual contract, the other party can claim the resulting damage. Such damage claim would be an estate claim taking priority over insolvency claims (see question 31), However, if the insolvency administrator (or in the event of a self-administration the debtor) has opted for the non-performance of the contract the resulting damage may only be filed as non-preferred insolvency claim (see above).

Arbitration processes in insolvency cases

22 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

There are no statistics addressing the number of arbitration proceedings in conjunction with insolvency proceedings.

After the opening of insolvency proceedings, the debtor loses its ability to be a party to a dispute in relation to the estate; instead, the insolvency administrator will be the right party. In principle, the insolvency administrator is – subject to certain exceptions – bound by an arbitration clause agreed by the debtor pre-insolvency. However, an arbitration clause agreed by the debtor prior to the opening of insolvency proceedings does not affect indispensable rights of the insolvency administrator, so that the insolvency administrator is not bound by an arbitration clause in respect of, for instance, avoidance claims pursued by the insolvency administrator or proceedings related to the insolvency administrator's right to reject the fulfilment of a contract. Also, the insolvency administrator may refuse to submit to arbitration proceedings if there is insufficient money in the estate to cover the expenses of such proceedings. The insolvency court does not have the authority to direct the insolvency administrator to submit a dispute to arbitration. The insolvency administrator is, however, bound by an arbitration (clause) he or she has agreed with the other party involved.

Apart from the aforementioned exclusions in relation to the insolvency administrator's intrinsic rights there are no types of insolvency disputes that may not be arbitrated. Where insolvency administrator is willing to enter into an arbitration agreement in an insolvency proceeding, the consent of the creditors' committee has to be obtained.

Where the insolvency administrator rejects the claim or another creditor objects to its insertion in the insolvency table then a creditor may need to bring proceedings to have the claim recognised. This may involve having to litigate or arbitrate an underlying dispute. In such litigation or arbitration the court or tribunal will be asked to make a declaration (rather than order specific performance). If the arbitration tribunal grants a declaration that the underlying claim is valid the creditor would be permitted to be included in the insolvency table. Where the counterparty obtained an arbitral award prior to the opening of insolvency he can file such claim with the insolvency table (although the insolvency officeholder could appeal the award).

The opening of insolvency proceedings does not automatically cause arbitration proceedings to be interrupted. Whether arbitration proceedings are interrupted or not depends mainly on the procedural rules applied by the arbitral tribunal. In any case, the insolvency administrator must have the chance to be heard in the arbitration proceedings. Otherwise, the arbitration award will not be recognised by German (insolvency) courts.

Successful reorganisations

23 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

The Insolvency Act places very few restrictions on what may be included in a reorganisation plan (such plan is called an 'insolvency plan' in Germany). By approving a plan, the parties can, inter alia, agree to deviate from the statutory rules on the disposition of the debtor's assets and the distribution of proceeds. The plan must describe the proposed measures for reorganising the debtor and how the plan affects the rights of creditors. Typically, a plan will contain provisions for a partial waiver of claims or for deferred payments. It will also usually set out the likely outcomes for creditors in a liquidation and a reorganisation of the business, so that the creditors can evaluate for themselves the (financial) advantages of a reorganisation.

The insolvency plan must separate creditors into classes. In particular, it must distinguish between secured and unsecured creditors. The plan must be approved by each class of creditor. A class of creditors accepts the plan if a majority in number and majority in value in that class vote in favour. It is then up to the court to decide whether to confirm the plan.

Furthermore, creditors who have not filed their claims with the insolvency practitioner and had them included on the official table are also bound by the measures approved through the insolvency plan. Such creditors will be treated as creditors of the appropriate class if they assert a claim against the debtor after the insolvency proceedings have been terminated (see also question 23).

As the insolvency plan can provide for the disposition of the debtor's assets, it may create releases by the debtor in favour of third parties (eg, releasing the management, advisers or lenders of the debtor company from a potential liability). Such releases become effective upon the creditors' consent to and the insolvency court's approval of the insolvency plan.

Furthermore, an insolvency plan may provide for all types of (restructuring) measures permissible under corporate law, especially a debt-to-equity swap. Where a debt-for-equity swap is planned, the shareholders need to vote on the insolvency plan in addition to the creditors. Shareholders will form a separate voting class. A class of shareholders accepts the plan if a majority in value in that class votes in favour of the plan. As under the German corporate law, this majority is sufficient here even without a majority in number.

As regards a debt-to-equity swap, each creditor who is to acquire an equity participation must consent. It is not sufficient that the class has been consulted, ie, it is not possible to force a lender to convert a loan into equity.

Expedited reorganisations

24 Do procedures exist for expedited reorganisations?

As stated above, the debtor is entitled to file an application for the opening of insolvency proceedings when illiquidity is threatened. At the same time, the debtor can apply for self-administration, which would allow the debtor to continue manage the insolvency estate under supervision, and submit an insolvency plan for a reorganisation of the business (a 'pre-packaged' plan (see question 24)). In practice, a pre-packaged plan will often be discussed with the debtor's main creditors before it is filed to ensure that they will not oppose it once insolvency proceedings have been initiated.

Unsuccessful reorganisations

25 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

A proposed insolvency plan must first be considered by the insolvency court. The insolvency court will reject the plan if:

- the formalities with regard to the authority to submit the plan and with regard to its contents – especially regarding class constitution – have not been observed;
- a plan submitted by the debtor clearly has no chance of being accepted by the creditors or confirmed by the court; or
- the claims to which the participants are entitled by the plan can obviously not be satisfied.

If the plan is not rejected on any of these grounds, the insolvency court will set a date for a hearing at which the insolvency plan and the creditors' voting rights can be discussed and the plan will be voted on (the 'hearing for discussion and voting'). Each class of creditors will vote separately on the plan. A plan will be accepted if each class of creditors accepts the plan by a majority in number and value. A class of shareholders accepts the plan if a majority in value in that class votes in favour.

Even if the required majority is not attained, the consent of a voting group is deemed to be given, if:

- the members of that group are not disadvantaged to a greater extent than they would be on the liquidation of the debtor's business and a disposal of its assets by the administrator;
- the members of that group have a reasonable share of the economic value that was to accrue to the participants in the plan; and
- the majority of the other voting groups have consented to the plan.

Following the acceptance of the plan by the creditors and shareholders the plan must be ratified by the insolvency court. The insolvency court will not ratify the plan if, inter alia, acceptance of the plan by the creditors (and shareholders) was obtained in a wrongful manner, including as a result of, but not limited to, preferential treatment of a creditor.

Furthermore, the court may refuse to ratify the plan if a creditor (or shareholder) successfully objects to and/or appeals the plan (see question 30).

Generally, a default by the debtor in performing an approved plan does not affect the validity of the plan. However, in the event that claims of creditors are deferred or partially waived as part of the plan, that deferment or waiver ceases to bind that creditor if the debtor falls into significant arrears in the performance of the plan. The debtor will be deemed to have fallen into 'significant arrears' if it fails to pay a due liability despite the creditor making a written demand and setting a minimum period of two weeks for payment.

Insolvency processes

26 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

In principle, all decisions of the insolvency court require notice to all the persons affected. Notwithstanding this, public notifications are sufficient for proof of service on all parties, even where the Insolvency Act provides for personal service. Thus, creditors should pay attention to all public notifications issued by the insolvency court and keep in contact with it.

The creditors have a right to be informed by the insolvency administrator about the affairs of the insolvency estate. The insolvency administrator will usually fulfil his or her duty to provide information at creditor meetings (in particular the information hearing, see below) by giving a detailed report on the financial situation of the debtor, the reasons for the insolvency, the prospects of a successful restructuring, the feasibility of an insolvency plan, the impacts on the satisfaction of creditors and on measures already taken by the administrator prior to the meeting.

With regard to meetings, a creditors' meeting can only be called by the insolvency court. The most important creditors' meetings are:

- information hearing – at this first meeting, the creditors mainly resolve, based upon a report by the administrator, whether to continue or partially or completely shut down the debtor's business. The creditors also resolve whether creditors' committee should be established, the approval of which would be required before certain measures can be taken by the administrator, for example, significant transactions;
- examination hearing – at this meeting, the registered claims are examined;
- hearing for discussion and voting – at this meeting, an insolvency plan and the creditors' voting rights are discussed and the plan is voted on; and
- final hearing – the purpose of this meeting is for a discussion of the administrator's final statement of fees, the raising of any objections against the final list of creditors and a decision by the creditors as to the assets of the insolvency estate that cannot be realised. The insolvency court also decides on the final distribution.

When the insolvency court makes the order opening the insolvency proceeding, it also sets dates for the information hearing and the examination hearing, which can take place on the same day.

Under the German Insolvency Act, an insolvency plan cannot create a release of liabilities owed by third parties to the creditors as insolvency plans may only govern (restructuring) measures in relation to creditors and shareholders of the insolvent entity.

Moreover, it is explicitly regulated that an insolvency plan may not affect the rights entitling creditors of insolvency proceedings against a debtor's co-obligors and guarantors (section 254(2) of the German Insolvency Act). In practice, this often complicates the restructuring of a corporate group if the parent company is insolvent and its subsidiaries are co-obligors or collateral providers, or both.

However, an insolvency plan may create releases by the debtor in favour of third parties (eg, releasing the management, advisers or lenders of the debtor company from a potential liability) (see question 23).

Enforcement of estate's rights

27 If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

Once insolvency proceedings have been opened, only the insolvency administrator may pursue claims belonging to the estate. The insolvency administrator cannot authorise a creditor to pursue a claim. In certain cases, the insolvency administrator may authorise the debtor or, respectively, its representatives to pursue a claim in court; however, this would not be a solution if the estate is insufficient to pursue the claim. Legal aid is available to an insolvency administrator, provided that:

- the costs of the lawsuit are not covered by the estate;
- the advancement of the costs by those who have an economic interest in the success of the lawsuit is unacceptable to them;
- the lawsuit has adequate chances of success; and
- the pursuit of the claim is not arbitrary.

Thus, no legal aid will be granted if (certain) creditors are able to advance the costs and if such creditors benefit from the lawsuit, because of a substantial increase of their quota. In many cases, the granting of legal aid for a lawsuit of the insolvency estate is denied, because there are creditors who would benefit from the lawsuit and who could advance the costs of the lawsuit, but are unwilling to do so. In any case, the insolvency administrator is free to enter into a loan to finance the costs of the lawsuit. The repayment obligation of the loan would be an estate claim taking priority over ordinary unsecured insolvency claims (see question 33).

Creditor representation

28 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

The insolvency court is generally obliged to appoint a preliminary creditors' committee in conjunction with the opening of preliminary insolvency proceedings, if the debtor meets two of the three following thresholds:

- balance sheet total of at least €6 million;
- annual turnover of at least €12 million; and
- at least 50 full-time employees.

In all other cases, the insolvency court may appoint a preliminary creditors' committee upon request of the debtor, the preliminary insolvency administrator or a creditor. The preliminary creditors' committee can require the insolvency court to appoint a certain independent person as preliminary insolvency administrator and has the right to suspend an early self-administration procedure (see question 14).

In the first creditors' meeting, the creditors will have to decide whether the preliminary creditors' committee is to be maintained and, if so, whether certain members of the committee should be removed and whether additional members should be appointed. In the preliminary creditors' committee and in the final creditors' committee, creditors with a right to separate satisfaction (see question 26), the largest insolvency claim holders, the minority creditors and the employees are to be represented. However, there are no rules on the composition of the final creditor's committee. The members of the creditors' committee are responsible for supporting and monitoring the insolvency administrator. For this purpose, the members of the creditors' committee have numerous powers and responsibilities. They must, primarily, keep themselves informed about the business of the debtor, examine the debtor's books and implement a cash audit. If the insolvency administrator intends to effect transactions of special significance, he needs the approval of the creditors' committee. In particular, such approval will be necessary if the entire enterprise, or one of its businesses, is to be transferred.

The members of the creditors' committee are entitled to adequate compensation for their function as members of the creditors' committee and to reimbursement of necessary expenses. Expenses incurred through retaining advisers will only be reimbursable if these are proportionate and necessary to properly fulfil the duties as a member of the creditors' committee.

Insolvency of corporate groups

29 In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

There are no provisions on group insolvencies (yet). German insolvency law strictly adheres to the principle 'one debtor, one estate, one procedure'. Therefore, a combination of the assets and liabilities of group companies into one pool (substantive consolidation) is not permitted. Also, a combination of the procedures (joint administration or procedural consolidation) is not possible under German insolvency law. However, provided that the same insolvency court and the same judge has jurisdiction to open the proceedings with respect to several group companies, there is a possibility to have the same insolvency administrator appointed for all proceedings, thereby assuring a factual coordination. The competent judge has discretion to appoint the same insolvency administrator for the insolvency proceedings of several group companies to optimise the coordination, or to refuse such (joint) appointments to avoid possible conflicts of interest.

Assets belonging to the insolvency estate of the German debtor may only be transferred to an insolvency estate of a debtor in another country based on either:

- a supply and delivery agreement between the two debtors that has not been terminated following the insolvency; or

- an asset sale and purchase agreement entered into by the insolvency administrators (ie, on the basis of continuing or new contractual arrangements).

It should be noted that, on 30 January 2014, the German government passed an official legislative draft bill that aims to facilitate the handling of group insolvencies ('Act on the Facilitation of the Handling of Corporate Group Insolvencies'). In essence, the draft bill intends to address the challenges of group insolvencies by introducing the following provisions:
- an optional common place of jurisdiction for the different insolvency proceedings;
- the obligation on the different insolvency courts to coordinate with each other on the appointment of one joint insolvency administrator for the group-wide insolvency proceedings;
- an obligation of the different insolvency courts, insolvency administrators and creditors' committees to cooperate; and
- coordination proceedings to further enhance the coordination between the different insolvency proceedings over group entities.

As far as cross-border insolvencies of corporate groups within the EU are concerned, please see questions 47 to 49 for more details.

Appeals

30 What are the rights of appeal from court orders made in an insolvency proceeding? Does an appellant have an automatic right of appeal or must it obtain permission to appeal? Is there a requirement to post security to proceed with an appeal and, if so, how is the amount determined?

Orders or decisions of the insolvency court can only be appealed where the Insolvency Act expressly provides for an immediate appeal (ie, there is no automatic right of appeal). Notwithstanding this, a simple appeal is possible if the decision in question is not made by the judge, but by the clerk of the court. In any case, a creditor will only be entitled to appeal if its claim is rejected or its rights are violated by the decision.

The provisions for an immediate appeal are set out in sections 6 and 4 of the Insolvency Act in connection with section 567 et seq of the Civil Procedure Code.

The time limit for filing an immediate appeal is two weeks beginning upon the pronouncement or upon the service of the judgment to be challenged. The appeal must be filed by a written notice to the insolvency court that has to decide whether it wants to grant intermediate relief.

Pursuant to section 574 et seq of the Civil Procedure Code, an appeal on points of law can be used to challenge decisions resulting from an immediate appeal. However, such appeal is only admissible if the appeal court has permitted to do so in its order following the immediate appeal. Such permission to file a complaint on points of law shall be granted by the appeal court if:
- the legal matter is fundamentally important; or
- a judgment is required for the purposes of advancing the law or for ensuring consistency of court decisions.

Neither the Insolvency Act nor the Civil Procedure Code provides for requirements to post security to proceed with an appeal.

As far as reorganisation through insolvency plans is concerned, on the application of any creditor (or shareholder), the court may refuse to ratify an insolvency plan if:
- the applicant objects to the insolvency plan by no later than the hearing for discussion and voting; and
- can demonstrate that he or she will be put in a less favourable position than he or she would have been in the absence of the insolvency plan.

Irrespective of such an application, the court shall ratify the plan if the insolvency plan provides for funds being made available for compensation in the event that a concerned party shows to the satisfaction of the court that it will be placed in a less favourable position, which is to be determined in a separate proceeding.

Furthermore, at the request of the insolvency administrator, the insolvency court may dismiss an appeal against the court order by which an insolvency plan is confirmed without delay, if it appears that the immediate effectiveness of the insolvency plan should take precedence, because the harm that would ensue on delaying implementation of the insolvency plan outweighs the losses sustained by the applicant. In such a case, the appellant will be compensated out of the insolvency estate for the losses sustained by implementation of the insolvency plan.

Claims

31 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

The order opening the insolvency proceeding, when sent to creditors or publicised, will include a notice to creditors requiring them to submit their claims to the administrator within a period of between two weeks and three months from the date of the order. It will also include a request to creditors to notify the administrator promptly if they claim to have security over the debtor's chattels or immoveable assets. The subject, nature and basis of the security right and the claim secured should also be stated.

Creditors are obliged to register their claims with the administrator in writing, stating the basis and the amount of the claim. Copies of documents supporting or evidencing the claim must be attached to the written statement by which the claim is asserted. If the amount of the claim cannot be determined exactly at the time the claim is registered, the claim has to be registered based on a fair estimate of the value as at the date of the opening of the insolvency proceeding. Claims that are subject to a condition precedent can be registered with the administrator and must be considered when proceeds are distributed. Respective amounts are, however, not distributed, but retained by the administrator either until the condition precedent is fulfilled, in which case the amount is released to the relevant insolvency creditor, or until it becomes clear that the condition precedent will not be fulfilled, in which case the proceeds are free for distribution to the other insolvency creditors. At the examination hearing, the registered claims will be examined to determine amount and ranking. In principle, claims that are registered after the expiry of the registration period can still be examined. A claim is deemed to have been admitted where no objection has been raised by either the administrator or another creditor.

The insolvency court will then prepare a table of registered claims showing which claims have been admitted and setting out the amount and the ranking of each claim. Inclusion in the table has the effect of a final judgment as far as the administrator and the creditors are concerned. Creditors who have claims which have not been objected to by the debtor may enforce such claims after termination of the insolvency proceedings by way of execution as they can under any normal executable judgment. Thus, an objection by the debtor cannot hinder the admission of a claim but may prevent the creditor from executing his claim on the basis of the entry in the table.

If a creditor's claim is disputed by the administrator or another creditor, the creditor can bring proceedings before an ordinary court for a decision as to whether its claim should be admitted.

Generally, all claims rank equally, preferential and subordinated claims being the exception. Among the subordinated claims, shareholder loans are of particular importance. All shareholder loans made by lenders holding more than 10 per cent of the shares in the borrower (ie, a company or a partnership that has no individual persons as general partners) are generally classified as subordinated insolvency claims. Furthermore, a repayment of such shareholder loan made in the year prior to the opening of insolvency proceedings will generally be voidable. Prior to an insolvency, shareholder loans may, however, be repaid, provided that such repayment is not restricted by a subordination agreement.

It should be noted that the provisions on shareholder loans should generally apply to all insolvency proceedings commencing on or after 1 November 2008. Prior to that date the far more complex rules on equity substituting shareholder loans were in force. Those were fully replaced on 1 November 2008, but in certain scenarios they are still applicable. In simple terms, the rules on equity substituting shareholder loans should still apply to insolvency proceedings commenced before 1 November 2008. Furthermore, any claims having come into existence prior to 1 November 2008 under the former provisions on equity substituting shareholder loans may have 'survived' the change of law, and may, therefore, still be relevant.

There are no specific provisions that deal with the purchase, sale or transfer of claims against the debtor and there is no general obligation to disclose such transfer of claims. However, setting off claims against the insolvency estate is not permitted if a creditor acquires his claim from another creditor after the opening of the insolvency proceedings (notwithstanding that the acquired claim may have originated prior to the opening of insolvency proceedings).

Creditors who acquire a claim at a discount are entitled to claim for its full face value (ie, they may file the full amount with the insolvency administrator).

Generally, creditors can claim interest that has accrued after the opening of insolvency proceedings. However, interest accruing on such claims from the opening of the insolvency proceedings is subordinated to other claims of insolvency creditors. They will only be paid when all other creditors' claims have been satisfied. However, they rank higher than further subordinated claims such as the costs incurred by the insolvency creditors because of their participation in the proceedings; fines, regulatory fines, coercive fines and administrative fines; claims to the debtor's gratuitous performance of a consideration; and shareholder loans (subject to certain exceptions – see question 31).

Modifying creditors' rights

32 May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

Under German insolvency law, the insolvency court has no competence to modify the priority of a creditor's claim.

Priority claims

33 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Under the Insolvency Act, in general, there are no priority claims. In particular, employee-related claims relating to a period prior to the opening of insolvency proceedings do generally not enjoy priority status.

However, employees are protected by 'insolvency money', which covers wages for a period of up to three months prior to the opening of the insolvency proceedings.

The opening of insolvency proceedings does not affect creditors with proprietary claims for the return of assets that do not belong to the insolvency estate. Secured creditors may also enjoy certain superior rights. Furthermore, claims and costs arising from transactions executed by the administrator after the opening of the insolvency proceedings attract priority status, ie, they need to be paid prior to the satisfaction of unsecured creditors, albeit after creditors with a right to separate satisfaction or a right to set off (see also question 16).

Employment-related liabilities in restructurings

34 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

Generally, the opening of insolvency proceedings over the estate of the employer does not affect the relationship with the employees. Claims of the employees against their employer that came into existence prior to the opening of insolvency proceedings are in general considered as ordinary insolvency claims with no priority; claims of the employees against their insolvent employers that come into existence after the opening of insolvency proceedings attract priority status as estate debts.

Employment contracts where the insolvent company is the employer may be terminated by either party with a notice period of three months, (irrespective of any contractual provision to the contrary or an exclusion of termination). However, even after the opening of the insolvency proceedings, the Employment Protection Act still applies, which may constrain redundancies by the insolvency administrator. The German Insolvency Act contains, a number of provisions which facilitate and accelerate consultation processes with the works council on operational changes that lead to redundancies and help to procure an effective termination of employment relationships, for example, protection from dismissal is limited in the event a list of employees to be made redundant has been agreed with the competent works council in a balance of interests or been approved by the labour law court in advance of issuing the notice letters. Where no works council exists, the redundancies will not trigger any severance payments under social plans. In the event that a works council had been established before a redundancy decision was taken, redundancies can be made during insolvency proceedings with the benefit that severance payments under a social plan are in any event capped at an aggregate maximum amount of two-and-a-half times the monthly salary per employee. For pension claims, see question 35.

Pension claims

35 What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

Employees' pension claims do not enjoy priority in insolvency proceedings unless they were secured by a specific collateral in the individual case and are thus treated preferentially compared to any other regular claim. However, pension commitments of the (insolvent) employer in relation to the employees are in general protected by the German pension insurance association. In simple terms, the German pension insurance association assumes the obligation of the insolvent employer to satisfy vested pension claims and, is in turn subrogated in the insolvency as a non-prioritised creditor.

Claims for deficiencies in an external pension plan or a pension scheme do not enjoy priority in the insolvency of an employer. Where pensions are granted through a pension fund, however, the insolvency protection via the German pension insurance association is also available to the employees in the event that the assets of the external pension fund do not suffice.

Environmental problems and liabilities

36 In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Generally, the insolvency administrator (or in the event of self-administration the debtor's management board) is responsible for fulfilling the debtor's public law obligations in the insolvency proceedings (eg, obligations resulting from environmental problems). Claims and costs arising from fulfilling such obligations attract priority status (see question 33).

However, the insolvency administrator is entitled to release objects from which public law obligations derive (eg, land) from the insolvency estate so that they become part of the debtor's assets not affected by the insolvency. In this case, the government would engage a third party to solve the environmental problems. According to case law of the Federal Administrative Court, the resulting claims of the government are either be treated as priority claims (see question 33) or as unsecured insolvency claims. This depends on the grounds of the liability:

- if there is a liability for the status of the object (eg, the owner exercises legal or actual control over the polluted site that contravenes the regulations), the government would have a priority claim;
- if there is a liability for the behaviour of the debtor as polluter prior to the opening of the insolvency proceedings (eg, a debtor causes the pollution of the site through his or her actions), the government would not have a priority claim, but an unsecured claim; and
- if there is a liability of an operator of a plant, the government would have a priority claim.

Liabilities that survive insolvency proceedings

37 Do any liabilities of a debtor survive an insolvency or a reorganisation?

Provided that the debtor is reorganised by way of an insolvency plan, debts of the debtor only survive the cessation of the insolvency proceedings if and to the extent they are specified in the insolvency plan.

This also applies for creditors who have not filed their claims with the insolvency practitioner and had them included on the official table. Such creditors are bound by the measures approved through the insolvency plan and will be treated as creditors of the appropriate class of creditors if they assert a claim against the debtor after the insolvency proceedings have been terminated. If, following the termination of the insolvency proceedings, any enforcement by these creditors jeopardises the enforcement of the insolvency plan, the insolvency court may, upon a request by the debtor, entirely or in part unwind an enforcement or deny it for a maximum of three years. Moreover, any such claims made by these creditors shall become statute-barred after one year.

A third party that acquires the debtor's business by way of an asset deal is generally not liable for any debts of the debtor, provided that the insolvency proceedings have actually been opened. The acquirer may, however, be held liable for the clean-up costs of polluted land acquired from the insolvency estate.

On the acquisition of the debtor's business (as a whole or in part) by way of an asset deal, the employees working in the business (or the respective part thereof) transfer to the purchaser by operation of law, unless the employees concerned object to the transfer of their employment relationships (see section 613a of the Civil Code). A dismissal of employees for the sole reason of the transfer is not permitted, even if the acquisition of the business is made out of an insolvency estate. However, redundancies may still be made for operational reasons, for example, to make the reorganisation of the business possible (see sections 125 to 128 of the Insolvency Act). Furthermore, the transfer of the employment relationships by operation of law does not encompass the employees' claims and pension rights arising prior to the opening of the insolvency proceedings.

Subsequent to the termination of the – regular – insolvency proceedings (ie, without an insolvency plan), creditors may – in principle – assert their remaining claims against the debtor without any insolvency related restrictions. In this context, it should be noted however, that, once the insolvency proceedings have been completed, any legal entity or partnership will, in general, cease to exist and be removed from the commercial register.

Distributions

38 How and when are distributions made to creditors in liquidations and reorganisations?

Distributions may be made whenever there is sufficient cash in the insolvency estate. However, the administrator has to obtain the consent of the creditors' committee, if one has been appointed, before each distribution. The final distribution takes place once all the assets of the estate have been realised, but only after the consent of the insolvency court has been obtained.

Distributions pursuant to an insolvency plan are not restricted by the terms of the Insolvency Act and, therefore, payments to creditors should be consistent with what has been agreed by the creditors in the plan.

Transactions that may be annulled

39 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

The avoidance provisions are set out in sections 129 to 146 of the Insolvency Act.

Once insolvency proceedings have been opened that include either a liquidation or reorganisation, the administrator may set aside transactions which prefer one creditor over another or where there has been a fraudulent conveyance. In order to exercise the avoidance right, an informal declaration by the insolvency administrator is sufficient. Furthermore, the insolvency administrator is entitled to close a dispute by way of an out-of-court settlement. If the creditor rejects the avoidance, the insolvency administrator has to sue the creditor before the civil courts. An insider has the burden of proving that the transfer was not preferential or fraudulent. In general, an insider has a close relationship to debtor. If the debtor is a legal person or a company without legal personality, insiders are, inter alia, the members of the body representing or supervising the debtor, as well as his general partners and persons holding more than one quarter of the debtor's capital, and a person or a company that has on the basis of a comparable association with the debtor under company law or under a service contract the opportunity to become aware of the debtor's financial circumstances. Anything that was transferred, disposed of or yielded from the assets of the debtor by means of a voidable transaction has to be restored to the insolvency estate.

Furthermore, the administrator can challenge the repayment of shareholders' loans if the repayment was made within the previous year prior to the filing for the opening of insolvency proceedings (see question 31).

In addition, any security over the debtor's assets obtained by execution of a judgment in the month prior to the application to the insolvency proceedings, or subsequent to such application, will be set aside by operation of law as at the date of the opening of the insolvency proceedings.

Proceedings to annul transactions

40 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

Once insolvency proceedings have been commenced that include either a reorganisation or liquidation, only the insolvency administrator is entitled to contest transactions and payments of the insolvent company that prefer certain creditors (preferential transactions).

According to sections 129 to 146 of the Insolvency Act, certain actions (including the granting of collateral to a creditor) taken by the insolvent company and resulting in a direct or indirect reduction of the value of the insolvent estate or in a complication in the enforcement of the rights of the insolvent estates are subject to avoidance rights of the insolvency administrator if the action or actions were taken within certain time periods prior to the filing for insolvency proceedings (suspect periods). The relevant period in which transactions and payments are voidable particularly depends on the underlying motivation of the parties involved and the value of the contingent consideration, as shown by the following examples.

Pursuant to section 130 of the Insolvency Act (congruent cover), the fulfilment of a debt or the granting of collateral, or enabling a counterparty to obtain such fulfilment or collateral, may be contested if it was made:

- in the three months prior to the insolvency filing, provided that at such date the company was illiquid and the other party was aware thereof; or
- after the insolvency filing, provided that at such date the other party was aware of the company's illiquidity or of the fact that the company had filed for insolvency.

This provision enables the insolvency administrator to contest transactions of the insolvent company, irrespective of any right of a creditor to such fulfilment or such security at the time (eg, the right of a creditor to a specific security). Knowledge of circumstances indicating the state of illiquidity of the company, or of the company's application to open insolvency proceedings, is deemed equivalent to actual knowledge of the illiquidity or of the filed petition.

Section 130 of the Insolvency Act does not apply if the underlying security agreement calls for an increase of financial collateral (as defined in section 1(17) of the Banking Act, for example, cash deposits, pledges or fiduciary transfers of securities) to close the gap between the value of the collateral that has already been provided, and the value of the collateral that must be provided under the security agreement (margin collateral).

Pursuant to section 131 of the Insolvency Act (incongruent cover) the fulfilment of a debt, the granting of security the counterparty could not have claimed, or not in such way or at such a time (ie, the creditor was not entitled to claim at the time), under the existing contractual arrangements may be contested if it was made:

- in the month prior to the insolvency filing or after such filing;
- in the second or third month prior to the insolvency filing, provided that at such date the company was illiquid; or
- in the second or third month prior to the insolvency filing, provided that the other party was aware or should have been aware that the action was to the disadvantage of insolvency creditors. Knowledge

that the granting of security is to the disadvantage of other insolvency creditors will be assumed if the creditor knows, or ought to know, at the time of the granting of the collateral, that the debtor will no longer be able to satisfy all of its other creditors in the near future because of the existing financial crisis.

Pursuant to section 133(1) of the Insolvency Act (legal acts wilfully disadvantaging the insolvency creditors), any legal actions taken by a debtor within the 10 years prior to the insolvency filing can be contested by the insolvency administrator, provided that the action was taken by the debtor with the intent of disadvantaging its creditors and the counterparty was aware that the debtor intended to disadvantage its creditors. Knowledge of the debtor's intention will be presumed if the counterparty was aware of the debtor's imminent illiquidity and of the disadvantageous effect of the action on the other creditors. An intention of a debtor to disadvantage its creditors does not require an actual desire of the debtor to disadvantage them. Rather, it will suffice that the debtor recognises that the satisfaction of, or the granting of security to, one creditor can cause disadvantages to its other creditors, in particular reducing the likelihood that its other creditors can be paid (whether in whole or in part) out of the remaining assets.

If no insolvency proceedings have been initiated, transactions and payments of the company may be contested by creditors under the Voidance Act, which provides rights for creditors similar to those of an insolvency administrator in insolvency proceedings.

On 29 September 2015, the German Federal Ministry of Justice issued a (revised) draft reform act on insolvency avoidance law (see Update and trends).

Directors and officers

41 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

The potential for (personal) liability is mainly a risk for the managing directors of a German limited liability company and the members of the management board of a stock corporation. They may have a liability to third parties and the company itself.

In principle, the managing directors of a German limited liability company and the members of the management board of a stock corporation are not liable to third parties for obligations owed by their companies. If they act in their capacity as corporate directors, only the company can be held liable for their actions. Personal liability of a managing director or a management board member can only arise in a few exceptional cases.

Liability to third parties generally

Managing directors can be held liable, jointly with the company, for a defective product if the defectiveness results from insufficient supervision or organisation of the production and monitoring process.

Whenever the company is insolvent (illiquid or over-indebted (see question 1)), the managing directors and the management board members have a duty to apply for the opening of insolvency proceedings without delay, but in no event later than three weeks after the date the company became insolvent. If they do not comply with this duty, they can be held liable for damages resulting from the delayed initiation of insolvency proceedings, and may also be liable for a fine or prison sentence of up to three years. Damage claims for the delayed initiation of insolvency proceedings can be asserted by the insolvency administrator (if the underlying contract, from which the claim of a creditor against the debtor results, was concluded prior to the insolvency of the company) or by the creditors (if the underlying contract was concluded after the insolvency of the company, but before insolvency proceedings were actually initiated).

Liability towards the company

The managing directors of a German limited liability company and the members of the management board of a stock corporation are required to exercise the diligence expected of a responsible businessman in the conduct of the affairs of the company. If they fail to do so, they will be jointly and severally liable to the company for any resulting damage. The obligation to exercise the diligence expected of a responsible businessman also includes the duty, if a crisis threatens, to consider all possible remedial steps and, as far as possible, to initiate such measures.

They are required to call a shareholders' meeting if it appears to be in the best interests of the company. A special meeting is required to be called without undue delay if it appears from the annual balance sheet, or from a balance sheet prepared during the fiscal year, that half or more of the share capital has been eroded. A managing director who fails to notify the shareholders in these circumstances may be liable to a prison term of up to three years or a fine.

Whenever the company is insolvent, the managing directors and the management board members have to ensure that the company generally ceases to make payments, unless the payments are consistent with the due care of a prudent businessman (which may, in particular, be the case if the respective payments are essential to uphold the business of the company). Accordingly, they can be held personally liable for payments that result in a reduction of the insolvent estate. In addition, they may also be held personally liable for payments to a shareholder that resulted in the illiquidity of the company, unless such payments were consistent with the due care of a prudent businessman. However, such damage claims are to be asserted by the insolvency administrator in favour of the insolvency estate and, thus, the creditors of the company.

Apart from this, a managing director may also be liable for pre-insolvency actions that are inconsistent with an orderly management of affairs leading to a reduction of the (insolvency) estate. For instance, a prison term of up to five years or a fine may be imposed upon a managing director, who, in the event of over-indebtedness or an impending or actual illiquidity of the company:

- conceals or removes or, in a manner inconsistent with the requirements of an orderly management of affairs, destroys, damages, or renders useless parts of the estate that would belong to the insolvency estate in the event of the institution of insolvency proceedings;
- fails to keep commercial books that he or she is obligated to keep under the law, or keeps or changes such books, in a manner that makes the view of the financial status more difficult; or
- contrary to the requirements of commercial law, prepares balance sheets in a manner that makes the assessment of the financial status more difficult.

A prison term of up to two years or a fine may be imposed upon a managing director who, knowing the illiquidity of the company, grants to a creditor a security or satisfies a debt to which it is not entitled or not entitled in such form or not entitled at such time, and thereby intentionally or knowingly prefers it over other creditors (see question 39).

In principle, these offences are only actionable if the company has stopped its payments, or if insolvency proceedings have been instituted, or if the application for the institution of insolvency proceedings has been rejected for lack of funds.

According to section 69 of the General Tax Code, a personal liability can arise for tax liabilities of the company, provided that such taxes have intentionally or negligently not been paid.

The managing directors can also be personally responsible for financial damages relating to fraud (section 263 of the Criminal Code), breach of trust (section 266 of the Criminal Code) and withholding and embezzlement of the employees' contributions to the social insurance (section 266a of the Criminal Code).

Groups of companies

42 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

In principle, neither the parent nor affiliated companies can be held liable for the liabilities of subsidiaries or affiliates, unless they have given guarantees or security for the debtor's liabilities. Generally, only the (insolvent) limited liability company is liable to fulfil its obligations unless explicitly agreed otherwise between the shareholder and the company (eg, by entering into a profit and loss transfer agreement) or the shareholder and affiliated companies with the relevant creditors (eg, by providing a guarantee), or both. There is, however, case law on 'piercing the corporate veil', for example, in cases of substantial undercapitalisation of the company or a misuse of the corporate form. The most important category of this case law encompasses capital maintenance requirements: 'measures of fundamental impairment'. This means that a shareholder must not withdraw the company's assets required for the ordinary course of business, thereby accepting a possible impairment of the company's creditors. In the event of a measure of fundamental impairment, the shareholders – and even the shareholders of such shareholders – can be held personally liable by the insolvency administrator in an unlimited way.

At present, German insolvency law does not specifically address corporate groups and is instead dominated by the principle of 'one entity, one estate, one insolvency process'. Therefore, a court cannot order a distribution of group company assets pro rata without regard to the assets of the individual corporate entities involved.

In the course of the ongoing reform of German Insolvency law, the German Federal Ministry of Justice has issued a draft Act on the Facilitation of the Handling of Corporate Group Insolvencies. This draft bill addresses the current lack of coordination between parallel insolvency proceedings of group companies (see question 29). It does, however, not offer a consolidation of the individual group insolvency proceedings. The draft also contains an explicit rejection of the substantive consolidation of assets and liabilities of group companies.

Insider claims

43 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

Repayment claims under shareholder loans and claims resulting from legal actions that are economically comparable to a shareholder loan will generally be classified as subordinated insolvency claims. Also, transactions made by the debtor with insiders or non-arm's-length creditors prior to the opening of insolvency proceedings can regularly be more easily contested, since the German Insolvency Act contains specific avoidance provisions on transactions with related parties (see sections 133(2) and 138 of the German Insolvency Act) and turns partially around the burden of proof to their disadvantage (see sections 130(3), 131(3), 132(3) and 138 of the German Insolvency Act (see questions 39 and 40)).

Creditors' enforcement

44 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

The court order opening insolvency proceedings imposes an automatic stay on unsecured creditors initiating or continuing actions against the company. Unsecured creditors can no longer enforce their rights in legal proceedings outside the insolvency proceedings.

The Insolvency Act does not impose an automatic stay on the enforcement by secured creditors. Creditors, who claim that an asset does not belong to the estate because of a right of segregation, including retention of title creditors are free to enforce their rights against the company. Creditors secured by charges on real estate may enforce such charges irrespective of the insolvency proceeding. The administrator may also initiate such enforcement proceedings, for example, by selling real estate in an auction and paying the proceeds to the security holder. Hence, the creditor and the administrator are both equally and independently entitled to enforcement with respect to real estate.

Creditors with a security interest in moveable property will mainly be prevented from enforcement, which may then only be initiated by the administrator. Moveable assets that are subject to security held by creditors and receivables, which have been assigned for security purposes, will generally be sold by the administrator free and clear of the security and the proceeds of such sale will be paid to the holders of such security, less a handling fee. This shall not affect financial collateral (as defined in section 1(17) of the Banking Act, for example, cash deposits, pledges or fiduciary transfers of securities) and collateral granted to the participant of a securities settlement system (as defined in section 1(16) of the Banking Act). The administrator is not entitled to enforcement if the creditor is still in possession of the moveable asset; in this case the creditor's enforcement right remains unaffected by the opening of the insolvency proceedings.

Corporate procedures

45 Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

German corporate law contains procedures for the dissolution and liquidation of a corporation, which cannot easily be summarised. The cases in which the company may or must be dissolved are set out in the relevant laws. These laws specify additional reasons other than insolvency for the dissolution of the company. At any time, the shareholders' meeting can resolve, with a qualified majority of usually 75 per cent of the votes cast, to dissolve the company.

The commencement of dissolution as such does not cause the company to cease to exist as a legal entity. It merely constitutes the commencement of the company's liquidation by changing the purpose of the company. Once dissolved, the company can no longer pursue the business purpose defined in its articles. Its sole purpose becomes the liquidation of its business, that is, it has to terminate its current business transactions, discharge its obligations, collect its receivables, convert its assets into cash and distribute the liquidation proceeds, if any, to the shareholders.

Generally, the company is liquidated by its liquidators (who are appointed at the shareholders' meeting), except in the case of insolvency, where the insolvency administrator liquidates the company in accordance with the provisions of the Insolvency Act.

Conclusion of case

46 How are liquidation and reorganisation cases formally concluded?

Liquidation and reorganisation cases are formally concluded by an order of the insolvency court. As soon as the final distribution has been made, the insolvency court will make an order terminating the insolvency proceedings. As far as reorganisation cases are concerned, the insolvency court orders the termination of the insolvency proceedings as soon as the insolvency plan has been unconditionally approved (ie, an appeal against the order confirming the plan is no longer possible) and any necessary remediation measures to cure the illiquidity or over-indebtedness or both have been implemented in accordance with the insolvency plan (eg, registration of the deb-for-equity swap with the competent commercial register).

If the performance of the plan is to be supervised, an order to that effect will be made together with the order terminating the insolvency proceedings. The insolvency court will then order the termination of supervision when:

- all the claims covered by the plan have been satisfied; or
- three years have elapsed since the termination of the insolvency proceedings and no application to commence a new insolvency proceeding has been filed.

International cases

47 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

As far as cross-border insolvencies within the EU are concerned, the EC Regulation on Insolvency Proceedings (Council Regulation (EC) No. 1346/2000) (the EU Insolvency Regulation), applies. On 5 June 2015, the Regulation (EU) 2015/848 replacing Council Regulation (EC) No. 1346/2000 on insolvency proceedings has been published in the Official Journal of the European Union and shall enter into force in all member states except Denmark on 26 June 2017 (the EU Recast Regulation) (see the European Union chapter). Cross-border insolvencies concerning non-EU member states are governed by German international insolvency law, which became effective on 20 March 2003. Both regulations follow the same principles.

Within the EU, the courts of the member state in which the debtor's COMI is situated will have jurisdiction to open main insolvency proceedings. Generally, foreign insolvency proceedings are recognised automatically and the German assets of the debtor will be subject to the foreign insolvency proceedings. Notwithstanding this, foreign insolvency proceedings will not be recognised if to do so would be incompatible with German public policy. If, pursuant to German international law, the courts of a non-EU member state where the proceedings were commenced do not have jurisdiction over the company, such proceedings will not be recognised in Germany.

If a debtor's COMI is located in a member state of the EU, the opening of secondary proceedings in Germany requires that the debtor has an establishment in Germany. Generally, this is also the case where insolvency proceedings of a non-member state are to be recognised in Germany. Such secondary proceedings encompass only the German assets of the debtor. If foreign insolvency proceedings have already been commenced against the debtor, proof of insolvency is not be required for the commencement of the German insolvency proceedings.

Employment relationships with employees working in Germany will still be governed by German law.

Creditors' rights in rem concerning tangible or intangible, moveable or immoveable assets that are owned by the debtor and situated in Germany shall not be affected by the commencement of foreign insolvency proceedings.

Although any avoidance is in principle subject to the law that governs the underlying insolvency proceedings, a transaction that, pursuant to the general principles on conflict of laws, is governed by German law, may only be avoided by a foreign insolvency office holder if the transaction may also be avoided pursuant to German law or is ineffective for any other reason.

Foreign creditors are entitled to participate in German insolvency proceedings in the same way as domestic creditors. The foreign creditor is subject to the rules of the Insolvency Act. The Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation of the European Parliament and the Council No 1215/2012 (the Brussels Regulation recast) is also relevant in relation to recognition of foreign proceedings (see the European Union chapter).

Germany has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

COMI

48 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The EC Regulation does not contain a definition of 'COMI' but the recitals to it state that the COMI should correspond to the place where the debtor conducts the administration of his or her interests on a regular basis and is therefore ascertainable by third parties. The EC Regulation applies the concept of COMI to each individual debtor and not to a group of companies – which can all have individual COMIs.

In the case of *Interedil* (*Interedil Srl v Fallimento Interedil Srl and Intese Gestione Crediti SpA* (C-396/09)) the ECJ confirmed that COMI must be interpreted in a uniform way in EU member states and by reference to EU law and not national laws. Where a company's registered office and place of central administration are in the same jurisdiction, the registered office presumption set out in the recitals to the EC Regulation cannot be rebutted. Where a company's central administration is not in the same place as its registered office, a comprehensive assessment of all relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's central administration is located in another EU member state.

Factors that have been held to be relevant to determine a debtor's COMI (in addition to the rebuttable registered office presumption) are: location of internal accounting functions and treasury management, governing law of main contracts and location of business relations with clients, location of lenders and location of restructuring negotiations with creditors, location of human resources functions and employees as well as location of purchasing and contract pricing and strategic business control, location of IT systems, domicile of directors, location of board meetings and general supervision.

The rebuttable presumption that a company's COMI is where its registered office is located has been slightly modified in the EU Recast Regulation, which states that it is not possible to rely on the rebuttable presumption where a debtor has moved its COMI in the preceding three months (see the European Union chapter).

As regards a corporate group of companies, there is no specific test to determine the COMI. Hence, in general, the parent company and each subsidiary of a corporate group is subject to an individual and entirely separate insolvency proceeding, often at different insolvency courts and under different administrators (see question 29). However, on 30 January 2014, the German government passed an official legislation draft bill that aims to introduce an obligation of the different insolvency courts, insolvency administrators and creditors' committees to cooperate in insolvency proceedings over group entities (see question 29). This draft would introduce – in addition to the venue at each individual debtor's COMI that remains in force – a uniform venue for all companies of the same group (which have their COMI in Germany), providing that one of the debtor companies (or its insolvency administrator) must request such a uniform venue pursuant to proposed section 3a Insolvency Act. The uniform venue constitutes in this case the COMI of the company requesting such uniform venue.

Cross-border cooperation

49 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

Generally, German insolvency law allows for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators.

According to article 16 of the EU Insolvency Regulation, any judgment opening insolvency proceedings handed down by a court of a member state which has jurisdiction pursuant to article 3 of the EU Insolvency Regulation (see question 48) shall be recognised in all the other member states from the time that it becomes effective in the state of the opening of proceedings. The judgment opening the proceedings shall, with no further formalities, produce the same effects in any other member state as under this law of the state of the opening of proceedings, unless the EU Insolvency Regulation provides otherwise. However, according to article 26 of the EU Insolvency Regulation, any member state may refuse to recognise insolvency proceedings opened in another member state or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that state's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual (*ordre public*).

The concept of an automatic recognition is similar reflected in the Insolvency Act governing international insolvency law for non-EU members. According to section 343 of the Insolvency Act, the opening of foreign insolvency proceedings shall be recognised. However, this shall not apply if the courts of the state of the opening of proceedings do not have jurisdiction in accordance with German law or where recognition leads to a result which is manifestly incompatible with major principles of German law, in particular where it is incompatible with basic rights.

As regards the cooperation between domestic and foreign courts and domestic and foreign insolvency administrators, there are only very few statutory provisions governing such cooperation. According to article 31 of the EU Insolvency Regulation, the administrators of main and secondary proceedings shall exchange all relevant information and shall generally cooperate with each other. The concept of article 31 of the EU Insolvency Regulation is reflected in section 357 of the Insolvency Act governing international insolvency law for non-EU members. Under article 31 of the EU Insolvency Regulation or section 357 of the Insolvency Act, the German administrator is obliged to share all relevant information and documentation with a foreign administrator in order to facilitate an effective and smooth process and the best possible satisfaction of creditors in the insolvency procedures. This would, inter alia, encompass the sharing of information on the insolvency estate, court actions, opportunities to realise the insolvency estate, the registration of claims and voidance rights.

Update and trends

During the past year, a hot topic was the restructuring of Germany-based companies by using an English law scheme of arrangement. Between 2010 and 2014, German companies used English law schemes of arrangements successfully to implement financial restructurings and to avoid going into German insolvency proceedings (*Tele Columbus* (2010), *Rodenstock* (2011), *Primacom* (2012) and *Apcoa* (2014)). In the latter case, German-law-governed finance documents were changed to provide for English governed law and for the creditors to submit to the English courts' jurisdiction.

In a number of cases, already the (announced) intention of German companies to use and/or prepare a scheme of arrangement has apparently helped to achieve a consensual solution for the restructuring of financial debts with creditors (eg, *Scholz* (2015/2016), *HC Starck* (2015)).

Schemes of arrangement are (still) in competition with the restructuring measures provided under German insolvency law that, as a consequence of the 'ESUG' (the Further Facilitation of Restructuring Businesses Act), provides, inter alia, for the possibility of a debt-to-equity-swap as part of an insolvency plan, including the option to cram down dissenting shareholders. These restructuring measures have been well received by practitioners as a number of prominent cases have already demonstrated (eg, *Pfleiderer AG* (2012) and *IVG Immobilien AG* (2014)). Whether the outcome of the Brexit vote will make a difference to the number of German companies utilising an English law scheme of arrangement will need to be seen in due course.

A further hot topic relates to the financial restructuring of outstanding bonds under the German Bond Act 2009. Over the past years, a large number of *Mittelstandsanleihen* (mid cap-bonds), which had been increasingly used as an alternative to bank credits, had to be refinanced and/or restructured. Under the German Bond Act 2009, which has replaced the Bond Act dating back to 1899, a bond may be modified (eg, in respect of principal or value) by a majority resolution of the bondholders (75 per cent of the bondholders by amount present at a bondholders' meeting), if the bond provides for such modification. Thus, the Bond Act 2009 can offer an efficient out-of-court restructuring tool that has already been demonstrated in a number of cases (eg, *Solarworld* (2014), *Ekotechnika* (2015) and *Singulus* (2016)).

Against the background of the European Commission's Action Plan on Building a Capital Markets Union (see the European Union chapter), there is a broad discussion among German legislators and insolvency experts:

- whether pre-insolvency proceedings have to be introduced to fulfil the requirements envisaged by the EU or whether the existing German insolvency proceedings that have been introduced by the aforementioned ESUG in 2012 are already sufficient; and
- how such pre-insolvency proceedings should be arranged.

At this stage, it seems not unlikely that a new pre-insolvency proceeding will be introduced, especially because a large number of insolvency experts hold the view that there is a need for such a proceeding.

On 29 September 2015, the German Federal Ministry of Justice issued a revised draft reform act on insolvency avoidance law (after a first draft had been issued in March 2015). The draft aims to reduce legal uncertainty for business transactions mainly caused by the extensive interpretation of the rules by German courts in favour of insolvency administrators. The current legal debate focuses on the insolvency administrator's right to rescind agreements for instalment payments concluded up to a period of 10 years before the application has been filed, provided that the debtor is at least in a state of imminent insolvency and the creditor is aware of this by virtue of external circumstances (see questions 39 and 40). The draft bill proposes to limit the right to set aside legal acts wilfully disadvantaging the insolvency creditors by reducing the period for contesting any payments from 10 to four years.

Furthermore, congruent transactions of the debtor (ie, payments or the provision of collateral by the debtor that the creditor had a right to receive) shall only be voidable if:

- the debtor acts knowing that insolvency is not only imminent but has already occurred; and
- the creditor is aware of this.

Besides, the draft bill provides for privileged treatment of payments by the debtor deriving from an executory title against the debtor obtained in a foreclosure proceeding, and sets out a new regulation on interest payments pursuant to which a debtor of an avoidance claim shall be protected against an excessive interest payment.

The draft bill is still being widely discussed in legal publications and among economists and, thus, stuck in legislative process. However, it is not unlikely that this reform will be implemented in the course of 2016–2017.

In January 2014, the German government passed an official legislative draft bill that should facilitate the handling of group insolvencies (see question 29). The intended bill has been 'pre-packed' with the draft reform act on insolvency avoidance law (mentioned above) and is therefore also in the legislative process.

The reforms to the EC Regulation on Insolvency Proceedings (Council Regulation (EC) No. 1346/2000), which will have an impact on Germany as its provisions will, once in force, be directly binding on Germany, should also be noted. For more information on these reforms, see the European Union chapter.

Although not expressly provided for in the EU Insolvency Regulation or the Insolvency Act, German insolvency administrators are also allowed to enter into protocols in order to establish a contractual framework for the conduct of the various proceedings. Depending on their contents, such protocols require approval by the German creditors' meeting or the creditors' committee.

Under the EU Insolvency Regulation and the Insolvency Act, there are no provisions governing cooperation between domestic and foreign insolvency courts. The UNCITRAL Model Law contains provisions on the cooperation of insolvency courts in international proceedings; these have, however, not been translated into EU or German law. It is undisputed, however, that such cooperation between courts is allowed and some even say that insolvency courts are obliged to cooperate according to the principles established for the cooperation of insolvency administrators. The purpose of such cooperation is, in the first place, to share information in order to avoid jurisdictional conflicts and clarify the financial position of the debtor. Such cooperation is to be handled on an informal basis without formal requests for judicial assistance. Against this background, insolvency courts are also allowed to agree on protocols in order to establish a framework for the different proceedings.

On 30 January 2014, the German government passed an official legislation draft bill that aims to introduce an obligation of the different insolvency courts, insolvency administrators and creditors' committees to cooperate in insolvency proceedings over group entities (see question 29).

New procedures with the aim of facilitating cross-border coordination and cooperation between multiple insolvency proceedings in different member states relating to members of the same group of companies have been introduced by the EU Recast Regulation (see the European Union chapter).

German insolvency courts have successfully cooperated with foreign insolvency courts and have thus avoided jurisdictional conflicts (in cases such as the insolvency of the PIN Group, where German and Luxembourg courts have been in close contact, or the insolvency of the BenQ Group, where German and Dutch courts have cooperated). There are no reported cases in which German insolvency courts refused to cooperate with foreign courts.

However, in a judgment dated 15 February 2012 (IV ZR 194/09), the German Federal Supreme Court refused to recognise an English scheme of arrangement between the UK-based insurance company Equitable Life Assurance Society (ELAS) and its creditors.

Given the fact that the particular scheme related to an insurance company and, therefore, specific insurance regulation had to be applied, it should however be noted that the court did not decide whether the Council Regulation 44/2001 (the predecessor to the Brussels Regulation recast) could be applied for schemes of arrangements concerning non-insurance companies. However, the court indicated that there were arguments to apply Council Regulation 44/2001 as scheme of arrangements were similar to judgments in the meaning of that regulation. In this connection, it should also be noted that a number of Germany-based companies have successfully used an English law scheme of arrangement during recent years (see 'Update and trends').

Cross-border insolvency protocols and joint court hearings

50 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Although German courts have dealt with several well-known cross-border insolvency cases, the German courts have not yet entered into any cross-border insolvency protocols or similar arrangements to coordinate proceedings with courts in other countries. The same applies to joint hearings with courts in other countries. German courts have, however, cooperated with foreign insolvency courts on an informal basis (see question 49).

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Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

The Italian legislation governing the liquidation, restructuring and insolvency of corporate entities is as follows:

- Royal Decree No. 267 of 16 March 1942 on Insolvency, Composition with Creditors and Compulsory Administrative Liquidation, as subsequently amended and supplemented (the Insolvency Act). Important amendments have been introduced by:
  - Law Decree No. 35 of 14 March 2005 as subsequently converted into Law No. 80 of 14 May 2005;
  - Legislative Decree No. 5 of 9 January 2006;
  - Legislative Decree No. 169 of 12 September 2007; and
  - Law Decree No. 69/2013, as subsequently converted into Law No. 98 of 9 August 2013;
- Law Decree No. 78 of 31 May 2010, as subsequently converted into Law No. 122 of 30 July 2010;
- Law Decree No. 83 of 22 June 2012, as subsequently converted into Law No. 134 of 7 August 2012 (the Development Decree);
- Legislative Decree No. 270 of 8 July 1999, governing the Extraordinary Administration (Law No. 270/1999) as amended and supplemented;
- Law No. 39 of 18 February 2004, governing the Extraordinary Administration of Large Enterprises as subsequently amended and supplemented (Law No. 39/2004);
- the Civil Code (in particular, articles 2272 to 2283, 2308 to 2312, and 2484 to 2496 for the liquidation of partnerships and companies and article 2221 for the insolvency of a commercial activity);
- Legislative Decree No. 385 of 1 September 1993, as subsequently amended and supplemented, which applies where banks and financial institutions are subject to extraordinary administration or compulsory administrative liquidation (the Banking Law);
- Law Decree No. 1 of 5 January 2015, as subsequently converted into Law No. 20 of 4 March 2015, containing urgent provisions for the conduct of companies of national strategic interest in crisis;
- Law Decree No. 83 of 27 June 2015, as subsequently converted into Law No. 132 of 6 August 2015 (Law Decree No. 83/2015);
- European Regulation No. 848 of 20 May 2015 on insolvency proceedings;
- Legislative Decree No. 180 and 181 of 16 November 2015 (Legislative Decrees No. 180/2015 and No. 181/2015), implementing the Bank Recovery and Resolution Directive of 15 May 2014 of the European Parliament and of the Council (Directive 2014/59/EU or Bank Recovery and Resolution Directive);
- Legislative Decree No. 72 of 21 April 2016 (Legislative Decree No. 72/2016), implementing the Mortgage Credit Directive of 4 February 2014 of the European Parliament and of the Council (Directive 2014/17/EU or Mortgage Credit Directive); and
- Law Decree No. 59 of 3 May 2016, as subsequently converted into Law No. 119 of 30 June 2016 (Law Decree No. 59/2016).

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

Jurisdiction over insolvency proceedings is vested in the court of first instance located where the company has its principal place of business. Any transfer of the main headquarters of the company during the year preceding the procedure for the declaration of insolvency does not affect jurisdiction. Companies whose registered office is abroad may be declared bankrupt in Italy even if they have not been declared bankrupt abroad (subject to international agreements and EU legislation), and any transfer of the registered office abroad does not preclude Italian jurisdiction if it occurs following the filing of the application for the declaration of bankruptcy by the debtor or any of the creditors, or following the application for bankruptcy by the public prosecutor. In larger regions, the court will have a specific arm dealing with insolvency matters. A supervising judge is appointed by the court and is responsible for the conduct of proceedings and for the supervision of the bankruptcy receiver. The bankruptcy receiver is appointed by the court at the same time as the court makes the declaration of insolvency. Courts cannot appoint a bankruptcy receiver who has either acted as judicial commissioner in a procedure of composition with creditors for the same debtor or joined a professional association with those who have held this position. The bankruptcy receiver must complete his or her obligations within the prescribed deadlines, under penalty of revocation.

Excluded entities and excluded assets

3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

Italian insolvency and restructuring proceedings differ from the common law liquidation and bankruptcy procedures in several respects. First, there is no general winding-up procedure for companies. Separate provisions for voluntary liquidation and insolvency are contained in the Civil Code and the Insolvency Act, respectively. It is also a distinctive feature of Italian law that a private individual who is not an entrepreneur cannot be declared bankrupt; therefore (save for the two exceptions listed below) only entrepreneurial entities as defined in the Civil Code are subject to insolvency proceedings. The two exceptions are:

- public entities and other entities (such as banks, insurance companies or other financial institutions) that carry on public services. These are subject to specific insolvency procedures such as compulsory administrative liquidation; and
- entrepreneurs who meet the following requirements:
  - they have made annual capital investments in the business (averaged over the past three years or since the beginning of the activity if less) of an amount of less than €300,000;
  - they have achieved annual gross revenues (averaged over the past three years or since the beginning of the activity if less) for an amount of less than €200,000; and
  - they have an overall amount of (both matured and non-matured) debts of less than €500,000.

The above thresholds may be updated every three years by a decree from the Ministry of Justice. Moreover, there is no declaration of bankruptcy if the overall amount of the outstanding debts stated in the pre-bankruptcy investigation papers is less than €30,000.

The following assets are generally excluded from insolvency proceedings or exempt from claims of creditors:

- items and rights of a strictly personal nature;
- maintenance, salary, pension, pay cheques and anything that the entrepreneur earns from his or her business that is required to maintain the entrepreneur and his or her family (relevant thresholds are set by the supervising judge, taking into account the personal conditions of the entrepreneur and of his or her family);
- proceeds deriving from the legal use of his or her children's assets, assets that are part of a trust fund and revenues arising therefrom; and
- items that cannot be seized by law (such as religious items, clothes, bedding, beds, dining tables, cupboards).

The insolvency proceedings also include assets that are acquired by the debtor during the proceedings, less liabilities incurred for the purchase and maintenance of the assets themselves. However, with the authorisation of the creditors' committee, the receiver may refuse to accept assets that are acquired during the insolvency proceedings if the cost required to purchase and maintain them exceeds their value.

As a general principle, creditors may not bring individual (interim or enforcement) actions in relation to assets included in the insolvency proceedings once insolvency has been declared, even in relation to debts accrued during the insolvency proceedings.

Small gifts from, and acts of, the debtor resulting from a moral duty or for purposes of public utility are excluded from claw-back actions even if they took place in the two years prior to the insolvency declaration, provided that the donation is proportionate to the donor's assets.

Public enterprises

4 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

Article 2221 of the Italian Civil Code and article 1 of the Insolvency Act exempt 'public entities' from bankruptcy, but do not exclude companies (although held by public agencies) that actually carry out a business from bankruptcy declaration. Despite this, a significant body of case law (among others: Court of Naples, 31 October 2012 and 24 October 2012; Court of Appeal of Genoa, 2 February 2012; Court of Catania, 26 March 2010) has recently stated that said companies, under certain conditions, could also qualify as 'public entities' and, thus, benefit from the exemption from bankruptcy. This case law trend is based on the principle of substance over form: a business carrying out an essential public service should meet the test of 'public entity', regardless of that fact that it is, in form, a business organisation. This interpretation is challenged by another branch of case law (Court of Appeal of Naples, 27 May 2013, 24 April 2013 and 15 July 2009) and also by the Supreme Court of Cassation (27 September 2013, No. 22209). The ruling of the Supreme Court is based on various grounds, among which: (i) the principle of substance over form is contrary to the general rule set out in article 4 of Law No. 70/1975, according to which 'any new public entity can be incorporated or acknowledged only by operation of law'; (ii) companies providing essential public services are subject to the extraordinary administration procedure of large enterprises, under specific provisions intended to ensure continuity of services – a system exempting such entities from bankruptcy but not from extraordinary administration would be unsound. The foregoing must, however, be considered in light of further recent case law (among others: Court of Nola, 30 January 2014; Court of Naples, 9 January 2014; Court of Verona, 19 December 2013) according to which the specific category of 'in house' companies should be exempted from bankruptcy. This case law tries to tie in with principles on jurisdiction for liability actions against corporate bodies of 'in-house' companies (Court of Cassation, 25 November 2013, No. 26283 and 10 March 2014, No. 5491). The Courts of Palermo and Reggio Emilia confirmed, however, that even in-house companies can be declared bankrupt if not all conditions for exemption are strictly met.

Protection for large financial institutions

5 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

As regards banking crises, Legislative Decrees No. 180/2015 and No. 181/2015 implemented the Bank Recovery and Resolution Directive by amending the Banking Law and identifying the Bank of Italy as the relevant national resolution authority.

Banks operating in Italy are required to prepare a full recovery plan that sets out the measures to be taken by those institutions for the restoration of their financial position following a significant deterioration. This will provide the resolution authority with the appropriate information to plan how the institutions' or groups' essential functions may be isolated and continued. Resolution authorities are also to be provided with powers to require an organisation to take steps to restore financial soundness or to reorganise its business.

Using the recovery plan as a basis, the resolution authority will prepare, after having consulted the European Central Bank (for those banks on which supervision is carried out jointly by the Bank of Italy and the European Central Bank), a resolution plan for each institution, setting out different options for resolving the institution in a variety of scenarios.

When an institution is failing, a resolution authority should have a harmonised minimum set of resolution tools, including:

- a sale of business tool: enabling authorities to effect a sale of part or the whole of the business without shareholder consent;
- a bridge institution tool: providing for a new institution to continue to provide essential financial services to clients of the failed institution;
- an asset-separation tool: enabling the transfer of 'bad' assets to a separate vehicle or 'bad bank'; and
- a bail-in tool: ensuring that most unsecured creditors of an institution bear appropriate losses.

Resolution powers are triggered when the competent authority, on the basis of objective tests specified by the law, determines that the institution is failing or likely to fail and there are no alternative measures that would prevent such a failure within a reasonable time frame. The resolution is chosen when the Bank of Italy verifies the existence of the public interest, namely, when the resolution is necessary and proportionate to reach one or more of the resolution objectives and the winding up of the institution under compulsory administrative liquidation would not meet those resolution objectives to the same extent. The choice of the specific resolution tool to adopt rests with the competent authority.

Other special rules on banking crises and crises of financial institutions also residually apply when the recovery and resolution procedures cannot be undertaken. These rules are set out by the Banking Law (for banks and banking groups) and the Financial Consolidated Act (for other intermediaries) apply, which provide for different proceedings depending on the seriousness of the crisis, to be assessed in light of the amount of capital losses and of the irregularities or violations of the legislative and administrative applicable rules.

If it is possible for the company to survive, the Minister for the Economy and Finance may place the company into special administration following such a proposal from the Bank of Italy. The Bank of Italy will subsequently appoint various special bodies to provisionally manage the company and, most importantly, to assess its financial situation and propose solutions in order to ensure the protection of savings.

In an urgent situation, if the conditions for placing the bank into special administration have been met, the Bank of Italy can appoint a commissioner to manage the bank for a maximum of two months (temporary management).

If the crisis is irreversible and cannot be overcome, the company will undergo a compulsory administrative liquidation ordered by the Minister for the Economy and Finance on the Bank of Italy's proposal. The Bank of Italy will appoint the liquidating bodies, which will act under its supervision.

No other regimes apart from the special administration and compulsory administrative liquidation described above are provided for large institutions, regardless of the size of the insolvent company.

Secured lending and credit (immoveables)

6 What principal types of security are taken on immoveable (real) property?

Under Italian law, loans are mainly secured by way of a mortgage over immoveables. Some types of immoveables (aircraft, vessels and motor vehicles) are subject to specific regimes applicable to the constitution, validity and enforcement of a mortgage over that type of asset.

A mortgage grants the right to appropriate the asset (even against third-party transferees) and a priority on the proceeds of the sale of the mortgaged assets.

There are three types of mortgage over immoveables:

- legal mortgage: provided for by law (eg, for the benefit of transfer of a real estate property, a security for the performance of the transferee's obligations under a transaction);
- judicial mortgage: whenever a judgment is entered against a debtor on the debtor's personal property; and
- conventional mortgage: whenever the parties agree to grant a mortgage, for example, as security for a loan. A mortgage over immoveables may only be validly constituted by notarial deed.

Mortgages are established through the registration of a mortgage deed in the property register of the place where the property is located, or in the relevant register for registered chattels. The mortgage deed must clearly identify the mortgaged property and state the exact value of the obligations secured.

Legislative Decree No. 72/2016, implementing the Mortgage Credit Directive, introduced a new contractual mechanism to ensure the enforceability of security granted by consumers to financial institutions or intermediaries in the context of:

- loans backed by mortgages over residential immoveable property; and
- loans granted for the purchase or conservation of land or buildings either existing or projected.

The Decree gives the parties the right to include a clause in the credit agreement stating that failure by the client to repay 18 monthly instalments will cause the transfer of the immoveable over which security is given (or of the proceeds of its sale) to the creditor. In any case, if the value of the collateral is higher than the amount of the existing debt, the consumer has the right to receive the exceeding amount. At the time of the conclusion of the credit agreement, the parties may also agree, by specific clause, that the transfer of the goods may extinguish the debt even if the immoveable is worth less than the outstanding debt.

Secured lending and credit (moveables)

7 What principal types of security are taken on moveable (personal) property?

Pledge

The main type of security taken over moveable property is the pledge. A pledge may be taken over any moveable property, including shares (whether listed or unlisted), patents, trademarks, businesses, book debts or bonds owned either by the debtor itself or by a third party to secure the debtor's obligations.

By executing the pledge, the pledgor transfers possession of the pledged asset to the pledgee or to a jointly appointed custodian. Possession is retained by the pledgee or the custodian until the obligations secured by the pledge have been discharged in full. Failing performance of the secured obligation, the pledged asset may be sold. Where the court consents the pledged asset may also be assigned to the pledgee in discharge of the claim.

It is essential to prove that the pledge is created in writing on a date certain at law in order to enforce the pledge against third parties or to gain priority in insolvency proceedings. The Civil Code sets out specific rules governing how the date is determined.

In the past, there has been academic debate and conflicting case law regarding the constitution and enforceability of pledges over listed shares, bonds and other financial instruments. It was not clear whether a pledge over financial instruments deposited at Monte Titoli (the Italian clearing system) or, more generally, a pledge over instruments, which could be substituted with similar instruments in kind and value, was valid and enforceable. The 1998 reforms of the financial markets and case law developments have however confirmed that such pledges are validly constituted.

Non-possessory pledge

Law Decree No. 59/2016 introduced *pegno mobiliare non possessorio*, a new form of security over moveable assets available to businesses aimed at improving businesses' access to lending and boosting growth.

Any business registered in the Companies' Register is now allowed to grant a pledge over its assets to a broad range of creditors, without losing the right to use and/or trade the assets (in contrast to what would happen for ordinary Italian pledges). Furthermore, any proceeds from the use and/or disposal of pledged assets shall automatically be subject to the same form of security without additional formalities.

In the past, under Italian law the only security interest that allowed the security giver to dispose of the secured assets was the special lien under the Italian Banking Act (see below). However, the special lien is only available to banks as a security for medium-long term loans and qualified investors as a security for medium-long term bonds. By contrast, the newly introduced non-possessory pledge can be granted to any type of creditor as a guarantee for any obligation (including those arising from short-term credit lines and future obligations related to the pursuit of the business activity, as long as they are determined or determinable and the maximum amount is indicated).

The agreement must be in writing and the pledge may be created over existing and/or future assets, to the extent they are used for the conduct of business and are sufficiently described (a general reference to a category of assets or to a total amount would suffice).

This new security must be registered with a new online register held by the Italian Tax Revenue Office and is enforceable vis-à-vis third parties as from the date of registration.

In the context of insolvency proceedings, non-possessory pledges may be enforced by the creditor only after his or her credit is admitted to the statement of liabilities as a preferential credit. The new security interest is subject to the claw-back provisions applicable to ordinary pledges.

General or special liens

Liens (both special and general) are granted by law to certain creditors.

A general lien is created upon all moveable assets of the debtor. A special lien is created over specific moveable or immoveable assets.

With a few exceptions the granting of a lien is neither dependent on the parties' agreement nor on public notification.

Liens allow the creditor to satisfy his claim in priority to other creditors, although in compliance with the rank expressly set out by law (as described below).

General liens may not be exercised if exercising the lien would prejudice third parties who have rights over the moveables concerned (except where the moveable assets have been seized by a creditor).

Special liens on moveable property may, however, be executed in priority to rights acquired by third parties over the assets concerned. Where a pledge and a special lien have been created over the same asset the pledge takes priority and the creditor with a special lien cannot enforce the lien in priority to the pledge.

Special lien under article 46 of the Banking Law

Article 46 of the Banking Law provides for a special lien created with the agreement of the parties.

The special lien is a security that may be created voluntarily on unregistered moveables (such as equipment and licences) by a company as security for medium or long-term banking loans. The main characteristic of this security is that the creation of the special lien does not require transfer of possession of the relevant asset but only a written deed.

Unsecured credit

8 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

Any unsecured creditor may, before the debtor becomes insolvent, initiate individual proceedings to enforce his rights. If certain conditions are met, a creditor may obtain a summary judgment that is immediately enforceable and may subsequently obtain an attachment order over the debtor's assets. Unsecured creditors need to participate in the insolvency or bankruptcy proceedings to enforce their rights. A request to participate must be submitted to the judge supervising the proceedings before any distribution plan is approved. Unsecured creditors' claims will rank senior to any unsecured claim submitted after the approval of the distribution plan. Where the debtor has already been declared insolvent, unsecured creditors simply file their request to participate in the insolvency proceedings and any individual proceedings commenced before such declaration lose their effect.

Voluntary liquidations

9 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

Stock corporations and limited liability companies may be voluntarily dissolved by passing a resolution in the shareholders' general meeting, on any one of the events set out below.

The events are as follows:
- expiry of the company's fixed duration as stated in the by-laws;
- achievement of (or the impossibility of achieving) the purpose for which the company was established;
- if the shareholders' meeting can no longer function or remains inactive;
- if the capital is reduced to less than the legal minimum and the shareholders have not provided for any increase;
- if there are no profits or reserves available to pay a withdrawing shareholder, and if it is impossible to reimburse the holding of the withdrawing shareholder; or
- for any other reason laid down in the by-laws.

If any of the above events occur the directors of the company may not undertake any new activity or enter into any new business. If they do so, they will be jointly and severally liable for the debts arising thereafter. A company in voluntary liquidation may still become insolvent in which case the company's directors have a duty to file a request for a declaration of insolvency.

The provisions of the Development Decree envisage that in the period running from the date on which the petition for a composition with creditors (or for the validation of a restructuring agreement: see question 11) is filed until the court validates such composition or agreement, the rules that require the company to be wound up where its corporate capital is reduced below the statutory level, as specified above, do not apply.

Involuntary liquidations

10 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

Article 5 of the Insolvency Act states that a commercial entrepreneur may be deemed insolvent when, owing to default or other circumstances, the entrepreneur is unable to pay its debts as they fall due. Normally a situation of transitional illiquidity or financial difficulty that is likely to be cured in the short term would neither compel the debtor nor give grounds to creditors for filing insolvency proceedings.

The proceedings are initiated by a judgment of the competent court rendered upon a petition filed by one or more creditors, by the debtor, or by the public prosecutor. In practice petitions are normally filed by one or more creditors.

The effects of the court making a declaration of insolvency are:
- the debtor is deprived of its business and assets, including all those assets received during the bankruptcy procedure, and is no longer entitled to manage them, unless the court expressly authorises the temporary continuation of trading (which rarely happens);
- commencement of bankruptcy proceedings results in an immediate suspension of the payments of all debts and liabilities of the debtor (all the acts, transactions, payments (made or received by the insolvent debtor) and formalities with third parties that have been carried out after the declaration of bankruptcy are not effective as regards the creditors of the debtor);
- certain payments made, securities given or transactions entered into by the debtor in a certain period before the debtor's submission to a judicial liquidation procedure (varying from six months to two years) can be set aside and clawed back if certain conditions are met;
- legal actions commenced by creditors, including uncompleted enforcement proceedings, are stayed and any execution or attachment on the assets of the insolvent debtor cannot be further pursued (save for some enforcement proceedings relating to certain mortgage loans that are subject to specific Italian registration); and
- any monetary obligation of the debtor towards each claiming creditor must be verified during the insolvency procedure.

Voluntary reorganisations

11 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

The main types of reorganisation and liquidation procedure are:
- composition with creditors;
- debt restructuring agreement;
- extraordinary administration; and
- extraordinary administration of large enterprises.

The requirements for a debtor to commence a financial reorganisation are different in relation to each of the proceedings mentioned above.

Composition with creditors

A debtor in 'crisis' (see below) may file a petition for a composition with its creditors with the local court. Also creditors, who represent at least the 10 per cent in value of the total debt, can file a concurrent petition for a composition with creditors. As a general rule, the petition must contain a proposal for an agreement with creditors and must be accompanied by a restructuring plan, a report of an expert assessing the plan's feasibility, and other documents illustrating the debtor's financial situation. The expert has to be an independent professional, appointed by the debtor, entered in the register of auditors who can be either a lawyer, a business consultant, an accountant or a professional partnership (but, in the case of a partnership, partners have to meet the professional requirements of the aforementioned practitioners). It is not a requirement for the debtor to be technically insolvent at the time of filing the proposal, it is sufficient that the debtor is in a state of 'crisis' (a situation of temporary illiquidity or financial difficulties). The debtor's proposal may provide for a wide range of arrangements, including, for instance, the assignment of assets or the attribution of shares or financial instruments to creditors (as a means of satisfying their claims) and the division of creditors into different classes, each of which may be offered different treatment. The petition is subject to the approval of the majority of the creditors representing the majority of the credits admitted to vote. If the petition provides for different classes of creditors, it will be approved if it is approved by the majority of the creditors (by value) admitted to vote in the majority of the classes. In this case, the Insolvency Act provides that the court (at the request of an opposing creditor and not ex officio) may approve the petition despite the rejection of the plan by one or more classes of creditors, if the terms of the petition allow the creditors that voted against it to be satisfied to the same extent as they would have been following a practicable alternative procedure (ie, the dissenting creditors are 'crammed down').

The debtor's proposal can provide that secured creditors are not fully repaid, provided that the secured creditor obtains at least the market value of the secured asset (this market value being the market value that could have been achieved in a liquidation sale) and does not receive worse treatment than unsecured creditors, to whom, in any case, the debtor's proposal has to guarantee the payment of at least 20 per cent of the unsecured debt. Should the proposal provide for part satisfaction of the secured creditors' claims, they will be admitted to vote for the portion of the claim that has not been satisfied. Secured creditors are also admitted to vote (notwithstanding that the debtor's proposal provides for their full satisfaction) if they waive their security.

Pursuant to the Development Decree, the debtor may also file a 'conditional' petition for a composition with its creditors, (ie, a generic petition without the restructuring plan and the other documents generally required by law), reserving its right to file a definitive proposal, plan and other documents within a certain period, which the court will set at between 60 and 120 days (with the possibility of a further extension of 60 days: see article 161 of the Insolvency Act). Within this period, the debtor may change strategy and opt to file a petition for the validation of a debt-restructuring agreement instead of filing the definitive petition for a composition with creditors.

Law Decree No. 69 of 21 June 2013, as subsequently converted into Law No. 98 of August 2013, amended certain aspects of the 'pre-composition' with creditors to prevent abuse and provides for the following:

- the debtor must deposit a list of its creditors (indicating the amount of the respective credits), together with its financial statements, when requesting to open the procedure;
- the court has the power to reduce the period to between two and six months after the initial request to deposit the remaining documentation if the debtor's activity results in it not being suitable to continue the procedure;
- the court has the power to appoint a judicial officer to monitor the debtor's management and report any breaches to the court during the procedure (such as the concealment of losses); and
- the debtor must provide reports to the court at least once a month during the procedure (it is up to the court to decide what information must be provided). Law Decree No. 83/2015 provides that the petition for a composition with creditors may also be filed by creditors in cases where the debtor's petition does not provide for the satisfaction of at least 25 per cent of unsecured creditors and as long as it is an approved proposal. The petition for a composition with creditors, whether complete or 'conditional', is published in the Companies' Register and once published:
  - creditors may not start or continue any enforcement or interim actions on the debtor's assets, nor may they acquire preferential rights (unless authorised by the court), on penalty of nullity;
  - any mortgages registered in the 90 days prior to the publication of the petition in the Companies' Register will have no effect on creditors;
  - each creditor is obliged to set off debit and credit balances with the debtor (provided that the debts arose before the submission of the petition for the composition with creditors);
  - interest ceases to accrue on creditors' claims;
  - until the order allowing the composition is issued, the debtor may carry out acts of ordinary administration and, where authorised by the court, urgent acts of extraordinary administration; and
  - the debtor may ask the court to authorise the termination or the suspension of ongoing contracts (excluding employment contracts): in this case, the other party has a claim in damages equal to the damages caused by the failure to comply with the contractual provisions.

Once the petition has been declared admissible, the court appoints an officer who monitors the directors of the company.

A composition that has been approved by a court is binding on all creditors existing before the publication of the relevant petition in the Companies' Register. However, creditors keep their rights as regards any joint obligors, and the debtor's guarantors. During the sale of assets, offers for the purchase of goods can be made not only by the debtor, but also by third parties, provided that their proposals are approved and comparable.

Restructuring agreements

Alternatively, the debtor may ask the court to validate a debt restructuring agreement executed with creditors that represent at least 60 per cent of the debtor's outstanding debts or with 75 per cent of the financial creditors representing at least 50 per cent of the debtor's outstanding debts and without prejudice to the full payment of non-financial creditors. To do so, it must file the same documentation required for the composition petition (see above), together with an expert's report attesting: the accuracy of the company's data, the feasibility of the agreement and whether the creditors not party to the agreement will be paid in full. According to the Development Decree, such suitability will have to be verified by an expert based on specific indications established by law.

The agreement is published in the Companies' Register and for 60 days from the date of the publication creditors may not start or continue any enforcement or interim actions on the debtor's assets, nor may they acquire preferential rights, unless other creditors agree. The debtor may also request a prohibition on interim or enforcement actions during the negotiations on the agreement.

Extraordinary administration

Extraordinary administration is available to companies that: employed at least 200 employees during the previous year (including those admitted to the redundancy fund), have debts equalling at least two-thirds of their assets and are insolvent but able to show serious restructuring prospects within strict time limits (to be achieved through the sale of business assets, financial restructuring or assignment of contracts).

The court is tasked with assessing the chances of achieving such restructuring. After hearing the advice of the judicial commissioner and the Ministry of Economic Development concerning the opening of the extraordinary administration procedure, the court issues a decree that places the company under the administration procedure or, if the restructuring is judged as not achievable, the court will make a bankruptcy order. The Ministry of Economic Development appoints one or three commissioners, who are primarily responsible for drafting a 'plan of reorganisation' specifying the assets to be kept as well as those to be transferred, and any possible trade structures. The execution of the plan must be authorised by the Ministry of Economic Development after hearing from a supervisory committee (which is a consultative body) appointed by the Ministry.

The main effect of the procedure is that the commissioners are only responsible for the liquidation of the company or the transfer of the company as a going concern to a purchaser, as the case may be.

Extraordinary administration of large enterprises

In response to the Parmalat collapse the Italian government amended the procedure of extraordinary administration. The amendments were intended to facilitate and expedite the restructuring and reorganisation of large insolvent companies. In the past, the economic and financial restructuring provisions set out by the extraordinary administration procedure have been little used – the preferred route being a break-up and disposal of the company's assets.

The extraordinary administration of large enterprises is available to insolvent companies with least 500 employees and an overall debt of €300 million.

The extraordinary administration of large enterprises is a procedure whereby a company is admitted to extraordinary administration and a special commissioner is appointed. The Ministry of Economic Development can admit large enterprises to extraordinary administration and appoint a special commissioner immediately upon application by the insolvent company. The court is informed of the company's application and the Ministry's decision. For companies providing public services the Prime Minister or the Ministry of Economic Development shall appoint the commissioner and may fix the conditions of the appointment, even in derogation of the applicable provisions.

The role of special commissioner can be performed by a single individual who shall:

- within 60 days of appointment (which can be extended by an additional 60 days), file with the competent court a report on the state of insolvency and the viability of the restructuring and extraordinary administration (on the basis of which the court shall declare the insolvency and adopt the ensuing measures);
- within 180 days of appointment (which can be extended by an additional 90 days), file with the Ministry of Economic Development (which has the power to approve) the following:
  - a plan for the economic and financial restructuring and reorganisation of the company or disposal of business assets for a period not exceeding two years (restructuring plan); and
  - a detailed report of the reasons underlying the insolvency of the company or the group;
- until the plan is authorised, the commissioner may request authorisation to implement those transactions (or categories of transactions) that are necessary to ensure the continuation of the business and protect the economic and commercial value of the group. Such authorisation is not required for any transaction implemented in the ordinary course of business or having a value (when considered individually) lower than €250,000; and
- if the Ministry of Economic Development does not approve the restructuring plan within 60 days from the rejection of the plan,

the company must evaluate whether it could be suitable to file an alternative plan relating to the disposal of business assets.

Should the ministry reject the plan, the competent court shall, upon hearing the commissioner, make a bankruptcy order and open judicial liquidation proceedings.

As an alternative to the procedure above, the commissioner may carry out a private negotiation for the disposal of the business concerns and assets if the purchaser guarantees to provide such public services for a certain time and complies with the relevant legal provisions. The commissioner's decision shall comply with the principles of transparency and non-discrimination governing any insolvency and restructuring procedure and the price for the dismissal shall not fall below the market value (as estimated by the Ministry of Economic Development).

Any merger transaction carried out according to the restructuring plan approved by the Ministry of Economic Development is deemed to reflect the general public interests and does not require further governmental approvals provided that it is not an abuse of a dominant position and does not have the effect of restricting competition. For six months from its admission to the restructuring procedure, the company must still comply with any legal requirements for the possession of a licence or concession necessary for the exercise of its corporate activity. If parts of the business that require a license or concession are sold, such licences and concessions are transferred to the purchaser.

If the commissioner is willing to dispose of certain business assets to protect the economic and commercial value of the group, the commissioner and the purchaser shall enter into a consultation procedure with the unions to agree on the transfer of the employees; in particular, the commissioner and the purchaser may agree to transfer only some of the employment contracts granting the possibility for employees to benefit from the redundancy fund. Any decision relating to the employee redundancy or, unemployment, will be agreed among the parties in a very short time frame, enabled by the extraordinary administration procedure of large enterprises which halves the time periods under the applicable employment laws.

In summary, the extraordinary administration of large enterprises is different to the extraordinary administration procedure in three key respects:

- it provides that the two stages are merged into one with a sole commissioner having all powers, so that the reorganisation may be pursued in a shorter time frame;
- it enhances the powers of the ministry as regards those of the court, with the former having most approval powers; and
- the commissioner may at any time apply for the avoidance of earlier detrimental corporate transactions.

The extraordinary commissioner may (within 60 days of appointment) ask the Ministry of Economic Development to extend the extraordinary administration of large enterprises to any other group company.

Finally, according to Law Decree No. 1/2015, converted into Law No. 20/2015, companies that manage at least one industrial site of strategic national interest, such as the steel-making plants of Ilva, will benefit from the extraordinary administration procedure for companies operating in essential public service sectors. In such cases, certain exceptions to the extraordinary administration procedure for companies operating in essential public service sectors apply. These include, in particular:

- if the company is already under extraordinary receivership, the application to be admitted to the procedure can be submitted by the extraordinary commissioner, who can be appointed as special commissioner in the new procedure by the Ministry of Economic Development;
- for companies providing public services and companies managing at least one industrial site of strategic national interest, the special commissioner may carry out a private negotiation not only to sell, but also to rent business concerns and assets. In such cases, and with exclusive regard to business concerns and assets included in the negotiation, the special commissioner is not required to file any of the following: (i) the aforementioned restructuring plan with the Ministry of Economic Development; (ii) the detailed report of the reasons underlying the insolvency of the company or the group with the Ministry of Economic Development; and (iii) a report on the state of insolvency and the viability of the restructuring and extraordinary administration with the competent court; and
- for 18 months (and not six, as is provided for other companies) from its admission to the restructuring procedure, any company providing public services or managing at least one industrial site of strategic national interest must still comply with any legal requirements for the possession of a licence or concession necessary for the exercise of its corporate activity. If parts of the business that require a licence or concession are sold, such licences and concessions are transferred to the purchaser.

Involuntary reorganisations

12 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

Only the extraordinary administration (as opposed to extraordinary administration of large enterprises) can be commenced by one or more creditors filing a petition. On receipt of the petition, the court, after consultation with the competent administrative authorities, initiates a procedure that:

- declares the debtor insolvent;
- appoints one or three commissioners; and
- suspends all legal proceedings commenced by creditors against the debtor.

Once insolvency has been declared and the relevant procedure has commenced, creditors or third parties may file a proposal for a composition with the court, with the aim of closing the insolvency proceedings with a reorganisation agreement with its creditors. Such agreement may envisage a restructuring of the company's debts, including through the sale of assets or other transactions. The debtor (or any company in which it has a holding or which is subject to joint control) may only file a petition a composition with creditors one year after the declaration of insolvency and within two years of the decree that enforces the final schedule of liabilities.

Mandatory commencement of insolvency proceedings

13 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

Insolvency proceedings are commenced by a judgment following a petition filed by the debtor, its creditors or a public prosecutor. When a company is insolvent or near insolvency, its directors are under a duty to avoid preferential payments and not worsen the financial position of the company. In particular, should the share capital of a company fall below the prescribed minimum threshold and the company ceases to have the statutory minimum net asset value, the directors are under a duty not to enter into new transactions and are obliged either to increase the capital or to resolve to voluntarily liquidate the company.

Breach of these duties may result in criminal liability and in personal civil liability for the loss suffered by the company (see question 41).

Transactions carried out by an insolvent company before the declaration of insolvency may be subject to a clawback action in the event they fall within the cases provided by the Insolvency Act and the Civil Code. A director who has carried out transactions falling under articles 216 and 217 of the Insolvency Act (fraudulent or simply bankruptcy) can be charged with criminal liability.

Doing business in reorganisations

14 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?

The conditions under which the debtor may carry on business during a reorganisation (and the role of the courts involved) vary according to the type of procedure, as outlined in question 11. As a general rule, in a composition with creditors, the debtor is permitted to continue trading only to the extent necessary to carry out or complete particular transactions, and thereafter only under the direction of the supervising judge and the day-to-day supervision of the commissioner. Transactions other than those in the ordinary course of business (for example, any new loans, disposals of real estate, etc) may only be made with the written consent of the supervising judge. Any third-party debts arising from such acts have priority status.

The Development Decree has introduced particular rules for compositions that are intended to facilitate the continuation of the business activities, and may implemented by selling the business as a going concern or by transferring it to another company. The same possibility is also granted to debtors filing petitions for the validation of debt restructuring agreements.

In order to carry out a composition that continues the debtor's business, the debtor must file a plan indicating the expected costs and earnings arising from the continuation of the business, the resources required and the coverage procedures. A coverage procedure is a plan showing how to meet the financial needs of the composition with creditors. In particular, it explains which are the financial resources required to enable the continuation of the activity. The plan must consider among the 'costs' the financial burdens and the eventual reimbursement of principal until the sale of the company to third parties, or, if the company is not sold, until the creditors have been satisfied. The plan must also be accompanied by an expert's report certifying that continuing the business will serve to ensure the best interests of the creditors. It is also possible to provide for a moratorium (for up to one year from the validation of the composition) covering the payment of preferential creditors (with pledges, liens or mortgages).

The debtor may also ask the court to: authorise it to take out loans with priority status (if an expert certifies that they are in the best interests of the creditors) and authorise the payment of previous debts for the provision of goods or services (if an expert states that such services are essential for the continuity of the business and are in the best interests of the company's creditors). The court may also authorise the debtor to take out loans with priority status when a 'conditional' petition for a composition with creditors has been filed and on an urgent basis without an expert's certification, once having heard from the main creditors. The same authorisation (to pay debts due for the provision of goods or services) may also be requested by debtors filing petitions for the validation of debt-restructuring agreements.

The activities carried on by the debtor during a composition with creditors (following its validation) are generally supervised by the supervising judge, the receiver and the creditors' committee who verify the company's compliance with the procedures established in the validation decree.

In both extraordinary administration and extraordinary administration of large enterprises, the ministerial decree that initiates the procedure will normally permit the company to continue its business for various reasons (including the need to protect employees' interests), whereas contracts such as leases, supply contracts or contracts that have already been executed by one of the parties are subject to the same conditions as set out in the Insolvency Act for the other insolvency procedures (ie, they may be terminated at the commissioner's or liquidator's discretion). During extraordinary administration of large enterprises, authorisations, certifications, licences, concessions and other acts or securities are to be transferred to the tenant or the purchaser in the case of the letting or sale respectively of companies and branches of companies. Furthermore, the commissioner must require the tenant or purchaser of plants to file, when submitting the offer, a business and financial plan covering investments (indicating the necessary financial resources and coverage) and outlining the strategic objectives of the group companies' production.

Following the declaration of bankruptcy the directors lose all powers of administration save for:

- the power to appeal against the declaration of the company's insolvency or other court decrees or both;
- the power to bring an action in certain circumstances against the bankruptcy receiver or the creditors' committee; and
- the power to apply to court to suspend a sale of the company's assets.

In addition, the directors will be entitled to receive a copy of the bankruptcy receiver's report and are able to bring claims in respect of this report.

Stays of proceedings and moratoria

15 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

From the date on which the insolvency was declared, no legal action can be started or continued against the insolvent party's assets and any legal proceedings that are commenced or continued are void.

There are exceptions to the prohibition in relation to tax and land credit procedures where the insolvent company is in compulsory administrative liquidation.

In a composition procedure enforcement and interim actions are blocked from the date on which the petition is published in the Companies' Registry and any judicial mortgages registered in the 90 days prior to the filing of the petition are ineffective. The same prohibition on creditors starting or continuing any legal action against the insolvent party's assets also operates where an early 'conditional' petition for a composition is filed (ie, a generic petition without a restructuring plan and the other documents required (see question 11)).

Similarly, the Insolvency Act provides that, in the case of petitions for the validation of a debt restructuring agreement, within 60 days of the agreement being published in the Companies' Register creditors are prohibited from bringing interim or enforcement actions in relation to the debtor's assets and cannot obtain priority rights, unless such rights are agreed by the other creditors.

Post-filing credit

16 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

A debtor may not manage or dispose of its assets if declared insolvent. Any transaction or payment made or received by the debtor after the declaration of insolvency is ineffective against the creditor, who is obliged to return to the insolvent estate any sums so acquired.

This principle does not apply to a composition with creditors where the debtor is not dispossessed of its assets and continues to manage its assets under the judicial commissioner's supervision.

As mentioned above (see question 11), under the Development Decree, debts arising from loans entered into as part of a composition with creditors (or validated debt restructuring agreement) have priority status.

Similarly, this provision also applies to debts arising from loans issued for the purposes of filing the petition for composition (or for validation of the debt restructuring agreements) where such loans were envisaged in the plan (or in the restructuring agreement) and the priority status is envisaged in the decree with which the court approves the petition. Moreover when the debtor files its petition for composition with creditors (or for the validation of a restructuring agreement), it may ask the court for authorisation to take out loans with priority status. In making such a request an expert must confirm that taking out the loans would be in the best interests of the company's creditors. The authorisation may also regard loans that are only identified by type and amount, even if they have not yet been the subject of negotiations.

Finally, the court may also authorise the debtor to grant pledges or mortgages to secure such loans.

Set-off and netting

17 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Creditors have a right to set off debts they owe to the debtor against claims that they have against the debtor, even though they have not expired before the declaration of insolvency.

Set-off will not take place where the creditor purchased a claim that remains unexpired after the declaration of insolvency or in the one-year period immediately prior to the declaration.

A prerequisite for the right to set-off is that the debt and credit to be set-off against each other are liquid or may be made liquid promptly and easily and are of the same nature.

The principles of set-off apply to all insolvency procedures.

Sale of assets

18 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

There are different procedures for the sale of the debtor's immoveable or moveable assets: an auction sale of immoveable assets to protect creditors' interests in bankruptcy proceedings and a private sale for moveable assets and assignment of claims. The procedures are subject to the supervision of the court and in some cases to the (non-binding) opinion of the creditors' committee.

In order to speed up the sale procedure and to guarantee the best realisable value, payment by instalments can be granted to the purchaser. Moreover, the judge can identify and utilise the best methods to determine price, publicity and award criteria for the most economically advantageous tender. The judge will order the sale by auction when, according to his evaluation, the auction price of the assets could exceed half of their market value. The judge can authorise the purchaser to pay in instalments. In this case, if asked by the purchaser, the judge can also authorise his possession of the assets. An independent, irrevocable and on demand guarantee has to be issued by a bank, an insurance company or a financial intermediary.

The transfer of a business as a going concern (or a branch thereof) implies the transfer of all those assets that are organised for the purpose of carrying out that business or that branch of the business (including real property, plants and machinery, stocks, trade receivables goodwill and contracts (including employment contracts)).

If a transaction qualifies as a transfer of business as a going concern, certain provisions of the law concerning contracts, employment, liabilities and receivables pertaining to the business become applicable. While the parties may agree to derogate from such laws in many respects they will be unable to derogate from the law in relation to certain rights of third parties (ie, employees and creditors).

The transferor remains liable to the creditors after the transfer of the business for the debts that exist at the time of the transfer, unless the creditors have given their consent to the transfer. The transferee is jointly liable along with the transferor for the debts and liabilities of the business, if and to the extent such debts and liabilities are recorded in the accounts of the transferor.

In general terms, this rule is aimed at protecting the creditors' interest, and cannot be derogated by the parties. However, according to case law the parties may contractually exclude the debts and liabilities from the transfer of the business, with the stipulation that such exclusion shall be effective only between the parties and not as regards the creditors.

The Insolvency Act and Law No. 270/1999 provide for specific rules on the matter, according to which:

- unless agreed otherwise, the transferee of a business as a going concern is not liable for the of the business debts arising before the transfer; and
- the bankruptcy receiver or commissioner may provide for the transfer of the business as a going concern or assets or receivables by way of contribution to one or more companies, with the exclusion of liability on the transferor for the liabilities arising from the carrying out of the business prior to the transfer.

According to Law No. 270/1999, the sale of a business as a going concern (or part thereof) or the sale of a group of assets of the insolvent company is made in accordance with specific provisions, pursuant to which, inter alia:

- the transferee must undertake to continue the same business activity for at least two years;
- the transferee must maintain the employment level established at the time of the transfer for at least two years. Insofar as the employees are concerned in the framework of the trade unions' consultations applicable in the of transfer the of business as a going concern (the consultations), the commissioner, purchaser and employees' representatives may agree on certain exceptions to Italian law on the protection of employees transferred by way of a transfer of business as a going concern (TUPE legislation);
- in the framework of the consultations, or after the unsuccessful conclusion of the consultation, the commissioner and the transferee may agree to transfer only parts of the businesses as a going concern with the identification of the employees in those parts of the business to be transferred to the transferee;
- the commissioner may also proceed with a disposal of assets and liabilities initiated by the insolvent company, with the exclusion of the transferor from the liabilities related to the exercise of the business prior to the disposal; and
- the existing liens and guarantees in favour of the transferor maintain their validity and rank in favour of the transferee.

Certain Italian employment provisions setting out a favourable and protective regime for employees in the event of any transfer of business concerns shall not apply to any transaction under this procedure. In particular, a derogation is made to the application of article 2112 of the Italian Civil Code, which provides that employees retain any rights arising from the employment relationship with the transferor, including the terms and conditions of the employment, and any dismissal following the transfer shall be deemed wrongful.

Likewise, under the Development Decree it is also possible to derogate from article 2112 of the Italian Civil Code where the transfer relates to a business for which a composition with creditors has commenced or a debt restructuring agreement has been validated, provided that an agreement has been reached regarding the maintenance of employment levels.

The application of the principle of the automatic transfer from the transferor to the transferee of all the employees of the business can be excluded by the transferor and transferee under certain conditions. This procedure must involve a consultation with the trade unions.

Once a sale agreement has been agreed the sale can be 'suspended' every time a better irrevocable offer is presented to the bankruptcy receiver although such an offer must be higher than the original offer by at least 10 per cent. The power of the bankruptcy receiver to suspend the sale is discretional and the bankruptcy receiver will have to assess the reliability of the offer to ensure that it has not been presented to hinder the regular sale procedure.

As regards credit bidding, although there are no provisions on the point, on the basis of general principles such offsetting does not seem to be possible because while the creditor's claim is against the bankrupt, the debt accrued by the purchase of the asset would be against the mass of creditors. Thus, since the bankrupt and the mass of creditors are separate entities, compensation in such a situation would breach the principle of par condicio creditorum.

Regarding the composition procedure the Development Decree has introduced specific rules where the composition requires the sale of the business concern or the contribution of the business concern to one or more companies (including newly incorporated companies) – known as composition with continuity of the business. In such cases, the plan filed by the debtor with the court may also envisage the sale of any assets that are not required for the company to operate and:

- the ancillary documentation for the petition for composition must describe the costs and proceeds expected from the continuation of the business, as well as the financial resources and the relevant coverage procedures; and
- the debtor must submit an expert report that certifies the continuation of the business is in the best interests of the creditors.

Finally, the rules on a composition with continuity of the business provide that contracts pending on the date on which the petition is filed may not be terminated as a result of the start of proceedings.

Intellectual property assets in insolvencies

19 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

Contractual clauses (either in the IP field or otherwise) that provide for the termination of a contract if either party is declared insolvent are ineffective. If an IP contract has not yet been executed (in full) when either party is declared insolvent, the execution of the IP contract is suspended until the bankruptcy receiver, after the authorisation of the committee of creditors, either accepts to continue of the contract on behalf of the insolvent debtor (assuming all the rights and obligations thereto), or resolves to terminate the contract. Furthermore, the counterparty can solicit the choice of the bankruptcy receiver, requesting the court to set a deadline of 60 days for such decision and on expiry of the deadline the contract is deemed to terminate.

Personal data in insolvencies

20 Where personal information or customer data collected by an insolvent company is valuable to its reorganisation, are there any restrictions in your country on the use of that information in the insolvency or its transfer to a purchaser?

The lawful use of customer data in the context of insolvency proceedings is not restricted, unless there is a change in the entity in charge of data processing or in the one that owns such data. The lawfulness of the use of customer data is assessed against the provisions of Legislative Decree No. 196 of 30 June 2003 (Legislative Decree No. 196/2003) and must be in line with the specific use for which the customers provided their consent.

In the event any such change occurs, including in case of transfer of the insolvent company to a purchaser, if the data transferred fall under certain sensitive categories identified in article 37 of Legislative Decree No. 196/2003 (eg, among others, data processed by using electronic means aimed at defining the profile or the personality, or at analysing habits or consumer choices, or at monitoring the use of electronic communications services, with the exception of technically indispensable processing to provide services to users), it is necessary to carry out some notifications related to the change in the entity that owns and manages customer data:

- before the end of the data processing, the assignor has to notify the Italian Data Protection Authority of the end of the processing and the change of the data controller; and
- before beginning the data processing, the purchaser must notify the Italian Data Protection Authority that it will take on the processing.

In any event, customers must be notified of all necessary information to be able to identify the entity or individual who owns and is in charge of the processing of their personal data. Hence, in the case of purchase of the business of the insolvent company or acquisition of the company itself it will then be necessary to inform customers that a different entity is holding their personal data. The means through which such notice is effectively given are to be determined from time to time. The Italian Data Protection Authority issued instructions for specific circumstances of transfer of data in order to simplify the process when one-by-one communications are not feasible (eg, in the event of transfer of entire business units in the banking sector).

Rejection and disclaimer of contracts in reorganisations

21 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

Composition with creditors

The debtor may request the court (while submitting a petition for a composition with creditors, or afterwards, once the order allowing the composition procedure has been issued) to authorise it to terminate pending contracts or suspend them for no more than 60 days (which may only be extended once). The contract counterparty is entitled to damages, equal to the damages that would have arisen from default: this sum will be paid not with priority, but in the same way as any other debts in accordance with the rules on the priority of claims. However, such rules do not apply to employment contracts, property lease contracts or, under certain conditions, preliminary residential property sale contracts.

There are particular rules for composition with continuity of business: in this case, any contracts pending on the date on which the petition is filed are not terminated as a result of the commencement of the procedure, even if they have been executed with the public administration, and any stipulation to the contrary will be null and void.

Bankruptcy and compulsory administrative liquidation

In bankruptcy and compulsory administrative liquidation procedures the general rule is that if an agreement has not yet been performed or has not been completely performed by both parties when one of the parties is declared bankrupt, the performance of the agreement shall, unless otherwise provided by law, be suspended until such time as the bankruptcy receiver, having been authorised by the creditors' committee, declares that he is exercising his right of subrogation and replaces the bankrupt party as party to the agreement, thereby assuming all the obligations thereunder, or that he is terminating the agreement. The contract counterparty may give the bankruptcy receiver formal notice and ask the supervising judge to set a deadline of no more than 60 days to make such a decision. If such deadline expires and no action is taken by the bankruptcy receiver, the agreement is deemed to terminate.

If the agreement is terminated, the contract counterparty is entitled to submit a creditor's claim relating to the failure to perform the agreement, but is not entitled to claim compensation for damages.

Any action for termination of the agreement brought prior to the bankruptcy against the defaulting party will take effect in respect of the bankruptcy receiver.

Contractual clauses that provide that bankruptcy constitutes a ground for termination are invalid. However, this rule does not apply to certain contracts, which are deemed terminated by law as a consequence of the commencement of any procedure.

Extraordinary administrative procedures

In extraordinary administrative procedures, the extraordinary commissioner may terminate any agreement, including contracts requiring a continuous or periodical performance that have not yet been performed or have not been completely performed by both parties on the date on which the extraordinary administration process starts. Until such time as the right of termination is exercised, the agreement will continue to be in existence.

Once the execution of the restructuring plan has been authorised, the contract counterparty may give the extraordinary commissioner 30 days' notice in which to elect to continue the contract; once such period has expired, the agreement is deemed to be terminated. Again, the general rule does not apply to employment agreements, or real property lease agreements where the extraordinary commissioner shall replace the lessor, unless agreed otherwise.

If the bankruptcy receiver elects to adopt the contract and then breaches its terms the contract counterparty has a damages claim that ranks with a higher priority than unsecured creditors but behind secured creditors. Payment of such damages – if not challenged – must however be authorised by the creditors' committee or by the court.

Arbitration processes in insolvency cases

22 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

In a composition with creditors, the company may only enter into arbitration with the prior written authorisation of the supervising judge. In compulsory administrative liquidation, the liquidator may enter into arbitration, but if the claim is of indeterminate value or exceeds

€1,032.91, it has to be authorised by the administrative body supervising the liquidation, which will do so having consulted the supervisory committee.

Arbitration, however, is rarely used in insolvency proceedings.

In insolvency proceedings, the court will allow arbitration to continue after an insolvency case is opened, but if the agreement containing an arbitration clause is terminated, the pending arbitration proceedings cannot proceed. In the event that the bankruptcy receiver replaces the debtor as a party to the agreement, the capacity to sue and be sued is transferred to the bankruptcy receiver, with the prior authorisation of the supervising judge: thus, the bankruptcy receiver is bound by the arbitration agreement. Moreover, in this case, once the arbitration panel has been informed of the insolvency, it must notify – or ask the non-insolvent party to notify – the bankruptcy receiver that a proceeding is pending, and once notification has been served and the bankruptcy receiver has been informed, the arbitral award may be enforced against the company.

All claims arising from bankruptcy proceedings must only be submitted to the court that declared the bankruptcy, which is the sole court with jurisdiction. Notwithstanding this rule, according to academics and case law, certain claims may be submitted to arbitration; in particular, claims against third parties and aimed at 'restoring' the estate of the insolvent company – which are not strictly connected to the bankruptcy proceedings – can be referred to arbitration, such as compensation or damages claims or claims aimed at obtaining repayment of a debt.

Note, however, that arbitration is not available for claims relating directly to the insolvency such as the collection or distribution of assets, claims against orders or other judgments issued by both the court and the supervising judge, 'late' creditors' claims (which have not been filed within the time limit set by the court) or any other claim aimed at challenging the assessment of the liabilities made by the supervising judge. Finally, it is still controversial whether clawback claims may be submitted to arbitration. It is worth noting that, according to Italian academics, if the bankruptcy receiver decides to carry on a contract (of the insolvent company) that includes an arbitration clause, such clause remains effective with regard to the insolvency procedure and the receiver is not entitled to avoid its effects.

Successful reorganisations

23 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

A company may propose a composition with creditors if it is 'insolvent' or in crisis.

In a composition with creditors, the company may propose a debt restructuring and satisfaction of creditors' claims by any means, including:

- by way of a transfer of assets, or other transactions to creditors or a company controlled by the creditors; and
- the issuance of shares, quotas or bonds to creditors or a company controlled by creditors or of other financial instruments or debentures.

One of the main features of the composition with creditors is that once the tribunal has admitted the company to the procedure, all creditors with claims prior to the date of the admission must suspend their actions until the final approval of the tribunal. The composition with creditors must be approved, on a vote, by creditors representing the majority by value of all 'admitted' claims. Note that creditors who do not take part in the relevant meeting may submit their disagreement by telegram, letter, fax or e-mail. Failing that, they are regarded as consenting and taken into account to calculate the majority.

After the creditor vote the composition must also be approved by the tribunal. The tribunal may only refuse its approval if it believes the composition has not complied with all legal requirements.

As part of the composition the company may propose:

- the division of creditors into classes according to their legal status and homogenous economic interests. The latter must be assessed in relation to the specific proposed plan. Factors such as the type of credit, its amount, the time of its formation or its maturity as well as whether there is a possibility of satisfaction and the existence of guarantees will be relevant to determine whether economic interests are sufficiently similar economical claims; and
- different treatment of creditors of different classes.

Where there is more than one class of creditors, each class must vote separately. The petition will be approved if it the majority of classes vote in favour. However, the Insolvency Act provides for the possibility of cram down in that the tribunal may approve the petition notwithstanding that one or more classes of creditors voted against it, if the terms of the petition allows the dissenting creditors to be satisfied to the same extent as they would have been following a practical alternative procedure.

The debtor's proposal can provide that secured creditors will not be fully satisfied, provided that they obtain at least the value of the secured asset that could have been obtained in a liquidation sale and they do not receive worse treatment than the unsecured creditors.

Should the proposal provide for the partial satisfaction of the secured creditors' claims, the affected secured creditors will be admitted to vote on the petition in respect of the portion of his claim that remains unsatisfied. Secured creditors are also admitted to vote if they waive (all or parts of) their security (notwithstanding the fact that the debtor's proposal provides for the full satisfaction of their secured claim).

Furthermore, acts, payments and securities entered into or given pursuant to a composition with creditors (provided that the composition with creditors obtains the final approval by the court) are not subject to clawback actions.

Debt-restructuring agreements may also have wide-ranging contents and provide for various ways in which to restructure the company's debts.

However, in order to obtain the court's validation, this type of agreement has to involve creditors that represent at least 60 per cent of the debts, and the petition must be filed together with a report by an expert (see question 11) (chosen by the debtor), that attests to the accuracy of the data and the feasibility of the agreement, with particular regard to whether it is suitable to ensure full payment of third-party creditors within 120 days of the validation (in the case of debts outstanding on that date) or within 120 days of the expiry date (in the case of debts not outstanding on the date of the validation).

As with compositions with creditors, where such agreements are validated by the court, the relevant payments are immune from any clawback actions (in the event of bankruptcy).

The same principles are also applicable to the extraordinary administration of large enterprises. In the case of extraordinary administration, the Ministry for Economic Development may, on the basis of the opinion by the extraordinary commissioner and having heard the supervisory committee, authorise the insolvent entrepreneur or a third party to propose an arrangement to the court. The court will then decide on the arrangement proposal.

The reorganisation plan is binding only on creditors who have entered into it and cannot create releases in favour of third parties.

Expedited reorganisations

24 Do procedures exist for expedited reorganisations?

An insolvent debtor may try to avoid formal insolvency proceedings by an out-of-court settlement or a rescheduling agreement with creditors. These arrangements, between the debtor and all or some of its creditors (very often with lenders), are not subject to court endorsement and do not bind those creditors who do not expressly enter into the arrangement. While such procedures are more flexible and quicker than traditional voluntary reorganisations, these arrangements may result in possible criminal liability if they fail and result in the collapse of the company.

Along with these informal pre-packaged reorganisations, two forms of expedited reorganisations have been recently introduced in the framework of composition with creditors procedure.

The first concerns agreements for the restructuring of debts in which the debtor submits to the court a voluntary settlement agreement for the restructuring of its debt that it has previously entered into with creditors representing at least 60 per cent by value of total claims (which may also include tax claims). The debtor also files with the court a report by an expert attesting that the agreement ensures the satisfaction in full of the debts of those creditors who are not a party to the agreement within 120 days of the validation (in the case of debts outstanding on that date) or within 120 days of the expiry date (in the case of debts not outstanding on the date of the validation). The agreement is published in the Companies' Register and is effective from the date of publishing. For the 60 days following the publication date, the creditors cannot initiate or start interim or enforcement actions against the debtor's assets or acquire priority rights, unless agreed with other creditors. The creditors and any other interested party may challenge the agreement within 30 days of its publication. The agreement is binding only for those creditors that entered into it.

The debtor may request for a ban on commencing or continuing injunction or enforcement proceedings prior to 60 days from the publication of the agreement in the Companies' Register (subject to making certain filings).

During the negotiation of the agreement the debtor may change strategy and file a petition for a composition with creditors, without prejudice to the effects (such as the suspension of enforcement and interim actions) arising from the petition for the validation of the restructuring agreement.

Any payments and securities carried out or granted in execution of an agreement for the restructuring of debts approved by the court are expressly excluded from clawback actions (see question 40).

The Insolvency Act also provides for another form of reorganisation: extrajudicial composition. These agreements are not subject to clawback actions provided they are implemented as part of a plan that is likely to allow the reconstruction of the debt of the company and to ensure the company's financial situation is redressed.

Furthermore:

(i) term loans in any form granted in the implementation of a composition with creditors or an agreement of debt restructuring may be paid in advance;
(ii) term loans for the purpose of presenting the request of admission to the composition with creditors or the request of approval of the agreement on debt restructuring may be paid in advance if the composition plan or the agreement allows term loans and as long as the advanced payment has expressly been provided by the tribunal decision accepting the request for admission to the composition with creditors or approving the agreement on debt restructuring;
(iii) these rules also apply to term loans made by shareholders, for up to 80 per cent of their amount; and
(iv) sums owed to any person in charge of drafting the report, may be paid in advance as long as the advance payment has expressly been provided by the tribunal decision accepting the request for admission to the composition with creditors or approving the agreement on debt restructuring and is attached to the motion admitted to the composition with creditors.

With reference to claims in points (ii), (iii) and (iv), such creditors are excluded from voting and from being considered part of the majority for the approval of the composition and from the computation of the credit percentages for the purposes of the agreement on debt restructuring.

Unsuccessful reorganisations

25 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

A petition for composition with creditors will be declared inadmissible if the statutory requirements for admission have not been met. The court will issue an unchallengeable decree declaring the petition to be inadmissible once it has heard the debtor. A declaration of insolvency and commencement of insolvency proceedings, may only be issued at the request of one or more creditors, or the public prosecutor, provided that it has been verified that the debtor is insolvent and that the other statutory requirements for the declaration of insolvency have been met.

The same rules apply where the composition has not been approved by the creditors or when, following the approval of the composition it is no longer judged to be feasible the judicial commissioner will inform the creditors and the court will follow the same process as if the plan was declared inadmissible.

Authorisation of the composition with creditors may also be revoked ex officio by the court (which will inform the public prosecutor and the creditors), where it becomes apparent the debtor has hidden any part of its assets, wilfully omitted to declare one or more debts, declared non-existent liabilities or committed other fraudulent acts. At the end of the proceedings, the court issues a decree and, at the request of the creditor or the public prosecutor, may declare the company insolvent if the relevant requirements are met. The same rules apply if, during the composition proceedings, the debtor carries out unauthorised acts or acts intended to defraud the creditors.

Finally, any creditor may ask for the composition to be terminated if the debtor fails to comply with the arrangements for the composition (within the year following the composition's deadline). However, the composition may not be terminated for a minor default.

If a reorganisation plan is not approved by the creditors and a judicial liquidation order is granted by the court, the debtor may prevent insolvency if, for example, it still has available funds provided by a third party. The same result is achieved if the debtor fails to satisfy the conditions set out in the creditors' resolution.

Insolvency processes

26 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

The bankruptcy receiver will give creditors notice of the insolvency order by registered post, which will also indicate the date of the hearing to verify the existence of their claims. Following the verification hearing the bankruptcy receiver prepares a partition plan. Creditors whose claims have been partially admitted or rejected will be notified by the bankruptcy receiver by registered post or any other form of communication where receipt can be evidenced. Creditors are allowed to challenge the bankruptcy receiver's partition plan within 15 days from notification. Such challenge is filed against the bankruptcy receiver and all other creditors whose partition quote may vary should the challenge be successful. Within 30 days of the bankruptcy judgment, the committee of creditors must be appointed by the court. Such committee has a general supervisory and consultative role, and may authorise the bankruptcy receiver's actions or express an opinion on the conditions provided under the law. Furthermore, under certain conditions, the creditors' committee can also ask the court to replace the bankruptcy receiver. However, there is no express provision authorising the release of liabilities owed by third parties who are not part of the debtor group through a reorganisation plan.

Enforcement of estate's rights

27 If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

There are no procedures by which the creditors can pursue the estate's remedies if the insolvency administrator is without assets to pursue a claim.

Creditor representation

28 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

A creditors' committee may be formed as a corporate body appointed by the judge and composed of a limited number of creditors.

After 2006, the powers of such committees have been increased: they have become both an active stakeholder as well as an essential cooperator with the bankruptcy receiver during bankruptcy procedures.

The creditors' committee has a central role in authorising the bankruptcy receiver's actions and in controlling the bankruptcy management carried out by the bankruptcy receiver.

Insolvency of corporate groups

29 In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

Usually in the insolvency of a corporate group, the procedures of extraordinary administration and extraordinary administration of large enterprises apply.

When a company is subject to the extraordinary administration procedure as part of a corporate group, the procedure extends to the other insolvent companies in the group. Although the procedure is the same, the individual proceedings are separate and the companies' assets are not pooled. Each company maintains their financial autonomy and each insolvent company is only liable for its own obligations. A list of creditors will therefore be drawn up for each company in the group before the court can declare such company to be insolvent. The costs of the extraordinary administration are borne by the individual companies of the group in proportion to their respective assets.

If a company is subject to an extraordinary administration of large enterprises and is part of a group of companies, the extraordinary commissioner may ask the Minister for Economic Development to admit other insolvent companies in the group to the procedure by submitting an application for insolvency to the relevant court. The proceedings for each group company may be implemented jointly with those for the parent company or separately.

If the restructuring programme provides for implementation through a composition, several group companies subject to the procedure of extraordinary administration may submit a single proposal, subject to the autonomy of their respective assets and liabilities. Such autonomy may lead to differentiated treatment, even within the same class of creditors, according to the financial situation of each individual company to which the composition proposal refers.

Where an insolvent company has offices in various EU member states the competent court for the insolvency proceedings shall be where that company's group carries out its main operational decisions (as ascertainable by third parties). Therefore, jurisdiction tends to lie with the country in which the main interests of the parent company are located, on the presumption that, although the subsidiary conducts its business in other member states, in practice it merely receives and follows the strategy of the parent company.

Appeals

30 What are the rights of appeal from court orders made in an insolvency proceeding? Does an appellant have an automatic right of appeal or must it obtain permission to appeal? Is there a requirement to post security to proceed with an appeal and, if so, how is the amount determined?

The decree of enforceability of the statement of liabilities issued in the context of insolvency proceedings may be appealed by way of:

- opposition to the statement of liabilities;
- appeal against the credits admitted to the statement of liabilities; and
- revocation of credits or rights admitted or excluded.

A specific procedure is established that applies to any of these three kinds of appeal. The opposition to the statement of liabilities may be brought by: any creditor and anyone having any rights on moveable or immoveable property excluded by the statement of liabilities. It is aimed at opposing the denial or partial acceptance of the request of admission to the statement of enforceable liabilities. The opposition is brought against the bankruptcy receiver.

The appeal against credits admitted to the statement of liabilities may be brought by:

- any creditor;
- anyone having any right on moveable or immoveable property owned or possessed by the individual or entity undergoing insolvency proceedings; and
- the bankruptcy receiver.

It is aimed at appealing the acceptance of a request of admission of a concurring creditor. The appeal is brought against the concurring creditor, whose application has been accepted.

The revocation of credits or rights admitted or excluded may be brought by:

- the bankruptcy receiver;
- any creditor; and
- anyone having any rights on moveable or immoveable property either admitted or excluded from the statement of liabilities.

It is aimed at the annulment of the orders issued in the context of the appraisal of the liabilities, after the expiry of the time limits to bring the above-mentioned opposition and appeal, when the acceptance or the rejection of claims is deemed invalid by reason of:

- forgery, wilful misconduct or mistake that induced the court to make a mistake on a relevant fact; or
- lack of knowledge of a relevant document that was not produced in a timely manner for reasons not depending on the appealing party.

The revocation is brought against the concurring creditor, whose application has been accepted, or against the bankruptcy receiver, when the application was rejected.

The appellants listed above have an automatic right of appeal. They do not need to seek any permission before bringing the appeal.

Finally, no bond shall be posted in order to proceed with an appeal, but obviously the normal court fees required to begin a new proceedings have to be paid by the appellant.

Claims

31 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

After the declaration of insolvency, a notice is sent to all creditors specifying the date by which their claims must be lodged (which is normally about two months after the order and before the hearing for the preparation of the creditors' list). If any creditor considers that it is entitled to any security by way of, for example, a mortgage or lien, the creditor must inform the bankruptcy receiver within the time specified in the notice. There is no statutory form for the claim but it should nevertheless state the name and address of the creditor, the amount due and attach any supporting documentation.

A claim may be submitted after the hearing for the preparation of the creditors' list but the creditor may be asked to support the costs of arranging a further hearing. Any creditor whose claims have not been recognised or have been partially recognised may lodge a challenge to the decision within 30 days of the hearing. Within the same time period, any creditor may challenge the recognition of other creditors' claims.

The Italian Bankruptcy Act does not formally regulate the transfer of claims already admitted to bankruptcy proceedings. However, Italian case law suggests that transfer is possible but the new creditor has to file the claim again in order for it to be recognised, as final admission implies an assessment of the claim with respect to a specific claimant, whose identity is not irrelevant to the debtor.

The main principle that governs the submission of claims is that only claims arising before the declaration of insolvency may be registered. Whether a claim has arisen before or after the declaration of insolvency depends on the legal basis of the claim or its cause and not on any judicial order that has established its existence. This principle does not apply to claims that arise while the company is operating on a temporary basis or claims that arise as a direct result of liquidation measures issued by the bankruptcy receiver. Therefore, future claims (ie, claims arising from an event after the declaration of insolvency) may not be registered against the assets of the bankruptcy estate. Claims that arise before the declaration of insolvency but whose amount is not established at the time of the declaration of insolvency must be quantified and proven by the creditor at the time of registration and the amount may be challenged by the bankruptcy receiver and the supervising judge during the verification of the claims. In the event a claim is rejected or is admitted for a lower sum than that requested, the creditor may challenge the partition plan and provide evidence that it is entitled to receive the amount requested.

Conditional claims may be registered with reservations and a relevant sum is set aside pending the fulfilment or non-fulfilment of the condition. If the condition occurs, the supervising judge will, at the request of the creditor, order the admission of the claim. If the condition no longer applies, the sum previously set aside is shared among the other creditors.

A claim acquired at a discount cannot be enforced for its face value unless the creditor challenges the partial recognition of his claim and the court upholds his claim by decree.

The declaration of bankruptcy suspends the accrual of interest until the closing of the proceedings, unless the claim is secured by mortgage, pledge or privilege.

Because of such rule, a creditor cannot claim interest accrued after the opening of the insolvency proceedings.

Modifying creditors' rights

32 May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

The court may change the rank (priority) of a creditor's claim only if the security on which the rank is based is null, voidable or invalid.

Priority claims

33 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Priority claims that rank ahead of secured claims in reorganisations and liquidation proceedings are:

- liens over moveable property, which may be either:
- general liens enforced over all the debtor's assets (such as the general lien covering the entire property of the debtor for judicial expenses, sickness, wages, taxes, etc); or
- special liens on specific assets (such as liens for customs duties on merchandise, taxes on rent, leases, etc); and
- liens on immoveable property (such as liens arising from income tax payable in relation to property, from any form of indirect taxation and other claims as indicated by specific legal provisions).

Debtors that have filed a petition for a composition with creditors (or for the validation of a restructuring agreement) may ask the court to authorise them to take out loans with priority status that will be repaid in advance of other debts. To do this, the debtor must file an expert's report with the court certifying that the loan is essential for the continuation of the business and is in the best interests of all creditors.

As mentioned above (see question 11), the debtor may also carry out acts of ordinary administration and, where authorised by the court, urgent acts of extraordinary administration during the period running from the date on which the petition for the composition with creditors is filed to the date of the decree that allows the procedure: and the law expressly provides that any debts arising as a result of such acts will have priority status.

In the extraordinary administration of large enterprises procedure, priority claims also include debts arising before the beginning of the procedure owed to small and medium enterprises for services necessary for environmental restoration, for safety reasons and for the continuity of industrial plants' activities. The same priority treatment applies to debts arising before the procedure that relate to operations concerning environmental and health protection and those provided by the Environmental Plan.

Employment-related liabilities in restructurings

34 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

A liquidation of a company does not automatically terminate employment contracts but they are suspended until the bankruptcy receiver or the commissioner (upon approval of the creditors' committee or surveillance committee) decides to honour their performance or terminate them.

The termination of employment contracts is a collective dismissal procedure and this will be implemented by the company.

With regard to the process and timing of a collective dismissal procedure, large-scale redundancy is governed by Law No. 223/91, which applies to companies employing more than 15 employees. This law defines a collective dismissal as being a dismissal involving at least five employees within a period of 120 days in the same province and which occurs as a consequence of the decrease or reorganisation of the business or the amount of work, or as a consequence of the total shutdown of the enterprise or business.

The employer has a duty to inform, in writing, the works council (if any) and the unions that have signed the national collective bargaining agreement applicable to the employees in Italy regarding the decision to make a collective dismissal.

A letter must be sent to the unions and must contain the following information:

- an explanation of the reason for the employer's decision;
- the number of employees likely to be dismissed;
- the positions and professional profiles of the entire workforce;
- the time frame of the redundancy; and
- any proposal or measure to reduce the possible social consequences of the redundancies.

The unions may, within seven days following receipt of the letter, request that a meeting be held to discuss the possibility of avoiding or reducing the redundancies.

If no agreement is reached, a second meeting has to take place in the following 30 days before the Labour Office. In any case, the consultation with the unions must be completed within 75 days.

At the end of the 75-day period or, if in the meantime an agreement with the unions has been reached, the employer may give notice of dismissal in writing to the employees concerned, within the usual notice periods.

Once the employees receive a dismissal letter, the notice period will begin: the length of the notice period depends on the national collective bargaining agreement applicable.

The redundancy procedure carries two types of cost for the employer:

- severance pay that includes:
- end-of-service allowance;
- other payments including accrued but untaken holiday, and other personal benefits; and
- payment in lieu of notice; and
- a potential cost of litigation arising from a claim for unfair dismissal by one or more employees (in addition to this cost an employee may also obtain reinstatement if their claim is successful).

Where a large number of employees are dismissed or where the business ceases operations the employee claims are not as a whole increased.

Claims lodged by employees for outstanding remuneration and severance pay are granted general liens on immoveable assets as are claims for damages arising from a failure to pay contributions and for damages suffered because of unlawful dismissal.

If employees' claims are not satisfied or are only partially satisfied, the employee may apply to the Guarantee Fund at the National Institute of Social Security.

Pension claims

35 What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

All pensions-related claims are privileged claims included within the class of liens on immoveable property. Claims arising from the employer's failure to pay contributions to pension and insurance plans managed by institutions and bodies, can be submitted by such institutions or bodies as privileged claims in the insolvency proceedings.

Environmental problems and liabilities

36 In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Neither the Insolvency Act nor the Environmental Code allocate liabilities for the control of environmental problems or remediating the damage caused. As a result, general rules apply when an environmental issue arises during insolvency proceedings. The bankruptcy receiver will operate in accordance with his powers to solve the problem under the scrutiny of the delegated judge and the creditors' committee.

Under Italian law, the party whose actions caused the pollution or contamination is obliged to implement – and finance – the remediation measures required to eliminate the contamination. Such obligations apply regardless of any intent or knowledge on the part of such a party.

Failure to take appropriate remediation measures is a criminal offence.

The owner of the contaminated site who did not cause the pollution is under no obligation to clean up the site, although he has a right to do so. If he chooses to clean up the site he assumes the same remediation obligations as the party responsible for the pollution and can claim back all damages, costs and expenses incurred in the clean-up from the responsible party.

Liabilities that survive insolvency proceedings

37 Do any liabilities of a debtor survive an insolvency or a reorganisation?

Following the closure of the insolvency proceedings, creditors are free to bring actions against the debtor with regard to the parts of their debts which have not been paid (although where the debtor is a natural person he or she may be freed from all remaining debts owed to unpaid creditors).

In a composition with creditors, the composition is mandatory for all creditors so where the debtor pays only a percentage of the current debts because the creditors accepted the plan they are deemed to waive their right to be reimbursed for the remaining debt. No liabilities of the bankrupt party or of the party acquiring the debtor's assets survive. This principle also applies in the case of extraordinary administration and extraordinary administration of large enterprises.

However, the creditor may still exercise its rights against co-debtors, the debtor's guarantors and with-recourse obligors.

Debt-restructuring agreements involve at least 60 per cent of the creditors and are only binding upon those creditors who have agreed to its terms since such agreements do not constitute a 'mass' composition. Therefore, any creditors that do not agree to the composition will have to be paid in full.

Distributions

38 How and when are distributions made to creditors in liquidations and reorganisations?

After the debtor's assets have been disposed of, the official receiver in bankruptcy, after consulting the creditors' committee, must prepare a distribution plan that is submitted to the judge for approval. Creditors have little room to challenge such a plan. The judge will approve the plan and order a distribution.

The Insolvency Act provides a mandatory order of priority for the payment of claims as follows:

- expenses of the proceedings and claims arising from the activities of the debtor during the proceedings (priority claims), which are normally paid in full when they fall due;
- secured claims over moveables and real estate; and
- unsecured claims.

Transactions that may be annulled

39 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

The provisions governing clawback or setting aside transactions in insolvency proceedings are set out in articles 64 to 70 of the Insolvency Act. Transactions and disposals that unfairly favour a single creditor at the expense of the general body of creditors (for example, by giving one a preference or other benefit at the time when the debtor is unable to pay debts) may be revoked by the court by means of a clawback action.

A clawback action is aimed at obtaining a judgment from the court that declares void and ineffective the acts performed by the insolvent debtor during the period (see question 40) immediately before the debtor was declared insolvent. Once the avoidance of the disposal of the property is established, the counterparty must return such property to the bankruptcy receiver.

Article 67(1) provides a list of transactions that can be clawed back unless the counterparty to the transaction can show it had no knowledge of the debtor's insolvent state:

- transactions in which the value of the obligations performed or assumed by the debtor exceeded one-quarter of the consideration received in exchange by the debtor (ie, transactions at an undervalue);
- payments of monetary debts past due, where the payment was not made with money or other customary payment methods;
- pledges, securities and mortgages wilfully created that were not yet past due; and
- pledges, securities and mortgages created voluntarily or by court order in respect of debts past due.

Article 67(2) provides a list of transactions that can be clawed back if the bankruptcy receiver can show that the counterparty to the transaction had knowledge of the debtor's insolvent state:

- payment of liquid and enforceable debts;
- transactions for consideration; and
- transactions giving rise to rights of pre-emption over debts, including third-party debts.

Articles 64 and 65 provide a list of additional transactions that are subject to clawback actions:

- gratuitous transfers (eg, gifts, donations); and
- payments of debts originally due on or after the date of the declaration of insolvency.

For the applicable 'suspect periods', see question 40.

Courts have taken a broad approach to determining a party's knowledge of the state of insolvency of the debtor and have ruled that if there are symptoms of insolvency such as judicial attachment, group firing of employees or press reports referring to the company's financial difficulties, the burden of proof as to the knowledge of insolvency will be shifted onto the party defending the clawback action.

Certain transactions cannot be subject to clawback actions, for example, payments for goods and services in the bankrupt party's ordinary course of business (if not otherwise unusual), remittances to a bank account not materially and permanently reducing the indebtedness to the bank, sales of real estate at fair market value, deeds and payments and securities carried out or granted to implement judicially sanctioned agreements with creditors, payments and securities carried out or granted in execution of either a composition with creditors or an agreement for the restructuring of debts approved by the court and transactions, payments and securities made after the filing of the petition for the composition with the creditors, deeds and payments carried out during the extraordinary administration of large enterprises and aimed at ensuring the business is a going concern and in the pursuit of manufacturing activity.

Where the bankruptcy receiver tries to clawback payments made under an ongoing long-term agreement or relationship (eg, an agreement for the supply of goods or services or a lease), the counterparty to the transaction may only be required to pay back an amount corresponding to the difference between the maximum amount that its aggregate claims reached in the period in which it was aware of the insolvency of the bankrupt party, and the amount of its claims on the date of the company was declared bankrupt.

Proceedings to annul transactions

40 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

The suspect periods are:

- transactions under article 67(1): one year before the opening of the insolvency proceedings;
- transactions under article 67(2): six months before the opening of the insolvency proceedings; and
- transactions under article 64: two years before the opening of the insolvency proceedings.

In general, at least four conditions must be satisfied before a transaction entered into by the insolvent company can be clawed back under the Insolvency Act:

- the company must be in insolvency proceedings;
- the transaction must have resulted in a diminution of assets available to the general body of creditors;
- the company must have been unable to pay its debts at the time of the transaction; and
- the transaction must have been entered into within the applicable suspect period.

Only the bankruptcy receiver is entitled to make a clawback action in liquidation proceedings.

Voidable transactions can also be attacked in a reorganisation procedure (extraordinary administration and extraordinary administration of large enterprises). In the case of a restructuring programme under extraordinary administration, the satisfaction of creditors is envisaged by means of a compromise under which the business is transferred to an assignee. In this case only, the extraordinary commissioner cannot make use of clawback actions nor may the assignee take the benefit of proceeds deriving therefrom.

Under extraordinary administration of large enterprises there may be an identical restructuring programme, including a compromise under which the business is transferred to an assignee, where instead the extraordinary commissioner may indeed initiate clawback actions and transfer the benefit or proceeds deriving therefrom to the assignee.

Directors and officers

41 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

Directors and officers may be held liable to the company, to the company's creditors and to third parties. Directors are liable to the company if they negligently fail to fulfil duties imposed upon them by the law or the company's by-laws. They are also liable if they fail to supervise the general conduct of the company or if, being aware of prejudicial acts, they did not do what they could to prevent such acts from occurring. However, they cannot be made to pay obligations owed by their corporations.

When a company is insolvent its directors have a duty to avoid making preferential payments, not to continue trading in a way that would be detrimental to the financial position of the company and, if the statutory minimum share capital is lost, not to enter into new transactions. The directors will be jointly and severally liable for any breach of these duties.

If these duties are breached, the company's shareholders in a general meeting or, for listed companies, shareholders representing at least 5 per cent of the share capital, may resolve to bring a civil action for damages.

Directors are also liable to the company's creditors when the company's assets are insufficient to satisfy their claims because the directors have failed to preserve the company's assets. Such actions do not prevent single shareholders or third parties from bringing claims for damages if they are directly damaged by the directors' conduct.

Directors and de facto officers (as well as statutory auditors) may be charged with criminal liability for 'fraudulent bankruptcy' where a company has gone into judicial liquidation if they:

- have disposed and transferred all or part of the company's assets with intent to defraud creditors of the company;
- have destroyed or falsified all or part of the corporate books or other accounting records; or
- before or during the judicial liquidation proceedings they have made payments with intent to prefer one or more creditors.

The criminal sanction for 'fraudulent bankruptcy' is imprisonment for between three and 10 years and disqualification from acting as a director for 10 years.

Directors may be liable for 'simple bankruptcy' if they:

- have carried out high-risk transactions with the intent of delaying the commencement of bankruptcy proceedings;
- have increased the company's liabilities by failing to file a petition for the commencement of the insolvency proceedings when the company was insolvent or over-indebted; or
- during the three years preceding the declaration of insolvency, did not keep the corporate books and the other accounting records prescribed by the law.

The criminal sanction for 'simple bankruptcy' is imprisonment for between six months and two years and disqualification from acting as a director for up to two years.

There are some exemptions for bankruptcy offences including in respect of payments and transactions carried out to implement a composition with creditors, or an agreement on debt restructuring, or a plan aimed at the reorganisation of the company's debts and ensuring recovery from the financial distress.

Criminal liability may occur if directors and general managers, by hiding the company's crisis and insolvency, continue to obtain loans from credit institutions. Article 218 of the Insolvency Act provides for between six months' and three years' imprisonment and disqualification from acting as a director for up to three years. An increased penalty is provided where the company acts as a financial intermediary on the market.

Groups of companies

42 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

The only case where a corporation can be held responsible for the liabilities of another company is when, while exercising an activity of management and coordination, it has acted in a manner contrary to the principles of sound company management and thereby caused damage to the other company's assets. Despite the general principle of 'perfect patrimonial autonomy' based on which a parent or affiliated corporation will not be liable for the subsidiaries or affiliates' debts, the bankruptcy receiver is entitled to exercise the same rights as the bankrupt company's creditors and has the right to submit a claim against the parent company on behalf of the bankrupt company's creditors. The same liability may be extended to other entities of the group that were involved in the unlawful act or benefited from it.

Insider claims

43 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

For Srl companies (limited liability companies) the reimbursement of shareholder loans must be postponed with respect to all other debts of the company and if any sums were reimbursed in the year before the company was declared bankrupt, the amount reimbursed must be returned to the company.

This applies to any type of financing granted to the company by its shareholders 'in circumstances where – even considering the business activity carried out by the company – there is an excessive unbalance between company's indebtedness and its net assets or where an equity contribution would have been more reasonable'.

According to academics and case law, the provision includes shareholder funds injected in situations where the company appears undercapitalised at the time of the financing and thus has the 'substance' of an equity contribution and operates regardless of the relevant shareholder' s knowledge of the company's financial situation

The provision also applies to intercompany loans, and in particular to funds granted to the company (either joint-stock company – SpA – or Srl) by its parent company. According to some academics, the provision also applies to loans made by a sole shareholder, even if the company is a joint-stock company (SpA) and not an Srl, since there would be no reason for treating the same situation in a different way according to the type of company.

Creditors' enforcement

44 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Insolvency proceedings are aimed at satisfying the claims of a company's creditors. Their effect is that the creditors are prohibited, following the declaration of bankruptcy, from filing executive or interim claims over the assets of the insolvent debtor outside the bankruptcy procedure. In line with this principle, all individual enforcement proceedings are suspended in the event of insolvency, save for enforcement proceedings relating to certain mortgage loans that are subject to specific Italian registration.

There are particular rules for debts secured by liens or pledges, which may even be recovered by the relevant creditor during the insolvency proceedings, provided they are included in the insolvency estate with priority status, through the direct sale of the asset. To obtain authorisation for the asset to be sold the creditor must file a petition with the supervising judge, who, having heard the bankruptcy receiver and creditors' committee, will issue an order detailing the timing and the procedure for the sale.

Outside insolvency proceedings, the assets of a business can be seized only within judicial proceedings.

Corporate procedures

45 Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

Dissolution of a company may be voluntary, in which case the courts are not involved and the rules set out by the Civil Code apply. Dissolution occurs upon verification of conditions set out in the law, in the company's by-laws or upon the passing of a resolution at a shareholders' extraordinary meeting (see question 9).

The main difference between voluntary and mandatory dissolution is that, by virtue of the principle of non-discrimination among creditors, the Insolvency Act grants special protection to creditors, specifically the prohibition to file individual claims, the clawback action, etc.

Conclusion of case

46 How are liquidation and reorganisation cases formally concluded?

Both voluntary liquidation procedures and insolvency procedures are concluded when the proceeds from the disposal of the assets are distributed to creditors. In a voluntary liquidation, the liquidators must draft and deposit financial statements relating to the liquidation process. The company will then be removed from the Register of Companies. In an insolvency procedure, the court issues a formal order that declares the proceedings closed. The main effect of the order is that creditors whose claims have not been fully satisfied may initiate or continue individual enforcement proceedings over the debtor's residual assets and the debtor may restart its business.

International cases

47 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

For procedures opened in a member state of the European Union the opening of insolvency proceedings in that member state shall be recognised in all other member states. Recognition of the procedure shall not preclude the opening of insolvency proceedings in another member state concerning assets of the debtor situated in that territory (secondary proceedings).

A member state may refuse to recognise or enforce a judgment handed down in insolvency proceedings of another member state where the effects of such recognition or enforcement would be manifestly contrary to that state's public policy, especially when its effect is to restrict fundamental rights and freedoms, or on the grounds of public policy where the principles of due process have been breached (ie, breach of defence rights and the principle of audi alteram partem – impartiality of the court).

Where the insolvency proceedings are not subject to EU legislation there are two possible alternatives:

- the effects of the insolvency declared abroad may be extended to Italy where the insolvency officeholder or the creditors apply for recognition of the foreign declaratory judgment and the order detailing the estate; or
- the bankruptcy receiver or the creditors may request an independent declaration of insolvency in Italy, with the risk that there may be conflicts and interferences between the two proceedings. Indeed, the insolvency officeholder and the creditors involved in the foreign insolvency proceedings could lodge any claims admitted abroad in the Italian proceedings if they first obtain interlocutory rulings recognising such orders. However, the foreign creditors, like the Italian creditors, could also lodge independent claims in the Italian insolvency proceedings. Likewise, the Italian bankruptcy receiver could lodge claims under the same terms against the estate in the foreign insolvency proceedings.

Foreign insolvency judgments and orders may be recognised by Italian courts with immediate effect if certain conditions are met. The competent court of appeal will declare the foreign judgment enforceable in Italy if:

- the foreign court was competent to issue the judgment according to Italian law on jurisdiction;
- the defendant received adequate notice and was afforded sufficient time to appear in accordance with the law of the foreign tribunal;
- the parties in the foreign action appeared or the absence of either party was properly taken into account in accordance with the law of the foreign tribunal;
- the foreign judgment was final (ie, not subject to appeal);
- the foreign judgment is not in conflict with a final judgment handed down by an Italian court;
- the parties are not litigating the same matter before an Italian court in proceedings started before the beginning of the foreign proceedings; and
- the foreign judgment is not contrary to Italian rules of public policy and public order.

There are still some uncertainties regarding the practical implications and consequences for insolvent debtor's assets in Italy, but the unresolved issues seem to be similar to those common in other jurisdictions.

Foreign creditors are subject to the same regime applicable to national creditors.

Legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has not yet been adopted.

COMI

48 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The Insolvency Act says nothing about how to determine the COMI of a debtor company or group of companies. Thus, references should be made to the European Court of Justice (ECJ) case law. The EC Regulation on Insolvency Proceedings (the Regulation) does not contain a definition of 'COMI' but the recitals to it state that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. The Regulation applies the concept of COMI to each individual debtor and not to a group of companies – which can all have individual COMIs. See further the chapter on the European Union.

The two most important cases in which the Italian courts considered the concept of COMI recently were *Re Eurofood IFSC Ltd* (C-341/04) of 2 May 2006 and *Interedil Srl (in liquidation) v Fallimento Interedil Srl and another (Interedil)* (Case C-396/09) of 20 October 2011.

In *Eurofood*, the Irish Supreme Court referred questions to the European Court of Justice in relation to the insolvency of the Parmalat group of companies in Italy. In particular the question was whether a subsidiary of Parmalat (Eurofood), registered in Ireland, should be liquidated in Ireland or in Italy. Eurofood's principal business was the provision of financing facilities for Parmalat. Shortly after Parmalat went into administration, a creditor applied to the Irish High Court for it to be compulsorily wound up in Ireland. The Irish court considered that Eurofood's COMI was in Ireland and appointed a provisional liquidator. Two weeks later, the Italian court decided that it had jurisdiction because Eurofood's COMI was in Italy, and Eurofood was admitted to the Italian administration procedure.

The ECJ held that main insolvency proceedings opened by a court of a member state had to be recognised by the courts of the other member states, without the latter being able to review the jurisdiction of the former court. Further, where a subsidiary company and its parent were registered in different member states and the subsidiary carried on its business in the member state where it was registered, the article 3(1) presumption in the Regulation that a debtor's COMI was in that member state was not rebutted by the parent company's having control over the subsidiary's policy.

In the case of *Interedil* the ECJ confirmed that COMI must be interpreted in a uniform way by EU member states and by reference to EU law and not national laws. Here the company had been incorporated under Italian law, transferred its registered office from Italy to the United Kingdom. After the company had ceased all activity and had been removed from the United Kingdom register, a creditor filed winding up proceedings with a court in Italy. The company opposed those proceedings on the ground that based on its COMI in the United Kingdom, the United Kingdom had jurisdiction to open insolvency proceedings. On the creditor's application for a preliminary ruling as to the jurisdiction of the Italian courts to open insolvency proceedings, the Supreme Court of Cassation held that the presumption in article 3(1) that the COMI corresponded to the place of the debtor's registered office in the UK was rebutted by the presence of immoveable property in Italy owned by the company and in respect of which it had concluded a lease agreement. The Italian court held that decision was different to the case law of the ECJ, but that it was nevertheless bound by it under the Italian law. The ECJ held that European Union law precluded a national court from being bound by a national procedural rule under which the court was bound by the rulings of a higher court, where it was apparent that the rulings of the higher court were at variance with European Union law. The ECJ further held that the term 'COMI' was a term peculiar to the Regulation and has an autonomous meaning.

In summary, where a company's registered office and place of central administration are in the same jurisdiction, the registered office presumption set out in the recitals to the Regulation cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of assets belonging to the debtor and the existence of contracts for financial exploitation of those assets in an EU member state, other than that in which the registered office is situated, are not sufficient factors to rebut the registered office presumption, unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's central administration is located in that other EU member state.

Factors that have been held to be relevant to determine a debtor's COMI (in addition to the rebuttable registered office presumption) are: location of internal accounting functions and treasury management, governing law of main contracts and location of business relations with clients, location of lenders and location of restructuring negotiations with creditors, location of human resources functions and employees as well as location of purchasing and contract pricing and strategic business control, location of IT systems, domicile of directors, location of board meetings and general supervision.

Cross-border cooperation

49 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

In Italy, there is a good level of coordination and cooperation between the various courts involved in Italian bankruptcy proceedings taking place in different cities.

As for collaboration with other jurisdictions, there is a Franco-Italian Protocol that aims to regulate the exchange of information and collaboration between bankruptcy receivers in Italy and France.

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The case law reveals a generalised application of the principle of recognition of judgments declaring insolvency. In this regard, the following rulings may be of interest:

- the Court of Appeal of Turin reiterated the principle that 'the main insolvency proceedings opened in one member state must be recognised by the courts of the other member states, which does not verify the jurisdiction of the court of the member state in which the proceedings were opened';
- the Court of Milan stated that insolvency proceedings opened against an investment company in the member state in which it has its headquarters is automatically effective in Italy (in that case: an administration procedure in the United Kingdom);
- the Court of Naples held that recognition of a foreign judgment that opened insolvency proceedings does not imply that such decision has the same effectiveness in Italy as an Italian insolvency ruling, since it is necessary to take into account the effects produced in the country of origin; and
- the Court of Milan, applying German rules, recognised that the payment of a certain sum of money by the debtor in the three months preceding the application for the opening of insolvency proceedings, following the creditor's warning that it would submit the application in the event of a default, could be clawed back if the debtor was not in a position to fulfil its obligations.

With regard to the jurisdiction for declaring a company insolvent, the following decisions are significant:

- the Court of Rome declared the insolvency of Cirio Del Monte NV, whose registered office was in Holland and which was a wholly owned subsidiary of an Italian parent that had already been declared insolvent, on the grounds that its operational and executive centre was situated in Italy, where all the Italian members of the board of directors were resident.
- the Court of Parma, within the context of the insolvency of the Parmalat group, held that it had jurisdiction to declare the insolvency of Parmalat Neth BV, a company of the group whose registered office was in the Netherlands, on the grounds that the executive activities and operational centre of the company were located in Collecchio, at the headquarters of the parent. It concluded that the Dutch company was merely a vehicle for the financial policy of Parmalat SpA, which was created for the sole purpose of facilitating money flows.

Cross-border insolvency protocols and joint court hearings

50 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Italian courts have not entered into any cross-border protocols to coordinate proceedings with courts in other countries.

Netherlands

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Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

The Dutch Bankruptcy Act currently provides for three different types of insolvency proceedings:
- bankruptcy, applying to companies, other legal entities and natural persons;
- (preliminary and definitive) 'suspension of payments', which can be granted to most companies and legal entities or to natural persons carrying out a profession or business; and
- debt reorganisation of natural persons.

A court may proclaim a debtor bankrupt when there is prima facie evidence that shows that the debtor has ceased to make payments. If a creditor petitions for the debtor's bankruptcy, the creditor also has to show prima facie evidence of his claim against the debtor. Pursuant to Dutch bankruptcy law, a debtor has ceased to make payments when the following criteria are satisfied:
- there have to be multiple creditors and at least one of the creditor's claims is due and payable; and
- the debtor has to have stopped making payments.

Suspension of payments does not apply to credit institutions and insurance companies. There are specific emergency regulations for credit institutions and insurance companies in the Netherlands Financial Supervision Act, which are based on Regulation (EU) 806/2014 (the Single Resolution Mechanism Regulation) (which amends Regulation (EU) 1093/2010) establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms, the Directive 2014/59/EU (the EU Bank Recovery and Resolution Directive) on the reorganisation and winding up of credit institutions and investment firms (which amends, among others, Directive 2001/24/EC), the Regulation (EU) No. 1024/2013 (the Single Supervisory Mechanism) on the policy of prudential supervision on credit institutions and the Directive 2001/17/EC on the reorganisation and winding up of insurance undertakings, respectively.

A legislative proposal regarding the pre-pack procedure is currently awaiting approval from the Dutch Senate and is expected to enter into force somewhere in 2017. See 'Update and Trends' for more information about the legislative proposal on the pre-pack.

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

The district court of the district where the debtor is or was last domiciled (for companies, this is the place of the statutory seat) has exclusive jurisdiction to open insolvency proceedings. If the debtor is not domiciled in the Netherlands, but has or had an establishment in the Netherlands, the district court of the district in which the establishment is or was located has exclusive authority to open the insolvency proceedings.

Excluded entities and excluded assets

3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

Excluded entities

Dutch courts cannot open insolvency proceedings against a foreign state. Although the Dutch Bankruptcy Act does not contain exceptions, it is unlikely that insolvency proceedings could be opened against the Dutch state and local authorities, such as municipalities and provinces. For other Dutch governmental organisations this is less clear.

Excluded assets

There are a number of statutory exceptions that stipulate the exemption of certain assets to insolvency proceedings:
- assets that cannot be encumbered with attachments (in certain circumstances also copyright);
- the statutory exempt part of an individual's income;
- monies reserved for the bankrupted party derived from a statutory duty of support or maintenance;
- a supervisory judge may determine that property under administration is exempt from insolvency proceedings;
- monies that have been paid into court;
- assets under a regime of administration that have not been claimed by any creditor;
- based on case law, certain assets are exempt that are reserved from a prior bankruptcy;
- certain rights of use and the right of occupancy; and
- rights of a highly personal nature (such as for instance a right under an occupational pension scheme).

In certain situations it may prove difficult to determine whether an asset is excluded from insolvency proceedings. All relevant circumstances of each individual case may be relevant. Also in certain cases the cooperation of third parties may be important for instance in situations in which third parties will need to surrender their rights.

Public enterprises

4 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

All entities in the sphere of private law can be declared bankrupt in accordance with the Dutch Bankruptcy Act. It is not certain if governmental bodies and administrative authorities of such entities can be declared bankrupt. However, the bankruptcy estate will not include assets that are destined for public service. Dutch law also provides for lower governmental bodies qualifying for supplemental support from the state, subject to those bodies relinquishing part of their financial policy autonomy to the state.

Protection for large financial institutions

5 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

Background

The Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism (SRM) have created an EU legislative framework that deals with the failure of credit institutions and investment firms. The BRRD and the SRM are key components of the Banking Union's 'single rulebook' regulatory framework, which also applies in the Netherlands jurisdiction. The BRRD was implemented in the Netherlands in early 2016. For more detail on the BRRD and the SRM, see the European Union chapter.

The BRRD is a (minimum harmonising) EU directive and provides authorities with a common approach and a wide range of measures that can be taken to deal with failing credit institutions and investment firms. These measures can be divided over three phases: the preparatory and preventative; early intervention; and resolution.

The SRM is an EU regulation that is closely connected to the BRRD and creates a centralised resolution system for dealing with failing banks. The Regulation has direct effect and prevails over national law. The SRM confers special authority and powers to a new EU-level authority, the Single Resolution Board (SRB). Under the supervision of the SRB, each national resolution authority (in the Netherlands: the Dutch Dutch Central Bank) will be in charge of the execution of a resolution scheme.

Implementation in the Netherlands

The BRRD has been implemented in the Netherlands through the Dutch Implementation Act for the European Framework for the Recovery and Resolution of Banks and Investment Firms (the Recovery and Resolution Implementation Act), which entered into force on 1 January 2016. The Recovery and Resolution Implementation Act also purports to facilitate the application of the SRM. The Act, however, only covers areas of the BRRD that are not specifically provided for in the SRM (because of the direct applicability of the SRM). Therefore, both the SRM and the Recovery and Resolution Implementation Act need to be consulted to gain insight in the implementation and application of the new EU legislative framework within the Netherlands.

The SMR and the Recovery and Resolution Implementation Act both replace – for a large part – the Intervention Act, which was the previous legislative framework. The Intervention Act provided similar prevention, intervention and crisis management tools for distressed financial institutions that were deemed too big to fail (although the Intervention Act has largely been replaced by the new legislation, it is still relevant, see below).

Under the Recovery and Resolution Implementation Act, various amendments have been made to, among others, the Financial Supervision Act (FSA), the Civil Code and the Bankruptcy Act. A large part of the most significant changes can be found in the FSA, which introduces – among other things – a new Sub-Chapter (3A) entitled 'Special Measures and Provisions regarding Financial Undertakings'.

Recovery and resolution measures under the new legal framework

The Recovery and Resolution Implementation Act mirrors the same three-phase approach as set out in the BRRD (and SRM) – namely the preparatory and preventative phase, the early intervention phase and resolution phase. In conjunction with the SRM, the Recovery and Resolution Implementation Act provides specific rules and tools for each of those phases with respect to banks and investment firms (or groups containing such a bank or investment firm) that are based within the Netherlands.

With regard to the preparatory and preventative phase, there are new rules regarding recovery plans, intragroup financial support and resolution plans (which are prepared by the national resolution authority (ie, the Dutch Central Bank)).

With respect to the early intervention phase, new intervention tools are provided to the resolution authority, which aim to prevent the need for resolution of the bank or investment firm. Such early intervention tools include the supervisory authority instructing the relevant institution to implement a recovery plan, or to replace or remove members of its senior management or management body. Under certain circumstances, it shall also be possible to appoint a temporary administrator, whose powers and authority shall be decided upon a case-by-case basis.

With regard to the resolution phase, the resolution authority is responsible for determining when and how a bank or investment firm becomes subject to resolution, provided that:

- the entity is failing or is likely to fail;
- there is no reasonable prospect that any alternative private sector measure or supervisory action would prevent the failure of that entity; and
- a resolution action is necessary in the public interest.

If these conditions are met, then the resolution authority may resolve to write down and convert capital instruments of the failing entity. If the resolution authority anticipates that the sole write-down and conversion of the capital instruments is insufficient to restore the financial soundness of the entity, then the resolution tools (individually or combined) may be applied: the sale of business or the bridge institution. For further information on each of these tools, see the European Union chapter.

The bail-in tool is a new provision under Dutch law, but the nationalisation of Dutch bank/insurer SNS Reaal (on 1 February 2013) effectively also involved a bail-in of subordinated debt of SNS Reaal and SNS Bank-issued debt instruments.

When a failing entity becomes subject to prevention or crisis management measures taken by the resolution authority, the Recovery and Resolution Implementation Act provides that under certain conditions the resolution authority is allowed to unilaterally terminate or amend contracts with third parties. Subject to certain requirements, the resolution authority may also decide to suspend payment or delivery obligations, or restrict or suspend the exercise of contractual termination rights (which also includes rights to accelerate, close-out, set-off or net) and security interests. These powers aim to enhance the effectiveness of the resolution tools. Note that some of these suspension powers are only applicable if the possibility for the counterparty to exercise their right is a result of a crisis prevention measure or crisis management measure, or any event directly linked to the application of such a measure. Furthermore, some suspension powers can only be applied temporarily. Finally, in some situations the use of these suspension powers is only allowed if the failing entity continues to meet the key obligations under the relevant contract, including the provision of collateral.

Safeguards to protect shareholders and creditors

The European Union legislative framework provides for several safeguards to protect the position of shareholders and creditors of a failed entity in the event that the resolution authority decides to use resolution tools. One of these is the 'no creditor worse off' principle. For further detail of these, see the European Union chapter.

Another safeguard entails the protection of counterparties in certain agreements (ie, security arrangements, financial collateral arrangements, set-off arrangements, netting arrangements, covered bonds and structured finance arrangements) who are confronted with the partial transfer of assets, rights and liabilities of a failed entity under resolution or in the event of forced contractual modifications (ie, amendment or termination). The Recovery and Resolution Implementation Act protects these counterparties by providing that the rights under those agreements may not be affected by such partial transfer. This means that if the resolution authority has decided to apply a partial transfer or if contractual modification takes place, then the resolution authority may not apply such partial transfer or contractual modification to certain agreements (such as set-off arrangements or financial collateral arrangements). Further, the resolution authority will also:

- not transfer an asset against which a liability is secured without also transferring the liability and the benefit of the security;
- not transfer a secured liability unless the benefit of the security is also transferred; or
- only transfer assets and liabilities jointly if they relate to a structured finance arrangement or covered bond.

The previous legal framework

While the new EU framework has led to significant legal changes in the Netherlands, the previous Dutch legislative framework that dealt with distressed financial institutions (the Dutch Intervention Act, which entered into force on 13 June 2012), still has relevance. First, because the new EU framework only applies to banks (and investment firms). Therefore many provisions of the Dutch Intervention Act still apply to insurers, such as the authority of the Dutch Central Bank to, through a court order, transfer assets and liabilities of or shares in an insurer. Secondly, even though the new legislation has largely replaced the bank-related provisions in the Intervention Act, the special intervention powers that were granted to the Minister of Finance under the Intervention Act, remain in place (see Chapter 6 of the FSA). These powers include the power to transfer the deposits of banks, other assets and liabilities of a bank or insurer as well as the issued shares in the capital of a bank or insurer, and the power to expropriate assets or shares held in a bank or insurer.

Note that the Dutch legislator has stated that it considers these measures of the Intervention Act to be emergency legislation, which means that they are allowed to remain in place, despite the direct applicability of the SMR in the Netherlands. However, application of the SMR has priority over Dutch law. Therefore, the intervention powers granted to the Minister of Finance are seen as a 'last resort' and shall only be applied under extraordinary circumstances, which diminishes the importance of the 'old' intervention measures for banks under the Intervention Act.

Secured lending and credit (immoveables)

6 What principal types of security are taken on immoveable (real) property?

Security over immoveable property (including leasehold) and certain registered moveables (registered ships and aircraft) is created by means of a right of mortgage. A right of mortgage is created by way of a notarial deed followed by registration in the relevant register (eg, the land register for real property).

The rights of the mortgagee are not affected by insolvency proceedings and the mortgagee is therefore able to act as if there were no insolvency proceedings, unless the court has granted a cooling-off period. A cooling-off period may be granted by the relevant court for up to two months, and can only be extended once, by a maximum of another two months. During the cooling-off period, the mortgagee cannot foreclose its security interests without court permission.

Secured lending and credit (moveables)

7 What principal types of security are taken on moveable (personal) property?

Security over moveable property is created by means of a right of pledge. There are two types of pledges over moveable property:

- a possessory pledge, where possession of the collateral is transferred from the pledgor to the pledgee or to a particular third party agreed upon by the pledgor and the pledgee; a possessory pledge does not require notarisation or registration; and
- a non-possessory pledge, where possession of the collateral remains with the pledgor. The deed of non-possessory pledge must either be drawn up in notarial form or registered with the tax authorities for the pledge to be valid.

Security over claims is also created by means of a right of pledge. There are two types of pledges over claims: a disclosed right of pledge and an undisclosed right of pledge, depending on whether the debtor of the claim has been given notice of the pledge. The disclosed pledge does not require notarisation or registration. The deed of the undisclosed right of pledge must either be drawn up in notarial form or registered with the tax authorities for the pledge to be valid.

The rights of a pledgee are not affected by insolvency proceedings and the pledgee is able to act as if there were no insolvency proceedings, unless the court has ordered a cooling-off period. This may be ordered by the relevant court for up to two months, and can only be extended once, by a maximum of two months. During the cooling-off period, a pledgee cannot foreclose its security interests without court permission.

In January 2006, Directive 2002/47/EC on financial collateral arrangements was implemented in the Dutch Civil Code, resulting in the introduction of the financial collateral arrangement, which is a security instrument for cash and financial instruments only between certain categories of parties (in broad terms, 'financial institutions'). A financial collateral arrangement is created following an agreement between the parties and the execution of a pledge over the cash or financial instruments, or the transfer of the cash or financial instruments to the holder of the security that the financial collateral arrangement purports to create.

The rights of the holder of financial collateral are not affected by insolvency proceedings and it can act as if there were no insolvency proceedings, allowing the security holder to liquidate the assets over which it has security or, if agreed as part of the conditions of the security arrangement, retain ownership of the assets provided as security. Any cooling-off period ordered does not apply to assets subject to a financial collateral arrangement.

A supplier of goods may protect him or herself by inserting a retention-of-title clause in the supply contract. The clause will state that title to the goods supplied will not pass to the buyer until payment has been received. The seller cannot, however, reclaim the goods when these have been used in a manufacturing process such that accession occurred, nor does he or she have a right in the newly created goods. In addition, Dutch law provides for a statutory reclaim right for the seller of a moveable asset. The right to invoke this statutory right expires when six weeks have lapsed after payment was due and 60 days after delivery has taken place. The seller cannot exercise its statutory right to reclaim the goods when the goods have been used in a manufacturing process. During a cooling-off period, the supplier cannot effectively retake possession of the goods without court permission.

Furthermore, certain creditors holding the debtor's moveables or immoveables are able to invoke a right of retention, allowing them to withhold redelivery of the debtor's goods until receipt of payment of their claim. The creditor will obtain a preference over the proceeds of sale of the goods if a right of foreclosure is enforced against the goods, pursuant to a judgment granting authorisation to that effect.

Unsecured credit

8 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

An unsecured creditor has to commence legal proceedings against the debtor for recovery of its debt if the debtor is unwilling to pay. Anticipating or pending such proceedings, the creditor may levy an attachment on assets of the debtor to ensure that the creditor can take recourse on assets of the debtor if a successful order is awarded. To levy such attachment, the creditor needs prior court approval, which can in general be obtained quite easily, and the attachment is levied by a bailiff, being a government-appointed person. If the outcome of the legal proceedings is successful, the creditor can foreclose on the attached assets and seize more assets if necessary.

The position of an unsecured creditor changes when insolvency proceedings are opened. Upon bankruptcy, unsecured ordinary and preferential creditors are no longer allowed to start or continue actions against the debtor to obtain payment of their claims, and any attachments that are levied are released by operation of law (save during a preliminary 'suspension of payments' when attachments will only be released when the preliminary 'suspension of payments' becomes definitive). Unsecured creditors must submit their claims to the bankruptcy trustee. Payment can only take place on a pro rata basis.

There are no special rules for foreign creditors except that, when a legal proceeding is pending, the court may in rare cases require a foreign creditor who initiated the legal proceeding to provide security for the debtor's legal costs, which are set by the court and rarely amount to more than several thousand euros.

Voluntary liquidations

9 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

Principally, a debtor can only implement a voluntary liquidation of its business in accordance with general corporate procedures if it is able to pay its debts or if it can agree a composition with its creditors. The relevant corporate procedure is liquidation by means of dissolution, whereby the shareholders' general meeting adopts a resolution to dissolve the company (see question 45).

The Bankruptcy Act also allows the debtor itself to request bankruptcy as a means to liquidate its assets. The directors of a company can only file for bankruptcy if the shareholders' general meeting instructed them to do so, unless the articles of association provide otherwise (see question 10).

Involuntary liquidations

10 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

Bankruptcy

A debtor can be declared bankrupt when it has ceased to pay its debts (see question 1). A creditor petitioning for a debtor's bankruptcy should therefore provide prima facie evidence that it has a claim against the debtor, the debtor has ceased paying its debts and there is at least one other creditor.

If the court declares the debtor bankrupt, the court will appoint at least one bankruptcy trustee and a supervisory judge. With retroactive effect from midnight as of the date of the bankruptcy judgment, the debtor is no longer authorised to manage and dispose of its assets. Only the bankruptcy trustee may do so. The trustee is charged with the administration and liquidation of the bankrupt estate. The trustee needs the approval of the supervisory judge for certain acts, including the disposal of assets, termination of employment agreements and initiation of legal proceedings.

During bankruptcy there is a general moratorium and ordinary and preferential creditors may no longer enforce their claims against the debtor's assets. Secured creditors are in general not affected by bankruptcy, except during a cooling-off period (see questions 6 and 7). In addition, there is the possibility for the bankruptcy trustee to set a time frame wherein the secured assets need to be sold by the mortgagee or pledgee. Failure to do so will result in loss of the right to foreclose on the assets (although their claims will continue to have a high preference, they will have to share in the costs of the bankruptcy).

Strike off

Apart from bankruptcy, the Dutch Civil Code also allows the relevant chamber of commerce or district court to dissolve a company if it has consistently failed to comply with certain statutory obligations.

Voluntary reorganisations

11 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

Suspension of payments:

A 'suspension of payments' is the Dutch voluntary reorganisation proceeding for companies, legal entities and for natural persons conducting a business. The debtor can apply to the court for a 'suspension of payments' if it anticipates that it will be unable to pay its debts as they fall due. The directors of a company can request a 'suspension of payments' and they do not need the approval of the shareholders' general meeting, unless the articles of association provide otherwise.

Following the application, the court will grant a preliminary 'suspension of payments' and will appoint an administrator and also, in practice, a supervisory judge. The supervisory judge has a limited advisory role. The directors need the prior approval or cooperation of the administrator to enter into obligations that affect the assets of the company (see question 13). A 'suspension of payments' can be granted for a maximum of three years. It only has an effect on ordinary creditors, who are not allowed to enforce payment of their claims. Preferential and secured creditors are not affected, unless a cooling-off period has been granted (see questions 6 and 7).

Debtors can negotiate compositions with creditors outside insolvency proceedings. The disadvantage is that there are – except in rare situations – no opportunities to force a creditor to accept a general composition and that the composition is not court-supervised or approved.

Pre-pack procedure

In practice a process has been developed, which is used regularly and as part of which the debtor seeks the appointment of a bankruptcy trustee designate by the court in the period before the formal insolvency filing with a view to investigating restructuring options or to prepare for a formal filing, or both. The bankruptcy trustee designate is appointed by the court prior to the commencement of a formal insolvency procedure. The debtor and its stakeholders (creditors, including lenders) act on the assumption that the bankruptcy trustee designate is to be appointed by the court as the insolvency office holder once a formal insolvency procedure is opened. The pre-pack procedure has now been codified in a legislative proposal, the Continuity of Companies Act I, which is currently being reviewed by the Senate. See 'Update and trends' for more information about the legislative proposal on the pre-pack.

Involuntary reorganisations

12 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

Creditors cannot force or direct a reorganisation. However, if a bankruptcy petition is presented against the debtor it can counter with a request for a 'suspension of payments' by the debtor, often with the aim of avoiding bankruptcy for as long as possible. By law, a petition for a 'suspension of payments' is dealt with before a petition for bankruptcy.

Mandatory commencement of insolvency proceedings

13 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

There is no specific statutory obligation for managing directors to file for bankruptcy or seek a suspension of payments. However, in certain circumstances, managing directors or shareholders may be personally liable in tort towards creditors of the company if they decided to continue the business past a certain point in time (and that decision resulted in damage to the creditors). Other than under certain circumstances personal liability for the directors, there are no consequences if a company carries on business while insolvent, save for a Dutch public limited liability company which is obligated to call a shareholders meeting if it has negative equity.

Doing business in reorganisations

14 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?

Reorganisation outside insolvency

If the reorganisation takes place outside the scope of formal insolvency proceedings, the normal rules of representation will remain effective. This would apply to the pre-pack procedure as well. During the pre-pack phase the debtor remains authorised to manage and dispose of its assets.

Reorganisation within 'suspension of payments'

If the reorganisation occurs in the context of a 'suspension of payments', the managing directors need the prior approval or cooperation of the administrator to enter into obligations that affect the assets of the company. If a bankruptcy trustee continues a contract with a supplier in a 'suspension of payments', the supplier may request a bankruptcy trustee to provide security for the obligations of the debtor, which the bankruptcy trustee must then do.

Bankruptcy

Upon bankruptcy, only the court-appointed bankruptcy trustee is entitled to dispose of the assets of the debtor. The trustee needs the approval of the supervisory judge for certain acts, including continuation of the business of the debtor and a sale of assets. If a bankruptcy trustee continues a contract with a supplier after bankruptcy, the bankruptcy trustee is obliged to provide security in respect of the obligations of the debtor. The corporate law capacities of the directors remain unaltered (for example capacity to convene a shareholders meeting, to appoint directors, to deposit accounts with the trade register), however the directors no longer have the power to bind the company.

The Bankruptcy Act allows for the appointment of a creditors' committee by the supervisory judge to advance the interests of the creditors that has certain powers to supervise and advise on the settling of the estate by the bankruptcy trustee. Such a creditors' committee can be appointed if the importance or nature of the estate provides a cause to do so. The task of the creditor's committee is to give advice and exercise (if necessary) any of the specific powers given to it (for example, to file an objection against any act of the bankruptcy trustee with the supervisory judge). The reason for having such a creditors' committee is to allow a greater degree of involvement by the creditors. However, in practice, creditors' committees are rarely appointed.

Stays of proceedings and moratoria

15 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Bankruptcy

As a result of the bankruptcy order, there is an automatic stay, and legal proceedings that require the performance of an obligation by the debtor are suspended. Only a limited number of legal proceedings, for example, where a supplier claims or reclaims ownership, are not affected by the bankruptcy judgment and these can be continued. Secured creditors are not affected by the stay, unless a cooling-off period is ordered by the court (see questions 6 and 7).

'Suspension of payments'

In a 'suspension of payments', there is only a limited stay unless a cooling-off period is ordered by the court (see questions 6 and 7). Preferential and secured creditors are, in the absence of a cooling-off period, not affected by the suspension of payments. Even unsecured ordinary creditors can initiate or continue legal proceedings, although they cannot foreclose a judgment against the assets of the debtor to enforce payment.

Post-filing credit

16 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

Bankruptcy

The bankruptcy trustee can obtain loans or credit. The obligations arising as a result of these loans or credit extended to the trustee in bankruptcy are considered to be estate claims and they have a high ranking. Security can be granted over assets to secure repayment.

'Suspension of payments'

The managing directors can, with the consent of the administrator, obtain loans or credit. Credit granted during a 'suspension of payments' does not automatically have a high ranking, but in practice will often be fully secured.

Set-off and netting

17 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Prior to bankruptcy a creditor can set off a claim if the following requirements have been met: mutual indebtedness, the performance of the obligation corresponds to the claim, the creditor is entitled to perform its obligations (pay its debts) and the creditor's claim is due and payable. The creditor should give notice of the fact that he or she sets off the claims against the debtor and debts to the debtor. Parties may make different arrangements.

During a 'suspension of payments' or bankruptcy, the right of set-off is broader. The creditor may set off claims and debts if both the claim and the debt existed prior to the opening of the insolvency proceedings or the opening of a 'suspension of payments' or resulted from acts that were performed prior to the opening of the insolvency proceedings or 'suspension of payments' respectively. The requirements that the creditor must be entitled to perform its obligations (to pay its debts) and that the claim against the debtor must be due and payable do not apply. A creditor, however, is not allowed to set off claims if it obtained the debt or the claim against the debtor at a time that it knew or should have known that the debtor would go bankrupt or would file for a suspension of payments.

Sale of assets

18 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

'Suspension of payments'

In a 'suspension of payments' only the directors and the court-appointed administrator acting jointly will be able to bind the company and dispose of assets of the company (see question 14). There is no distinction between the sale of goods within or outside the ordinary course of business; therefore, claims may in certain cases pass with the assets.

Bankruptcy

Upon bankruptcy, only the court-appointed bankruptcy trustee can dispose of the debtor's assets. The sale of assets can take place by way of a public sale or a private sale. The bankruptcy trustee needs the approval of the supervisory judge for a private sale of assets. Often, depending on the method of sale chosen by the bankruptcy trustee, assets can be transferred free and clear, for instance, when a bankruptcy trustee sells real estate or assets for the benefit of a mortgagee or pledgee; however in other circumstances, third-party rights may pass with the assets, for example, rights of a tenant leasing a property which is sold.

Based on case law from lower Dutch courts, the bankruptcy trustee is obliged to investigate carefully the value of the assets in order to obtain the highest proceeds for such assets, meaning that he or she should look for alternative bidders should the received bids not be reasonable. The bankruptcy trustee may be liable when he or she intentionally prejudiced the creditors in any way. Although not specifically referred to in the Bankruptcy Act, credit bidding in sale procedures is not unknown in the Netherlands.

Holders of security rights over assets in a bankruptcy estate are able to exercise their rights as if no formal insolvency procedure has occurred. They are able to proceed to an enforcement sale of the assets in accordance with the statutory rules regarding enforcement sales. An enforcement sale can take place by way of a public sale (auction) or private foreclosure sale. An appropriation of the assets by the security holder is prohibited. However, the holder of the security right is allowed to participate in the auction process as a bidder. In case of an enforcement sale in respect of real estate there is a statutory requirement for the payment of the proceeds in cash to the notary that runs the enforcements process, which limits the ability to credit bid. This, however, does not mean that economically a credit bid cannot be achieved through, for instance, a daylight facility. The requirement that proceeds must be paid in cash to a notary or bailiff does not apply in the case of an enforcement sale of pledged assets. This means that in some instances there may be the possibility to implement a credit bid.

Intellectual property assets in insolvencies

19 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

Insolvency of a licensor

The position of an IP licence after insolvency has been subject of fierce debate in both academic circles and within the Dutch courts. In a judgment in 2006 (the *Nebula* judgment), the Supreme Court ruled that the principle that reciprocal agreements continue during insolvency does not mean that the creditor of such an agreement is free to continue exercising his rights under the agreement as if there is no insolvency. The Supreme Court decided that the principle of equality of creditors outweighs the continuation of reciprocal agreements after insolvency. Therefore, the creditor was not permitted to invoice the right of use of a licence after the insolvency. Notwithstanding that this specific case concerned tenancy rights the Attorney-General introduced a parallel with IP rights.

The Supreme Court's decision in the *Nebula* judgment was generally interpreted (both in legal literature, as well as in legal practice) as a right of the bankruptcy trustee to actively breach a reciprocal agreement. However, it appears that the Supreme Court has overturned the *Nebula* judgment in 2014 in its *Berzona* judgment, and that the right of a bankruptcy trustee to actively breach a reciprocal agreement does not extend to certain types of agreements. From the 2014 *Berzona* judgment it follows that a distinction can be made between reciprocal agreements in which:

- performance of the agreement by the bankrupt debtor requires a certain act from the bankruptcy trustee (at the expense of the estate), such as a payment or the delivery of goods; and
- performance of the agreement by the bankrupt debtor (solely) requires the bankruptcy trustee to honour the creditor's contractual right of use (eg, a lease agreement).

With respect to the second type of reciprocal agreement, the Supreme Court held that the bankruptcy trustee does not have a right to breach such agreements and that the bankruptcy trustee must honour the creditor's right of use. The *Berzona* judgment concerned the rights of use of a tenant vis-à-vis the right of the bankruptcy trustee to breach the lease. As was the case with the *Nebula* judgment, the Supreme Court's decision appears to be also relevant for other types of reciprocal agreements, such as licensing agreements. In practice this would mean that in the event a licensor is declared bankrupt, the bankruptcy trustee must respect the licensee's right of use (in principle for as long as the licensing agreement is in place).

Insolvency of a licensee

The position is different as regards the insolvency of a licensee because any reciprocal agreements should continue during insolvency an insolvency administrator should be able to continue to exercise the IP rights granted under the licence. This means that unless provided otherwise in the licence, the opening of insolvency proceedings in respect of the licensee does not impact the rights of the licensor. If the licensee becomes insolvent and the licensee has fully performed its obligations under the licence, the licensee's insolvency administrator is entitled to claim performance of the licensor. Furthermore, the insolvency administrator may also seek to terminate the licence.

To the extent that the licensor has fully performed its obligations under the licence and has a claim against the insolvent licensee, the licensor may seek termination of the licence on the basis of the general provisions of breach of contract, unless the insolvency administrator performs the licence. The licensor's claim resulting from termination of the licence will be unsecured.

Personal data in insolvencies

20 Where personal information or customer data collected by an insolvent company is valuable to its reorganisation, are there any restrictions in your country on the use of that information in the insolvency or its transfer to a purchaser?

The Personal Data Protection Act, which entered into force on 1 September 2001, provides mandatory rules on the protection, processing and storing of personal data. Any party that is processing personal data (for instance, by collecting personal information), must comply with the Personal Data Protection Act. Personal data can be any information related to a natural person (such as employees or customers of a company).

Personal data may only be processed when:

- the person involved has unambiguously granted consent;
- it is necessary in relation to an agreement to which the involved person is a party or shall become a party;
- it is necessary because of a statutory obligation;
- it is necessary to protect the health of the person involved;
- it is necessary for the proper performance of a public-law obligation; or
- when it is necessary to protect a legitimate interest of the processor or a third party that receives the personal data, unless such interest violates the fundamental rights of the person involved (eg, the right to privacy)).

Furthermore, the Personal Data Protection Act prohibits processing or further use of the personal data when:

- this is incompatible with the purposes for which the data were acquired; or
- an official, professional or statutory duty of confidentiality stands in the way of processing the personal data.

Once personal data have been processed (eg, collected, gathered, stored, categorised or used in any other way) in accordance with the Personal Data Protection Act, they must be adequately protected against loss or any form of illegal processing. If a company has processed personal data and goes insolvent, it must still adhere to the Personal Data Protection Act. The mandatory rules of the Personal Data Protection Act also apply when (processed) personal data are transferred to another party. Transfer of personal data to a third party is not explicitly prohibited in the Personal Data Protection Act, but the transferee must comply with the mandatory rules regarding the processing of personal data and the (further) use of personal data.

In practice, this means that when a bankruptcy trustee decides to sell personal data held by the insolvent company to a third party, the bankruptcy trustee or the buyer, or both, actively seek out the consent of the persons involved by informing them of the intended transfer and the intended use of the personal data. When informing the persons involved, the bankruptcy trustee or buyer, or both, usually offer them the opportunity to object against the processing of their personal data by the buyer (ie, an opt-out). If a person opts out, then his or her personal data will be excluded from the envisaged transfer. This is a practical way for the bankruptcy trustee and the buyer to ensure that they act in accordance with the Personal Data Protection Act.

Rejection and disclaimer of contracts in reorganisations

21 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

Yes. As a general rule, Dutch law provides that contracts continue after insolvency of a counterparty, unless the contract includes an ipso facto (or insolvency) clause (pursuant to which the contract automatically terminates (or may be terminated) on insolvency).

The Bankruptcy Act, however, allows the bankruptcy trustee to confirm or terminate executory contracts under which both the debtor and its counterparty have outstanding obligations (where he or she believes that continuation of the contract is not in the best interest of the debtor's creditors as a whole). Any creditor can request the bankruptcy trustee to confirm within a reasonable time whether a contract will be honoured by the estate. If the bankruptcy trustee does not provide such confirmation the estate forfeits the rights to request performance of the contract. The contract is considered terminated and the counterparty has an unsecured and non-preferred claim for damages. If the bankruptcy trustee decides to confirm continuation of the contract, the estate must provide security for the proper performance of its obligations, for example a right of pledge, mortgage or personal right (such as surety or a liability statement). The security should be sufficient to cover the claim and if applicable, any related interest and costs, in such a manner that a creditor can effortlessly take recourse. Security may include bank guarantees or the creation of security over unencumbered assets. Typically, a negative pledge undertaking in the finance documentation does not create a limitation. Only to the extent that actual security has been created, for the benefit of the financing bank over the assets does this create a limitation. After the provision of security, the contract will then have to be performed by both parties. If the bankruptcy trustee breaches such a contract, the creditor will be able to enforce its security rights.

For contracts where the estate is not under an obligation to actively perform but is only required to omit or tolerate a different regime applies. For these contracts, such as lease contracts or IP licences, the bankruptcy trustee may not simply reject the contract or terminate it, save as specially provided for in the Bankruptcy Act. This has been confirmed in case law of the Dutch Supreme Court (see question 19). The Bankruptcy Act contains specific provisions for the termination of certain types of contracts, such as leases and employment contracts. To terminate those types of contracts the bankruptcy trustee has to take into account fixed notice of terms as set out in the Bankruptcy Act.

As a final note, it is of course also possible that a creditor wishes to terminate a contract because of the debtor's insolvency. As stated above, if the contract includes an insolvency clause, then the creditor may exercise the termination rights arising from such a clause, as agreed under the contract. However, pursuant to case law of the Dutch Supreme Court (the *Megapool/Laser* judgment) there are exceptions to this general rule.

In *Megapool/Laser* the Dutch Supreme Court identifies two possible scenarios in which an insolvency clause may be null and void (subject to the context and other circumstances of the case at hand):

- if (solely) because of the occurrence of the debtor's insolvency the creditor's obligation to perform under the contract no longer applies, where the debtor has already performed its obligation, the insolvency clause may be considered to infringe on the central principle of Dutch bankruptcy law that the legal position of creditors is fixed as of the commencement of the bankruptcy; or
- if exercise of the insolvency clause is contrary to the overriding principle of reasonableness and fairness.

Permitting the exercise of insolvency clauses under those circumstances would disproportionately prejudice the other creditors' recourse options, because an asset of the debtor (ie, its rights under the contract) are being kept out of the estate of the bankrupt debtor solely because of its bankruptcy.

Arbitration processes in insolvency cases

22 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

Parties, including the bankruptcy trustee may choose to submit disputes to arbitration. The courts in the Netherlands, however, do not have the power to direct the bankruptcy trustee or its counterparty to submit disputes in the bankruptcy procedure to arbitration. There are certain types of insolvency disputes that may not be arbitrated, for example disputes regarding matters of public concern. A distinction should be made between arbitration procedures pending at the time of the commencement of the bankruptcy case and procedures commenced afterwards to solve a dispute related to the insolvency.

Pending arbitration

Arbitration proceedings regarding monetary claims or for breach of contract that are already pending at the time the insolvency proceedings are commenced are suspended through analogous application of the statutory provisions in the Bankruptcy Act dealing with litigation in a governmental court. If the claim is contested by the bankruptcy trustee, the arbitration may be continued to determine the amount of the creditor's claim that will be admitted for proof.

Post-insolvency disputes

Arbitration procedures do not typically play a substantial role in the insolvency process, although the bankruptcy trustee in principle is authorised to agree to arbitration on behalf of the estate (ie, claims by the estate are arbitrable). Claims against the debtor that do not involve the estate (ie, which are not aimed at retrieving payment from the estate) may also be submitted to arbitration. Neither the Bankruptcy Act nor case law directly addresses whether a contested claim for payment in the claims allowance stage, in respect of which no arbitral proceedings were pending when the insolvency proceedings were commenced, is arbitrable. There are differing views in legal literature, and the wording of the relevant provision of the Bankruptcy Act seems to preclude arbitrability. There is, however, a case of the Dutch Supreme Court in which the court found that a choice of forum for a foreign court was binding upon a bankruptcy trustee where he seems to reject or challenge a claim. It is not unlikely that the courts will come to the same conclusion with respect to an arbitration clause and require the bankruptcy trustee to arbitrate the claim.

Successful reorganisations

23 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

Outside insolvency

A reorganisation outside of insolvency will only be binding upon those creditors that agree to the plan. Only in very specific situations, where it would be wrongful not to vote in favour of the plan, for example, if the creditor in all reasonableness should not have refused to cooperate as it abuses its position in doing so, is it possible to force a creditor to accept the plan by a court order to that effect. To date the Dutch High Court has rejected many attempts to claim such an abuse of position.

Within insolvency

A reorganisation plan may be proposed by the debtor in a bankruptcy or in a 'suspension of payments'.

There are no mandatory features of a reorganisation plan except that it should take into account the statutory grounds for rejection (see below). A successful reorganisation, however, often relies upon preparation and securing the cooperation and commitment of major creditors to it before filing for a suspension of payments.

A plan that is accepted by a majority of creditors, as set out below, and approved by the court will be binding on all unsecured creditors (regardless of whether or not they submitted their claims and whether or not they voted in favour of or against the plan). Preferential and secured creditors are not bound by the plan, unless they so agree. Unsecured creditors that submitted their claims (which were accepted or conditionally admitted) and are present at the meeting of creditors must approve the plan by a simple majority representing at least 50 per cent of the total value of the unsecured claims against the debtor. If the required majority do not vote in favour of the plan, the supervisory judge may, upon request, nevertheless approve the plan if at least 75 per cent of those creditors who submitted their claims (which were accepted or conditionally admitted) approved the plan, provided that the rejection of the plan is because of one or more creditors who could not reasonably have been expected to vote against the plan.

The court will not approve the plan (even if the thresholds referred to above have voted in favour of the plan) if:

- the value of the assets in the estate is significantly higher than the amount offered to the creditors;
- the performance of the plan is not sufficiently guaranteed;
- the plan has been accepted as a result of fraud, preferential treatment of certain creditors or as a result of other unfair methods; or
- there are any other grounds why the court believes that the plan should not be approved.

Acceptance of a reorganisation plan does not automatically result in a release in favour of third parties. Any type of release in favour of third parties will need to be specifically negotiated and agreed.

Expedited reorganisations

24 Do procedures exist for expedited reorganisations?

Officially, there is no special provision for expedited reorganisations. However, in practice, bankruptcies are regularly pre-packaged in the sense that sale of the business to a newly incorporated entity is organised. A pre-pack takes place through the appointment of a *beoogd curator* (bankruptcy trustee designate), which is appointed by the court at the request of the business. The court will test whether the appointment of a bankruptcy trustee designate is justifiable. See 'Update and trends' for more information about the legislative proposal on the pre-pack.

Unsuccessful reorganisations

25 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

Outside of insolvency

A dissenting creditor can decide not to take part in a reorganisation that takes place outside of insolvency. Save for exceptional situations, he or she will not be bound by any plan agreed with other creditors. In the case of a pre-pack, the debtor's creditors, the bankruptcy trustee designate or the intended supervisory judge are each entitled to request the court to terminate the pre-pack procedure. See the 'Update and trends' for more information about the legislative proposal on the pre-pack.

Within insolvency

A reorganisation plan in insolvency proceedings is defeated if the majority of creditors does not approve the plan or the court does not approve the plan. In the case of a suspension of payments, the court must terminate the suspension of payments and declare the debtor bankrupt (see question 23).

If the debtor does not perform the plan after it has been approved by the court, the plan can be dissolved and the court will open or reopen the bankruptcy proceedings.

Insolvency processes

26 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

The opening and termination of insolvency proceedings are published in the government gazette and in the national insolvency register. This is an electronic register accessible online, in which all bankruptcies, suspensions of payment and debt reorganisations of natural persons opened after 1 January 2005 have been registered. Typically, it takes from one to several days between a company being declared bankrupt or 'suspension of payments' being ordered and publication in the register. To determine whether a company was declared bankrupt before 1 January 2005, it is still necessary to contact the relevant courts to confirm that the register is up to date. In addition, there is a separate register, kept by the court in The Hague, in which foreign insolvency proceedings that have been recognised under the EU Insolvency Regulation can be registered at the request of a foreign administrator.

If a creditors' meeting is held, this will also be made public in one or more newspapers. The bankruptcy trustee will also separately notify all creditors in writing of a creditors' meeting. A creditors' meeting is held if there are sufficient assets to make distributions to the unsecured creditors. During a creditors' meeting, all claims of creditors are verified and listed. Claims can either be admitted or challenged (see question 31).

If it is likely that there will be insufficient assets to distribute to the unsecured creditors, the bankruptcy judge may decide – at the request of the bankruptcy trustee – that it will not be necessary to deal with the unsecured claims and that there will not be a meeting at which claims are admitted or rejected. The bankruptcy trustee will then notify all creditors of this decision in writing and he or she will also announce the decision in one or more newspapers. Once the bankruptcy trustee has prepared a distribution plan for the estate and preferential creditors (see question 33), this will be filed with the court for inspection by the creditors. The filing will be announced in one or more newspapers and to the known creditors by separate letter.

In addition, a creditors' meeting is held in a 'suspension of payments' to vote as to whether the provisional 'suspension of payments' should be converted into a definite 'suspension of payments' to vote on an extension of the definite 'suspension of payments' or to vote on the acceptance of a reorganisation plan (see question 23).

At the end of each three-month period, the bankruptcy trustee must report on the state of affairs of the estate. The bankruptcy trustee must deposit his or her report with the clerk's office at the district court, where it will be available for public inspection free of charge. The three-month period may be extended by the supervisory judge.

As a general rule, the ability to bring proceedings against third parties in relation to losses suffered by the company is confined to the bankruptcy trustee. However, creditors may, in certain circumstances, pursue remedies against third parties, including directors and shareholders on the basis of tort (see question 41). Such procedures may be suspended by the court where they are brought until a decision has been reached in the procedure initiated by the bankruptcy trustee.

Currently the debtor is unable to effect a compulsory composition between the debtor and the third party creditors outside formal insolvency proceedings. See 'Update and trends' for more information about the pending legislative proposal on the compulsory composition for release of liability by guarantors.

Enforcement of estate's rights

27 If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

Under certain circumstances, a bankruptcy trustee may apply to the Ministry of Security and Justice to obtain financing to pursue claims against the directors and supervisory board directors. Any proceeds will be available for distribution to the creditors.

Alternatively, a bankruptcy trustee may seek to assign a claim to obtain financing to pursue other claims. Note, however, that the bankruptcy trustee cannot assign his own claim based on the statutory anti-abuse provisions.

Creditor representation

28 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

The Bankruptcy Act allows for the appointment of a creditors' committee by the supervisory judge (see question 14). The creditors' committee may demand inspection of the books, records and other data carriers relating to the bankruptcy at any time. The bankruptcy trustee must provide the creditors' committee with such information as the committee requires.

The bankruptcy trustee must obtain the advice of the committee on several instances such as whether to continue the business of the debtor and in respect of the manner of the liquidation and realisation of the estate and the time and amount of the distributions to be made. The bankruptcy trustee is, however, not bound to accept the advice of the committee.

There are no specific provisions that deal with retaining advisers or the funding of expenses.

Insolvency of corporate groups

29 In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

The Bankruptcy Act does not recognise the concept of consolidated reorganisation. In practice, a bankruptcy trustee or administrator appointed at the parent level may seek appointment at the subsidiary level also and realise a de facto combined administration for administrative purposes. However, from a legal point of view, each proceeding remains distinct and separate from the other, as are the creditors of the various entities. In the event of possible conflicts of interest between the (creditors of the) various entities belonging to a group of companies, the court may appoint different individuals as bankruptcy trustees or administrators of the entities involved, who then among them – with the approval of the court – may attempt to come to an arrangement that takes into consideration that the various companies prior to opening of the insolvency proceedings used to operate as a group, that is, as one economic entity.

A distinction should be made between countries to which the EU Insolvency Regulation applies and other non-EU jurisdictions (including Denmark). The transfer of assets is allowed with respect to member states where the EU Insolvency Regulation applies.

When only a main proceeding is opened all of the debtor's assets are subject to the main procedure. The liquidator may exercise all the powers conferred on him by the law of the state of the main proceeding in another member state, as long as no secondary proceedings have been opened. The office holder may remove the debtor's assets from the territory of the member state in which they are situated.

Also pursuant to the EU Insolvency Regulation the administrator of the secondary proceeding shall need to give the office holder of the main proceeding the right to use the assets of the secondary proceeding. This becomes relevant when the office holder in the main proceeding would like to restructure the business and sell it as a whole, including the assets involved in the secondary proceeding.

With respect to insolvency proceedings opened in countries which do not belong to the EU and where the EU Insolvency Regulation does not apply, Dutch bankruptcy law, although it recognises the authorities of a foreign insolvency officer under the lex concursus, does not recognise the effects of the foreign insolvency to such an extent that creditors are prevented from taking recourse on assets located in the Netherlands belonging to the debtor to which the foreign insolvency procedure applies. In Dutch case law, however, it is determined that a foreign insolvency office holder is allowed to invoke its rights in the same way as is available to the foreign insolvency office holder under domestic insolvency law, including over assets which are located in the Netherlands. The office holder is also allowed to sell these assets and consider the proceeds part of the assets of the foreign bankruptcy estate. Notwithstanding that the foreign insolvency procedure's seizure is regarded as having only territorial effects of the foreign insolvency, the effects are de facto recognised in the Netherlands. In the EC Regulation on Insolvency Proceedings 2000 (Council Regulation (EC) No. 1346/2000) (the Recast Regulation) a new mechanism is introduced for a group coordination plan. This regulation is in force at the time of writing although the majority of its provisions will only apply from 26 June 2017. Insolvency proceedings opened after 26 June 2017 in member states (other than Denmark) will fall under the scope of the Recast Regulation. An officeholder appointed in any insolvency proceeding will be able to request the opening of group coordination proceedings where more than one member of a group is in insolvency proceedings. The court first seized will have jurisdiction to consider the request. For further detail on the Recast Regulation and the timings of its effect please refer to the chapter on the European Union.

Appeals

30 What are the rights of appeal from court orders made in an insolvency proceeding? Does an appellant have an automatic right of appeal or must it obtain permission to appeal? Is there a requirement to post security to proceed with an appeal and, if so, how is the amount determined?

Under Dutch bankruptcy law, a debtor, a creditor, the Public Prosecution Service, or any other interested party are each granted rights to appeal (or oppose) a decision on a bankruptcy request. These rights arise automatically. Permission to appeal (or oppose) a decision on a bankruptcy request is not required. The various rights of appeal (or opposition) can be summarised in the following scenarios.

Rights of appeal when the court rejects a bankruptcy request

If a bankruptcy application is rejected by the court, then the applicant (either a debtor who applied for his or her own bankruptcy, a creditor, or the Public Prosecution Service) are each entitled to lodge an appeal against that decision with the court of appeal within eight days of the date of the rejection (note that this appeal option is not open to a creditor that did not file for the debtor's bankruptcy).

Rights of appeal and opposition when the court grants a bankruptcy request

The debtor who was declared bankrupt at the request of a creditor or the Public Prosecution Service can appeal against this decision with the court of appeal, within eight days of the day of the bankruptcy declaration.

If the debtor has not been heard by the court prior to the bankruptcy declaration, he has 14 days after the day of the bankruptcy declaration to oppose that decision at the court that decided on the bankruptcy application (note that this does not apply if a debtor filed for his or her own bankruptcy). The 14-day term can be extended to a month if it concerns a debtor who – at the time of the bankruptcy declaration – was not located within the borders of the Netherlands. If the court upholds the bankruptcy declaration in these opposition proceedings, then the debtor may lodge an appeal against that judgment with the court of appeal, within eight days of the day of the court's decision on the opposition.

A creditor that did not file for the debtor's bankruptcy or any other interested party also has the right to oppose a bankruptcy declaration. For such parties the opposition term expires eight days after the day of the bankruptcy declaration. If the court upholds the bankruptcy declaration in these opposition proceedings, then the creditor or interested party may lodge an appeal against that judgment with the court of appeal, within eight days of the day of the court's decision on the opposition.

Rights of appeal when an opposition against a bankruptcy declaration is successful

If the opposition by a creditor or interested party is granted and subsequently the initial decision to declare the debtor bankrupt is annulled, then the debtor, the creditor who filed the bankruptcy request, or the Public Prosecution Service have the right to appeal against that decision within eight days.

If any of the appeal/opposition scenarios set out above lead to a decision by the court of appeal, then that decision can also be appealed against by anyone who was a party to the appeal procedure. Such an appeal must be lodged with the Supreme Court, within eight days of the day of the decision by the court of appeal.

There is no statutory requirement to post security when bringing an appeal before a Dutch court. A defendant can request the court to order the claimant to post security for payment of the litigation costs (usually by way of a bank guarantee), but only if the claimant does not live (or has an office) in the Netherlands. However, there are numerous exceptions to this rule. For instance, if the claimant is from a country in which the EU Execution Regulation or the Civil Procedure Convention 1954 is applicable, then such request cannot be made. Also, under certain circumstances ordering a party to post security can be a violation of the 'equality of arms principle'. Owing to the various exceptions, the practical use of the possibility for a defendant to request the court to order the claimant to post security is limited.

Claims

31 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

Claims must, as a rule, be submitted to the bankruptcy trustee 14 days prior to the meeting at which creditors' claims are accepted or rejected (the 'claims allowance meeting') (for foreign creditors, a limited exception is possible). During a 'suspension of payments' a similar procedure applies, albeit a claim is only admitted with the aim to vote on the reorganisation plan submitted by the debtor. As a result, there is, unlike in a bankruptcy proceeding, no formal procedure available to litigate a claim if it is disputed. The bankruptcy trustee will decide whether he or she will admit or challenge a claim. Other creditors may also challenge the admittance of a claim. If he or she admits a claim, the claim is placed on a list with provisionally admitted claims. If the bankruptcy trustee challenges a claim, that claim will be placed on a separate list. During the claims allowance meeting, all claims are reviewed and when claims are challenged and no solution can be reached, the supervisory judge will refer the matter to legal proceedings on the merits, in which case the validity of the claim will be litigated.

There are no specific provisions that deal with the purchase, sale or transfer of claims against the debtor.

It is possible that claims that represent an unliquidated amount are recognised in a bankruptcy proceeding. The Bankruptcy Act determines that claims that do not reflect the amount in euros or claims that are indefinite, uncertain or not expressed in money must be verified for their estimated value (in euros). The estimation should be based on the value on the day that the company was declared bankrupt.

If the estimation of the value of a claim is not possible, but there is a likelihood that the value can be determined at a later stage, the allowance of the claim takes place on a preliminary basis. Such claim can be added as pro memorie to the list of known or disputed creditors.

The Bankruptcy Act provides also for the allowance of claims with an uncertain due date or claims that entitle the claimant to periodic payments. In such a case, the claim will be admitted for its value at the date of the bankruptcy order. Claims that become payable within a year of the commencement of the bankruptcy will be considered due as of the date of bankruptcy. Claims that become payable after one year will be admitted for their value one year from the date of the commencement of the bankruptcy. For calculation only, the intervals of instalment payments, any profit opportunity and, if the claim bears interest, the agreed rate of the interest will be taken into account. In principle, to the extent secured by in rem security rights, a claim acquired at a discount secured by security can be enforced for its full value. However, there are limitations on the acquisition of claims with a view to setting off claims at a point in time bankruptcy becomes unavoidable or with a view to bringing the claim under the scope of foreign security rights. Interest accrued after the opening of an insolvency case cannot be claimed by a creditor.

Modifying creditors' rights

32 May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

No. Dutch law does not recognise a concept similar to 'priming'.

Priority claims

33 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

A bankruptcy trustee will first pay estate claims and thereafter the pre-insolvency claims. Estate claims generally are claims incurred by the bankruptcy trustee in performing his duties, and that fall in the estate without requiring verification, which just like insolvency costs have priority above the ordinary and preferred debt claims against the debtor. Estate claims are deemed to include debts which give an immediate claim on the estate, because they are claims arising out of contracts continued or made by the bankruptcy trustee. With respect to the pre-insolvency claims, a distinction should be made between preferential claims (the majority of which tend to be held by the tax authorities and social security board) and unsecured claims. Preferential claims can again be subdivided between claims that have a general preference and claims that are preferential only in relation to a specific asset. Furthermore, the rank of preference may vary.

Claims that have a general preference include:
- claims for the costs of the filing of bankruptcy; and
- taxes and social security premiums.

Claims that are preferential in relation to a specific asset include:
- claims in connection with the preservation of an asset;
- claims secured by a right of mortgage or right of pledge; and
- claims in connection with a right of possession.

Employment-related liabilities in restructurings

34 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

The strict requirements that apply to the dismissal of employees outside bankruptcy do not apply in the case of bankruptcy. This means that, in practice, bankruptcies are regularly used for restructuring purposes.

An employee may have two claims with different priority. A distinction should be made between the period before the bankruptcy (pre-insolvency) and after the opening of the bankruptcy. The unpaid salary, pensions and other related benefits deriving from the employment contract that fell due before the bankruptcy are preferential claims with a general preference (see question 33). From the day the company is declared bankrupt salary, pensions and other related benefits deriving from the employment contract are an estate claim.

In addition to the above-mentioned claims of employees, a wage guarantee by the Dutch Employee Insurance Agency (UWV) exists in the Netherlands. When the employer is unable to pay the salary of the employee, the UWV will guarantee the salary for up to 13 weeks before the termination of the employee's employment contract by the bankruptcy trustee. The salary due over the notice period is an estate claim. Payment of salary during the notice period (a maximum of six weeks) is also guaranteed by the UWV. Holiday allowance and pension contributions that have remained unpaid are guaranteed by the UWV for a period of up to one year.

The procedure concerning termination of employment contracts is as follows.

The bankruptcy trustee has the right to terminate the employment contracts of the debtor's employees without obtaining a permit from the UWV, albeit with a notice period of a maximum of six weeks regardless of whether a longer notice period is applicable pursuant to Dutch labour law or has been agreed upon between parties. To terminate any contracts with employees, the bankruptcy trustee requires authorisation from the supervisory bankruptcy judge.

This procedure is different for collective redundancies. A bankrupt trustee who intends to terminate the employment contract of 20 or more of the employees within one UWV district within a period of three months has to inform the labour unions and if requested the UWV. In addition, the bankruptcy trustee must consult the works council. The same procedure is applicable when the bankruptcy trustee intends to transfer the ownership of the business.

During the suspension of payment, the regular dismissal rules will apply, requiring the trustee to obtain a permit from the UWV or court involvement to effect unilateral dismissals. This in practice makes the suspension of payment procedure a less efficient restructuring tool if a large number of employees are involved.

Pension claims

35 What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

A distinction should be made between the employer's and employee's part of the pension contribution and whether the premium has fallen due before or after the date of the bankruptcy.

Pension contributions falling due before the bankruptcy that have been withheld by the employer from the employee's salary, but which have not yet been paid to the pension provider, are considered to be directly based on the employment agreement and are therefore preferred claims (see question 34). The employer's part of the pension premiums will be considered an unsecured claim by the pension trustee against the employer. In practice, the UWV will be confronted with this difference in treatment of the two parts of the pension contribution as pension premiums (both the employer's and the employee's part of the pension contribution) are covered by the wage guarantee for a period of one year.

Post-bankruptcy pension-related claims, such as unpaid pension contributions that have fallen due after the bankruptcy order, are estate debts based on article 40(2) of the Dutch Bankruptcy Act.

Back-service obligations will be considered estate debts if they became payable as a result of an act by the bankruptcy trustee (in practice, as a result of a termination of the employment agreement after the date of the bankruptcy order) and an unsecured debt in all other cases.

Environmental problems and liabilities

36 In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

In principle, liability for environmental damage rests on the person who has caused that damage. Under Dutch law, however, remedial obligations for environmental pollution may also arise for a landowner, a land lessee, or the holder of a permit as well as the entity that caused the contamination. Generally, liability for (soil) pollution or remedial obligations, or both, may arise out of:
- contracts with the landowner regarding the use of its premises, including land lease contracts;
- conditions attached to a permit; and

- administrative remedial action, soil investigation and orders under the Soil Protection Act.

Dutch case law in respect of remedial costs for a lessor to remove contaminated goods from a property at the moment a Dutch bankruptcy trustee terminates the lease agreement (after bankruptcy of the lessee) has shown that such costs used to be classified as estate claims. On the basis of recent case law it is probable that claims are no longer to be classified as estate claim which has priority ranking but instead as an unsecured claim.

There are fines for corporations that are not in the possession of the right permits (for example, under the Soil Protection Act) or which breach environmental laws. Liabilities in relation to pollution and administrative clean-up costs depend on the severity of the pollution and the remedial costs.

Case law has shown that, in certain circumstances, other entities within the group could also be held liable for remedial costs.

The EU Directive on Environmental Liability (2004/35/EC) contains an option for national governments to implement measures on the obligation to provide financial security to cover liability risk for environmental damages. No such general measures have been implemented in the Netherlands. However, some specific legislation does include the obligation to provide financial security under certain circumstances, examples (among others) can be found in the Soil Protection Act (in the event of remedial actions at the moment of transfer of land or lease or on the basis of a remedial action plan, however, this then needs to be further specified in a general measure), the Activity Decree Environment Management (underground tank storage) and the Nuclear Energy Act (when dismantling a facility).

Liabilities that survive insolvency proceedings

37 Do any liabilities of a debtor survive an insolvency or a reorganisation?

A distinction should be made between bankruptcy and a suspension of payment.

'Suspension of payments'

If a suspension of payment is successfully terminated, this means that a reorganisation plan has become binding upon the creditors bound by the plan – in broad terms, the unsecured creditors. Pursuant to the plan, the creditors may receive payment in respect of (part of) their claim. To the extent that the creditors only receive partial payment of their original claim under the plan, the remainder of their claim, as a result of the plan becoming binding, cannot be enforced against the debtor. However, the remaining part of the unpaid claim will continue to exist as an unenforceable claim.

Bankruptcy

In bankruptcy, three different scenarios are possible:

- The termination of the bankruptcy following acceptance of a reorganisation plan between the creditors and approval of the plan by the court: in that event, the creditors will be entitled to receive payment under and in accordance with the plan and the remainder of their claim will continue to exist as an unenforceable claim.
- Termination of the bankruptcy following a meeting of creditors and the creditors' list becoming binding: in this scenario, the assets of the debtor will have been liquidated and distributed to the creditors and the bankruptcy will have terminated. However, the records of the creditors' meeting and the final distribution list as approved by the court form an enforceable title for creditors recognised at the occasion of the meeting of creditors, which can be enforced by each of such creditors against the debtor for the remainder of their claim following receipt of their distribution pursuant to the distribution list if ever any new assets of the debtor were to surface. In addition, any party of interest may petition the court to order the former bankruptcy trustee to distribute such new, previously unknown, assets in accordance with the original distribution list or to again apply for bankruptcy of the creditor; however, in that event, new creditors of the debtor will compete for the assets.
- Termination of the bankruptcy in the absence of assets without a final distribution list having been established: in this scenario, each creditor may again individually seek recourse against any assets that it is able to trace. Also, new applications for bankruptcy may be filed, but if a new application is filed within the three years following termination of the original case, the applicant must provide evidence that there are sufficient assets available to pay for the costs of the bankruptcy. Following termination of the bankruptcy of a legal entity for lack of assets, the legal entity will cease to exist. Alternatively to reapplying for bankruptcy, a creditor may also seek the liquidation of the company if a new asset has surfaced. If dissolution is sought by a creditor, the liquidator will be appointed by the court (see question 9).

Distributions

38 How and when are distributions made to creditors in liquidations and reorganisations?

The bankruptcy trustee is in principle authorised to make payments to estate creditors, the tax authorities and the social security board and certain other preferential creditors or force-creditors. Force-creditors are creditors which have a strong position because of the dependency of the debtor on their services (for example, a supplier whose products are essential to the business). Unsecured creditors can only be paid after the supervisory judge has ordered interim distributions. The bankruptcy trustee will prepare a plan for distributions, which needs to be approved by the supervisory judge.

A 'suspension of payments' does not affect the rights of secured or preferential creditors. Payments to unsecured creditors can be made at any time, provided those payments are made pro rata.

Transactions that may be annulled

39 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

Outside insolvency

Outside bankruptcy, creditors can take action against voluntary legal acts performed by the debtor if both the debtor and the counterparty knew or ought to have known that the creditors of the debtor would be disadvantaged as a result of such an act. A creditor – secured or unsecured – that is prejudiced in its recourse against the debtor can void such legal act which it can do by sending a simple letter, while if the challenge is disputed, litigation will follow where the creditor has to prove that the requirements for the challenge have been met. The creditor can only do so for its own benefit and only to the extent necessary to ensure that it is no longer prejudiced.

'Suspension of payments'

In a 'suspension of payments' the administrator does not have a specific statutory right under the Bankruptcy Act to void transactions.

Bankruptcy

In bankruptcy, the bankruptcy trustee has the right to challenge certain legal acts.

The bankruptcy trustee has the right to challenge voluntary legal acts (ie, acts where there was no prior legal obligation to perform them) for consideration, and legal acts without consideration that were performed by the debtor. In order to successfully invoke the challenge, the following requirements must be satisfied:

- the legal act of the debtor adversely affected the possible of recourse of one or more of its creditors (such disadvantage must be apparent at the time the challenge is invoked or contested in court);
- the debtor knew or ought to have known the legal act would adversely affect the possible recourse of one or more of the creditors (generally believed to be the case when the insolvency of the debtor was probable at the time of the legal act); and
- if the legal act was for consideration, it is also required that the counterparty to the transaction knew, or ought to have known, that legal act would prejudice the interests of one or more of the creditors.

The bankruptcy trustee can void such legal acts, with the effect that the act is deemed never to have occurred. The counterparty will be liable for any damage to the estate if the act cannot (wholly or partially) be unwound. For the applicable suspect periods please see question 40.

The bankruptcy trustee must prove that the requirements mentioned in the previous paragraph are satisfied in order to annul voluntary legal acts for consideration and legal acts not for consideration. Under certain circumstances, however, there is a shift in the burden of proof to the advantage of the bankruptcy trustee. This results in the presumption that both parties to the transaction knew or ought to have known that prejudice to creditors would be the result of this legal act, thereby satisfying the second and third requirements above. This presumption is rebuttable. First, specific circumstances need to be satisfied in order for the presumption to be triggered. Among these are when legal acts are performed in relation to insiders such as group companies and legal acts that result in a transaction in which the consideration because of bankrupt's counterparty substantially outweighs the consideration for the transaction received by bankrupt. Second, the following circumstances need to be satisfied:

- the legal act that adversely affected one or more creditors was performed in the year prior to the invocation of the annulment; and
- in the case when the legal act was for a consideration, the debtor must not have committed itself to that legal act before the beginning of such period (ie, the act was voluntary).

In addition, the bankruptcy trustee is able to void legal acts that were performed on the basis of a prior legal obligation, if the bankruptcy trustee can show evidence that:

- the other party knew that a petition for bankruptcy was already filed at the time that the act was performed, and the debtor was subsequently declared bankrupt; or
- the performance of the act was a result of consultations between the debtor and the other party with the aim of preferring the counterparty over the other creditors.

Note that the FSA specifically provides that it is not possible to set aside or annul the transfer of assets, rights or liabilities that has taken place between a failed entity (a bank or investment firm) and a third party, if this transfer is a result of the application of a resolution measure under the new (EU) legislative framework regarding the recovery and resolution of credit institutions and investment firms. This restriction on the *pauliana* action applies to the possibility to challenge transactions in both a pre-bankruptcy situation and the bankruptcy situation.

Proceedings to annul transactions

40 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

The ability to set aside transactions in bankruptcy is set out in question 39. There is a type of suspect period: if certain voluntary actions were performed in the year preceding the bankruptcy, two rebuttable statutory presumptions apply that relieve the burden of proof on the bankruptcy trustee. The presumptions provide that, for actions performed during that one-year period, it is deemed that such actions are prejudicial to the creditors of the debtor, and that both the debtor and the counterparty were aware of this. These actions include transactions where the value of the obligation of the debtor considerably exceeds the value of the obligation of the counterparty, or where the debtor and the counterparty are connected.

Directors and officers

41 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

As a general rule, managing directors of Dutch companies (the directors) are not liable for the obligations of the company. There are, however, certain exceptions to this rule. Directors of a company (and certain other legal entities) can be held personally liable for (certain) debts of the company. This would include the following situations:

- Personal liability can result because the directors have neglected to properly discharge their fiduciary duties as regards the company. This action can only be initiated by or on behalf of the company (and in the case of bankruptcy, by the bankruptcy trustee on behalf of the company).
- Upon bankruptcy (but not in the case of a suspension of payments), the bankruptcy trustee can hold all directors of a company personally liable on a joint and several basis for the entire deficit of the bankruptcy (ie, for all costs of the bankruptcy and the amount of debt that remains unpaid after liquidation of the assets) if the board of directors has manifestly improperly performed its duties during a period of three years preceding the bankruptcy, and if it is plausible that such improper performance is an important cause of the bankruptcy of the company. If the board of directors has failed to comply with its obligation to conduct a proper administration or to publish the annual accounts in accordance with statutory requirements, the directors are deemed to have performed their duties improperly and it is presumed that the improper performance of duties constitutes an important cause of the bankruptcy. This ground for personal liability applies not only to managing directors but also to non-executive directors (supervisory board directors; if, for example, they have failed to properly supervise the managing directors in relation to their obligations to maintain a proper administration and file annual accounts in a timely manner).
- Directors can be held personally liable for unpaid taxes and social security contributions. In particular, directors of a company in financial distress must notify the tax authorities and the social security board in writing if the company is no longer able to pay certain taxes, including VAT, wage withholding tax and social security contributions that are due. This notification should be made within two weeks of the date that the taxes and social security contributions should have been paid, and a failure to do so may result in the directors being held jointly and severally liable if the taxes and social security contributions remain unpaid. If a valid notice has been given, directors will only be liable if they have manifestly performed their duties improperly during a period of three years preceding the bankruptcy and if it is plausible that such improper performance is an important cause of the bankruptcy of the company.
- Directors (and even shareholders) may, in certain circumstances, be liable to creditors of the company or other parties on the basis of tort, for example, if the directors created a false representation of creditworthiness of the company or knowingly entered into transactions when they knew or ought to have known that the company was not going to be able to perform its obligations.
- Criminal liability may apply, for instance, in situations where managing directors fraudulently withheld assets of the company from the bankruptcy trustee or manipulated the accounts of the company to deceive investors or creditors.

Because of recent legal developments in the Netherlands, the bankruptcy of a company can – under certain circumstances – have severe legal consequences for its directors if directors' duties have not been properly observed.

Following the entry into force of the Director Disqualification Act on 1 July 2016, the Bankruptcy Act now grants the bankruptcy trustee or the Public Prosecution Service the authority to request the court to disqualify a director of a bankrupt company for a maximum duration of five years, if certain acts have been perpetrated by the director. A director who is disqualified following such a request, is prohibited to act as a director of a legal entity for the duration set out in the court order.

In addition, the Penalisation of Bankruptcy Fraud Amendment Act entered into effect on 1 July 2016. This Act extended the scope of the criminal liability of (supervisory) directors, for instance to situations where:

- a director fails to keep a proper administration of the company or, in the event of bankruptcy, intentionally does not provide the bankruptcy trustee with such administration; and
- a director excessively uses, withholds, disposes of the company's assets and resources or has granted a creditor an undue preference, which prejudices one or more creditors of the company.

See 'Update and trends' for more information about the Director Disqualification Act and the Penalisation of Bankruptcy Fraud Amendment Act.

Groups of companies

42 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

The basic premise is that shareholders are not liable for debts of group companies or subsidiaries. Shareholders can, however, be held liable in connection with the debts of subsidiaries or group companies when the shareholder has committed a tort with regard to the creditors by infringing on a duty of care. The following circumstances are prerequisites to a duty of care being established:

- the shareholder must have control over the subsidiary. Factors that can indicate control over the subsidiary include:
  - a majority shareholding;
  - the articles of association of the subsidiary;
  - the existence of personnel unions; and
  - the employment contract of the director of the subsidiary, which may for instance include a power of the parent company to instruct the director of the subsidiary;
- the shareholder is involved in the business of the subsidiary, for instance through the presence of a cash management system; and
- the controlling shareholder has insight into the lack of recourse available to the subsidiary for the satisfaction of the creditors of the subsidiary, but nonetheless permits the subsidiary to continue to trade.

Whether a shareholder has a duty of care to the creditors of a subsidiary or group company depends on the circumstances of the individual case. If there is central cash management through the controlling parent, the parent will generally have a sufficient level of knowledge as to the financial position of the subsidiary for liability to arise.

On the basis of case law, the supervisory judge in insolvency proceedings is able to allow consolidated liquidation for two or more entities that are declared bankrupt. This type of liquidation entails that the various bankruptcies are treated as one insolvency procedure. This will only happen in extraordinary cases.

When there is a matter of group liability, for example, when more than one company has taken an action which caused damage and it is not traceable which action specifically caused the damage, this liability may be joint and several. This means the creditor of such damage can recover its damage as a whole from any entity that is part of the group.

Insider claims

43 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

Insiders should abstain from setting off claims where the insolvency of an affiliated company is expected. Claims or debts following the transfer of these claims or debts prior to the declaration of bankruptcy or suspension of payment may under certain circumstances not be set off against the estate. A person who has assumed a debt towards the bankrupt or acquired a claim against the bankrupt from a third party is not allowed to set off such debt or claim if, at that time, he or she knew that, in view of the financial situation of the insolvent entity, the bankruptcy or 'suspension of payments' of the entity was to be expected (see question 17).

In addition, the Dutch Bankruptcy Act limits the possibility of setting off claims that are acquired before the date of bankruptcy, but where the acquiror was not acting in good faith, which is the case if the acquiror knew that the financial position of the insolvent entity was such that bankruptcy or a suspension of payment was to be expected.

Creditors' enforcement

44 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

A mortgagee and a pledgee or a security holder under a financial collateral arrangement can foreclose on the secured assets if there is a default in the performance of the secured obligations. For more detail, see questions 6 and 7. Unsecured creditors can levy an attachment (see question 8).

Corporate procedures

45 Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

Yes. Under corporate law a company can be dissolved. In most cases, the company is dissolved pursuant to a shareholders' resolution. The shareholders will appoint a liquidator, who will liquidate (all assets of) the company. However, if it becomes apparent that the liabilities of the company will exceed the assets of the company, the liquidator is obliged to file for the bankruptcy of the company, unless all known creditors agree with the continuation of the corporate liquidation proceedings.

An important difference to bankruptcy is that the corporate liquidation proceedings are, in principle, not court-supervised.

Conclusion of case

46 How are liquidation and reorganisation cases formally concluded?

Voluntary liquidation (see question 45) terminates as a result of:

- a declaration of bankruptcy being made pursuant to an application for bankruptcy by the liquidator; or
- payment of the final distribution to creditors and shareholders of the company being made.

Suspension of payments terminates as a result of:

- revocation of the 'suspension of payments' and conversion into bankruptcy (this can happen in a number of situations, including when the debtor acts in bad faith when administering the estate, if the debtor tries to bind the estate without the approval of the administrator, or when it becomes clear that the 'suspension of payments' will not result in the repayment of debts or a reorganisation plan with the creditors);
- lapse of time;
- refusal of creditors to grant a definitive suspension of payments;
- approval by the court of a reorganisation plan, the approval of which has become conclusive; or
- payment of all debts.

Bankruptcy terminates as a result of:

- a successful appeal against the verdict declaring the company bankrupt;
- a court decision terminating the bankruptcy as a result of insufficient funds to pay unsecured creditors;
- approval by the court of a reorganisation plan, the approval of which has become definitive;
- payment of all debts; or
- a final distribution to creditors being made if the list concerning the distribution to creditors has become definitive, regardless of whether all creditors have been paid.

International cases

47 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

As a result of the EU Insolvency Regulation, the opening of insolvency proceedings in one of the EU member states (except for Denmark) and the effects thereof are also directly recognised in the Netherlands, unless secondary or territorial insolvency proceedings are opened in the Netherlands. See the chapter on the European Union.

The effects of the opening of insolvency proceedings in other non-EU jurisdictions (including Denmark, which has opted out of the EU Insolvency Regulation) are only to a certain limited extent recognised in the Netherlands. This recognition may be challenged if the principles of due process and fair trial have not been observed in the foreign procedure. In the absence of a treaty and where the EU Insolvency Regulation does not apply, the Dutch Supreme Court has consistently

Update and trends

The Director Disqualification Act

The Director Disqualification Act entered into force on 1 July 2016. The bankruptcy trustee of a bankrupt company or the Public Prosecution Service can request a court to disqualify a director of a company, for a maximum period of five years.

At the request of the bankruptcy trustee or the Public Prosecution Service, a court can disqualify a director of a company if in the period of three years prior to the company's bankruptcy:

- pursuant to a final and conclusive court order, the director is held liable for the bankruptcy of a company because of mismanagement and that the mismanagement was an important cause of the company's bankruptcy;
- the director knowingly performed or permitted legal acts on behalf of the company that prejudiced creditors of the company, and the acts were subsequently nullified by a court in accordance with the Bankruptcy Act;
- the director has severely failed in complying with his or her statutory cooperation and information duties (under the Bankruptcy Act) vis-à-vis the bankruptcy trustee;
- the director has been involved in a bankruptcy at least twice, and serious blame can be attributed to the director with respect to these prior bankruptcies; or
- pursuant to a final and conclusive ruling the company or its director have been fined for certain violations under Dutch tax law.

The director can be disqualified for a maximum period of five years. During this period he or she cannot act as a director or supervisory board director of any legal entity (unless the court order states otherwise). Upon a final and conclusive decision on the matter (by either the court in first instance or higher courts in the event of an appeal), the disqualification of the director will be registered in the trade register of the Dutch Chamber of Commerce until the end of the term of the disqualification. Civil law notaries and the Dutch Chamber of Commerce are prohibited from cooperating with the incorporation of a legal entity if one of the intended directors is registered as a disqualified director. Any appointment as a director or supervisory board director who was disqualified following a final and conclusive court order will be void by operation of law. In the event the disqualification of its director/supervisory board director would cause a company to be left without a director or supervisory board director, then the court can decide to appoint a temporary director or supervisory board director.

The scope of the Director Disqualification Act extends to (former) directors of legal entities (such as private or public limited liability companies, foundations, a cooperation) that are incorporated under the laws of the Netherlands (including *societas Europae* (European companies)) and that have their registered office in the Netherlands as well as to natural persons that are conducting (or have conducted) a profession or business. Under Dutch law a director of a company also entails a de facto director, who is not officially appointed as a director pursuant to the articles of association of a company. A disqualification under the Director Disqualification Act can only be imposed:

- in relation to a bankruptcy declaration after 1 July 2016; and
- with regard to facts and circumstances that came into existence after 1 July 2016.

The Penalisation of Bankruptcy Fraud Amendment Act

This Act entered into force on 1 July 2016 and aims to combat, among other things, bankruptcy fraud. The Act also penalises wilful non-compliance with the duty to keep proper records or to provide information to the bankruptcy trustee.

A director (including the de facto directors) or supervisory board directors (hereafter 'director') can be held punishable under the Penal Code, resulting in prison sentences of up to six years or fines of up to €82,000. In addition to existing criminal liability for directors under the Penal Code, the following scenarios are now punishable following the entry into force of the Penalisation of Bankruptcy Fraud Amendment Act:

- if the company's financial soundness was endangered by a director's excessive use or disposal of the company's resources (including permitting or cooperating with such acts);
- if prior to the company's bankruptcy, prejudice to the recourse options of one or more creditors of the company is caused by:
  - the director's excessive use or disposal of the company's resources (including permitting or cooperating which such acts;
  - the director fraudulently withdrawing any asset from the company's estate; or
  - the director granting one creditor of the company an undue preferential treatment;
- if during or prior to the company's bankruptcy:
  - a breach of the duty to keep a proper administration is caused intentionally by the director, or attributable to his or her actionable negligence; and
  - if during the bankruptcy of the company, the director intentionally breaches his or her statutory duty to cooperate or provide information;
- provides incorrect or incomplete information; or
- breaches his or her duty to immediately provide the bankruptcy trustee with the company's administration.

The Pre-pack legislative proposal

The pre-pack procedure, which was developed/applied in the legal practice but lacked a statutory foundation, has now been codified in a legislative proposal: the Continuity of Companies Act I. The proposal was accept by the House of Representatives on 21 June 2016 and is currently being reviewed by the Senate. Assuming that the current proposal is accepted by the Senate, the new legislation will introduce a system in which debtors in financial distress (not being banks, insurers or natural persons who are not carrying out a business) are able to prepare and attempt a silent reorganisation/restructuring of the debtor's business through a pre-pack procedure. The pre-pack phase allows the debtor, together with the court-appointed bankruptcy trustee designate and the most important (secured) creditors, to explore and prepare, for example, an asset sale or other restructuring measures, which can subsequently be implemented immediately upon the commencement of the formal insolvency procedure. During the pre-pack phase, the debtor remains authorised to manage and dispose of its assets.

The pre-pack procedure may only be requested by the debtor, who must be represented by a lawyer. The court will allow the debtor to enter the silent preparation phase only if the debtor proves the added value of the pre-pack procedure to the specific situation at hand. If the debtor's request is granted, then the court appoints one or more bankruptcy trustee designates and one or more intended supervisory judges. The bankruptcy trustee designate must act in the interest of the debtor's creditors, but he or she does not need to follow instructions from these creditors or from the debtor himself or herself. He or she is supervised by the intended supervisory judge.

If the debtor has a (statutorily required) works council or employee representative body, then the debtor must involve that representative body in the pre-pack procedure (unless this is against the interest of the debtor's company; note that any works council member or employee representative that is involved is bound by a duty of confidentiality). Further, the court may, at its own discretion, stipulate that the pre-pack phase is subject to certain conditions if the court deems such conditions necessary to achieve the statutory aim of the pre-pack procedure, enhance the position of the bankruptcy trustee designate or protect the interests of the debtor's employees.

The pre-pack commences as soon as the court has appointed the bankruptcy trustee designate. In principle, the bankruptcy trustee designate is appointed for a term of two weeks. At the debtor's request, this period can be extended. After having heard the intended supervisory judge and bankruptcy trustee designate, the court decides whether or not to grant the debtor's extension request, and if so, the term of the extension. The court's decision on the debtor's pre-pack request or an extension request cannot be appealed.

By operation of law the pre-pack ends when the appointment term of the bankruptcy trustee designate expires, or when the debtor is declared insolvent (ie, bankruptcy or suspension of payment). The court can also decide to end the pre-pack phase or attach certain conditions to the pre-pack phase, at the request of the bankruptcy trustee designate, the intended supervisory judge or a creditor. The court decides upon such request, after having heard the debtor, one or more creditors, the bankruptcy trustee designate and the intended supervisory judge.

The legislative proposal for the pre-pack procedure is currently awaiting approval by the Senate. It is expected to enter into effect in 2017. Currently, there are ongoing proceedings regarding the pre-packaged sale of a large provider of childcare facilities. In these proceedings the Dutch court referred preliminary prejudicial questions to the European Court of Justice in February 2016. In essence, the questions come down to whether or not Directive 2001/23/EC (for further detail see the chapter on the European Union) safeguarding employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses applies to the pre-pack procedure or not.

decided that, foreign insolvency proceedings only have a 'territorial effect', meaning that they do not affect the debtor's assets located in the Netherlands and the legal consequences attributed to the bankruptcy pursuant to the bankruptcy law of such foreign country cannot be invoked in the Netherlands to the extent that it would result in any unpaid creditors no longer being able to take recourse on the assets of the debtor located in the Netherlands (either during or after the relevant foreign insolvency proceedings). This does, however, not imply that the powers of a foreign bankruptcy trustee are not being recognised in the Netherlands. In Dutch case-law it is determined that a foreign insolvency office holder is allowed to invoke its rights as available pursuant to the foreign domestic insolvency law, including over assets that are located in the Netherlands. The office holder is also allowed to sell these assets and consider the proceeds part of the assets of the foreign bankruptcy estate. Notwithstanding that the foreign insolvency procedure's seizure is regarded as having only territorial effects of the foreign insolvency, the effects are de facto recognised in the Netherlands, because the foreign insolvency office holder is able to exercise its power under the lex concursus.

Creditors are allowed to individually take recourse against the debtor's assets situated in the Netherlands, notwithstanding the opening of insolvency proceedings against the debtor abroad. Foreign creditors are, in general, not treated differently from creditors that are incorporated or residing in the Netherlands.

The Netherlands has not adopted the UNCITRAL Model Law on Cross-Border Insolvency and this is not currently under consideration.

COMI

48 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The definition of COMI derives from European Union law. There is a general presumption that a debtor's COMI is in the place of its registered office. This is slightly modified in the Regulation Recast which states that it is not possible to rely on the rebuttable presumption where a debtor has moved its COMI in the three months prior to insolvency proceedings. See further the chapter on the European Union.

In practice the Dutch courts have, among others, considered the following factors:

- the fact that the business activities of a Dutch general partnership had transferred to a foreign company which had been set up by the (general) partners did not result in the COMI of the Dutch general partnership no longer being located in the Netherlands;
- in respect of a company that for a considerable time no longer engaged in economic activities in the Netherlands, there was no longer any actual functioning COMI in the sense of the EU Insolvency Regulation and therefore only the statutory seat of the company was relevant in determining the COMI; the fact that liquidation activities were taking place in another EU member state was in this case not relevant as these were no (economic) activities of the company;
- the fact that the company's largest creditors were located in the Netherlands; that it was part of a Dutch fiscal unity; the court did not find relevant that the company had plans to move its statutory seat to another EU member state for tax reasons, as the test date is the date of the request for the opening of the insolvency proceedings;
- the fact that a company is also registered in another EU member state did not mean that the registration and statutory seat in the Netherlands had ended (and that therefore the COMI was no longer in the Netherlands);
- the fact that the most important activity of a company was the holding of shares in another company (in another EU member state), which was conducted from the Netherlands (the company paid tax in the Netherlands, with returns administered by a Dutch trust company and Dutch accountant, accounts were drawn up and deposited in the Netherlands and general shareholder meetings were held in the Netherlands on the basis of the articles of association);
- the fact that the tax returns were addressed by the Dutch tax authorities to an address in another EU member state and that the accounts were (also) prepared by an administration office in another EU member state did not result in COMI in another EU member state; and
- the fact that the company did not have a visiting address in the Netherlands and that monies were lent through the company (using foreign bank accounts) to avoid lending in another EU member state also did not lead to the COMI no longer being in the Netherlands.

In accordance with European Union law, Dutch courts determine the COMI for each individual company within a group of companies. This is apparent, for example, in a judgment in which the Dutch court decided that the COMI of three subsidiaries of a Dutch company in another EU member state was not relevant, as it looked at the debtor (the Dutch company) for the determination of a the COMI as a separate legal entity – even if the debtor has an interest in these activities of its subsidiaries. However, in Dutch practice, occasionally one bankruptcy trustee may be appointed for various subsidiaries within a group that all have its COMI in the Netherlands to facilitate the group being restructured as a single unit.

Cross-border cooperation

49 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

In respect of the recognition of foreign insolvency proceedings, see question 45.

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The EU Insolvency Regulation provides an obligation for cooperation and information exchange between insolvency office holders. See further the chapter on the European Union.

Cooperation between domestic and foreign courts or domestic and foreign insolvency administrators is not explicitly dealt with in the Dutch Bankruptcy Act. The Act does not prohibit and can provide a basis for coordination between procedures. Also in practice coordination or cooperation does occur and cross-border insolvency agreements (protocols) have been used.

An example of cooperation between different countries (including the Netherlands) in a cross-border insolvency is the insolvency of the Lehman Group. A cross-border insolvency protocol was agreed with the aim of cooperation between the trustees and liquidators of the different entities of the Lehman Group, in view of the common interest of the creditors. Furthermore, the aim of the protocol was to reduce the costs of settlement to a minimum and to share information. The bankruptcy trustee for Lehman Brothers Treasury Co BV signed up to the protocol as he considered this to be in the best interest of the Dutch entity's creditors (no court consent was required).

Cross-border insolvency protocols and joint court hearings

50 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Dutch trustees in bankruptcy do enter into cross-border insolvency protocols. However, to date, there have been no cross-border insolvency protocols entered into between Dutch courts and foreign courts. Also, no joint hearings have been held to date, although the Dutch (lower) courts have recognised the voting outcome of Chapter 11 hearings in the United States for the purposes of voting on a reorganisation plan in a Dutch suspension of payment.

Spain

Silvia Angós

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Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

The Spanish insolvency regime is mainly governed by the Spanish Insolvency Act (Law 22/2003, dated 9 July 2003) but has been the subject of several amendments, the latest being in October 2015. The Insolvency Act establishes a single insolvency proceeding applicable to both individuals and corporates, providing for the possibility of a settlement agreement between the debtor and its creditors and, if agreement is not reached, for the liquidation of the debtor's assets towards the payment of creditors.

In addition to the Insolvency Act, the following pieces of legislation, among others, are relevant in the context of an insolvency:

- the Civil Procedure Act;
- the Securities Market Act;
- the Recovery and Resolution of Credit Institutions and Investment Services Firms Act;
- the Supervision and Solvency of Insurance and Re-insurance Companies Act; and
- the Companies Act.

Cross-border EU insolvencies are governed by Council Regulation (EC) No. 1346/2000 and Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings.

Under the Insolvency Act, the only criteria to determine if a debtor is insolvent is a cash-flow test, with a debtor being considered insolvent when it is unable to regularly meet its payment obligations when they fall due.

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

Commercial courts have exclusive jurisdiction to hear insolvency proceedings. The relevant commercial court to which the insolvency is allocated will retain jurisdiction over most of the disputes that may arise during the insolvency proceedings, for as long as such disputes affect the debtor's assets and rights. In addition, the relevant commercial court will not only hear insolvency claims against the debtor but also certain labour claims arising from the insolvency (eg, termination, amendment and suspension of labour contracts), transaction avoidance claims, claims for directors' liability and attachment of the debtor's assets.

Pursuant to the Insolvency Act, other court proceedings pending in the courts of first instance can be transferred to the commercial court at the time of the filing for insolvency if the dispute is considered to be relevant for the preparation of the assets' or the creditors' list.

Excluded entities and excluded assets

3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

The only entities that are excluded from the Insolvency Act are public administrations and other public entities. In addition, there are some particular rules applicable to financial entities, insurance and reinsurance companies (see question 1) establishing specific provisions affecting certain types of transactions and these institutions.

Certain items (such as furniture, clothes, food, sacred objects or a certain amount of the salary, where the debtor is a natural person) are excluded from insolvency proceedings. Claims against assets that are encumbered with an in rem security in favour of the secured creditor are limited. Finally, specific rules apply to financial collateral that complies with the Spanish regulation that implements the Financial Collateral Directive.

Public enterprises

4 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

The determining criterion for entities to be considered immune from insolvency is that they must be deemed to have *personalidad juridico-pública* (public legal personality). Therefore, as indicated in question 3 above, public administrations and other public entities which have such public legal personality cannot be declared insolvent since they exist to serve public interests and their assets are considered unseizable.

However, government-owned entities that do not have the above-mentioned public legal personality (eg, public corporate companies and the majority of foundations) may be declared insolvent irrespective of whether they are government-owned. For these entities, there is no special regime or procedure to be followed within an insolvency scenario and therefore the general rules set out in the Insolvency Act apply.

Protection for large financial institutions

5 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

Yes. Law 9/2012 on restructuring and resolution of credit institutions was enacted to provide the Spanish supervisory authorities with certain tools, powers and procedures to tackle the risk of systemic failures and, more generally, reinforce their ability to deal with Spanish credit institutions in financial distress.

Law 9/2012 has been partially derogated by Law 11/2015 on the Recovery and Resolution of Credit Institutions and Investment Services Firms, which entered into force on 20 June 2015 (save for certain provisions that entered into force on 1 January 2016 and some others that will enter into force on 3 July 2017). Law 11/2015 implements Directive 2014/59/EU of the European Parliament and the Council, and it is based on identical principles to Law 9/2012.

Law 11/2015 contemplates two possible procedures – early action and resolution – whose application mainly depends on the viability of the credit institution in financial difficulty and on whether it requires bailout funds to survive. These procedures constitute an alternative to normal insolvency proceedings under the Insolvency Act and ultimately intend to provide a means to restructure or wind down Spanish credit institutions that are failing or likely to fail and whose failure would create concerns in terms of general public interest. In the absence of such general public interest, Spanish credit institutions may be allowed to fail in the ordinary way (ie, through normal insolvency proceedings).

The main changes introduced by Law 11/2015 are:

- the reinforcement of the preventive phase of the resolution by requiring all credit institutions (and not only those that are not economically viable) to have recovery and resolution plans;
- that the absorption of losses (bail in) will affect all types of creditors (and not only subordinated creditors);
- new regime of maximum protection of depositors; and
- the creation of a specific resolution fund funded by contributions from the private sector. Law 11/2015 has been further developed by Royal Decree 1012/2015.

Secured lending and credit (immoveables)

6 What principal types of security are taken on immoveable (real) property?

The main security over immoveable property is the mortgage, regulated in articles 1,874 to 1,880 of the Civil Code and in the Mortgage Act.

A mortgage is an in rem security whereby real estate assets that are subject to registration (and certain transferable rights attached thereto, such as usufruct rights and administrative concessions) are charged as security for the fulfilment of a monetary obligation.

Mortgages must be granted in a public deed before a notary public and be registered with the appropriate Land Registry. No security enforceable against third parties is created until the registration of the mortgage has been completed.

Secured lending and credit (moveables)

7 What principal types of security are taken on moveable (personal) property?

The main security over moveable property is the pledge, which is regulated by articles 1,863 to 1,873 of the Civil Code.

A pledge is an in rem security whereby possession over certain moveable assets is transferred to the pledgee (or to a third party that acts as depositary) as security for the fulfilment of the secured obligation. Therefore, the owner of the pledged asset, although losing possession, does not transfer title.

To be enforceable against third parties, pledges must generally be granted in a public document (either in an *escritura* or a *póliza*) and possession over the pledged asset must be transferred either to the pledgee or to a depositary. Specific provisions apply to pledges over credit rights and other moveable properties.

Unsecured credit

8 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

Creditors may file an application with the relevant court requesting the granting of interim measures for as long as these are deemed appropriate to ensure that the final judgment, should it be in favour of the creditor, can be effectively enforced.

Creditors have access to specific interim measures (eg, seizures, preventive registration of the claim in the relevant public registry, deposit of assets), as well as all the interim measures that are generally available by statute. Often interim measures are requested by creditors in insolvency situations where there is a concern that the debtor is concealing its assets.

Interim measures can be applied for prior to, together with or after the filing of the claims and can be granted with or without previously hearing the defendant by providing evidence that the general requirements are met, these being:

- the applicant's claim appears to have some merit;
- a fear that the delay of proceedings may lead the defendant to conceal or sell its assets; and
- the provision of a cross-undertaking in damages to cover the potential damages that the interim measures may cause.

In general terms, foreign creditors are subject to the same regulations and have the same rights as Spanish creditors.

Voluntary liquidations

9 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

The Spanish Companies Act provides for a voluntary liquidation of the company. This process is different to an insolvency process.

A voluntary liquidation is commenced when the company is solvent but a winding-up cause occurs. Winding-up causes can be set out in the company's articles of association or be triggered under Spanish corporate legislation. For example, a winding up-cause is established where the company's losses have reduced its equity to below 50 per cent of its share capital (unless the share capital is restored).

If a winding-up cause occurs, directors must call a general shareholders meeting to request that a winding-up resolution is passed. Where the directors fail to call the general shareholders' meeting or the shareholders fail to pass a resolution to wind up the company (and the winding-up cause is not cured) any interested party can and the directors of the company must, apply to the commercial court to initiate winding-up proceedings.

The effects of the voluntary liquidation resolution will depend on the type of company concerned. Most Spanish companies are either corporations or limited liability companies. The effects of voluntary liquidation on these two entities are broadly the same: the company's directors will no longer have authority to manage the company and one or more liquidators will be appointed at the general shareholders' meeting. The liquidators will be charged with, inter alia:

- collecting the company's debts and realising the company's assets;
- paying the company's creditors;
- concluding any outstanding commercial transactions; and
- entering any new transactions that may be necessary for the company's liquidation.

The liquidator must also prepare the liquidation balance sheet, which may be challenged by the company's shareholders. At the end of the period for challenging the balance sheet, if no challenges have been made or if a challenge has been made and a final judgment has been issued, the company's remaining assets (after payment of all creditors) will be distributed to the shareholders.

See question 13 in relation to directors' duties to file for insolvency.

Involuntary liquidations

10 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

Creditors can apply to the court to place a debtor into an insolvency process. For creditors to apply for insolvency they will need to either:

- satisfy the court with evidence showing that they have unsuccessfully attempted execution proceedings against the debtor's assets (and have found it impossible to attach any assets from which to obtain payment); or
- provide evidence that:
  - the debtor has generally ceased making payments;
  - the debtor's assets have been seized;
  - the debtor is selling its assets very fast or in a harmful way; or
  - there is a breach of certain payment obligations (ie, taxes, social security wages or salaries) for at least three months.

If a creditor files an application for the debtor's insolvency with the court, the debtor can either agree to the creditor's request or reject the creditor's request within five working days. If the debtor rejects the request it is required to deposit the amount of the debt owed to the creditor applying for insolvency (if it is due and payable) with the court. If the debtor refuses to deposit the amount with the court, the judge would hear representations from the parties on whether the insolvency declaration is appropriate. The parties will then be called to a hearing after which the court will render a decision on whether to declare the insolvency.

The effects of the creditor initiating insolvency proceedings are broadly the same as in the case where the directors file for insolvency, as set out in question 13.

A certain percentage (50 per cent) of the debt owed to the creditor applying for insolvency will hold a general privilege (provided that such debt does not qualify as subordinated), which may be an incentive for unsecured creditors to file for insolvency (see question 33 on the ranking of debts).

Voluntary reorganisations

11 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

Voluntary reorganisations can take place through 'refinancing agreements'. These can be either: individual refinancing agreements; collective refinancing agreements or court-sanctioned collective refinancing agreements.

An individual refinancing agreement is a notarised agreement that satisfies the following conditions:
- it improves the ratio of assets over liabilities;
- it ensures that the current assets are no less than the current liabilities;
- the value of the security interests (calculated in accordance with Insolvency Act provisions) is not of a greater proportion of the outstanding debt owed to creditor than of the debt prior to the refinancing; and does not exceed 90 per cent of the value of the outstanding debt owed to such creditors;
- it does not increase the interest rate applicable to the debt by more than one-third of the interest rate applicable to the debt prior to the refinancing; and
- it expressly states the reasons that justify, from an economic point of view, the terms of the refinancing, making specific reference to each of the above conditions.

A collective refinancing agreement is a notarised agreement which satisfies the following conditions:
- it has the support of creditors whose claims represent at least three fifths of all the debtor's indebtedness; and
- it extends maturity dates, grants new credit or replaces financial obligations or a combination of these, in each case, in accordance with a viability plan that allows business activity to continue in the short and medium term.

In the case of syndicated loans, all syndicated lenders shall be deemed to have supported the collective refinancing agreement if such refinancing agreement is approved by lenders representing at least 75 per cent of the financial indebtedness under the syndicated loan, save where the parties to the syndicated loan have agreed to a lower threshold, in which case the lower threshold shall apply.

A court-sanctioned collective refinancing agreement is an agreement that satisfies the following conditions:
- it meets the criteria set out above for a collective refinancing agreement;
- it has the support of creditors whose claims represent at least 51 per cent of the debtor's financial indebtedness; and
- it has received the sanction of the court as to compliance with requirements set out above (such sanction is called 'homologation').

To determine whether the 51 per cent threshold has been satisfied, the following rules apply:
- financial indebtedness held by creditors considered to be related parties is not taken into account, although these creditors may nevertheless be bound by the judicially sanctioned agreement;
- all holders of any financial debt (excluding commercial transaction creditors, creditors for labour credits and creditors for public law liabilities) are considered creditors of financial indebtedness, regardless of whether they are subject to financial supervision; and
- in the case of a syndicated loan, all of the lenders shall be taken to have supported the judicially sanctioned agreement if such agreement is approved by lenders representing at least 75 per cent of the financial indebtedness under such syndicated loan, save where the parties to the loan have agreed to a lower threshold, in which case the latter shall apply.

A court-sanctioned refinancing agreement is the only type of refinancing agreement that can bind dissenting (including absentee) unsecured and secured creditors of financial indebtedness in relation to the debtor provided that the required majorities set out in the Insolvency Act approve it.

A judicially sanctioned agreement may only be challenged by a dissenting creditor if the relevant required majority has not been obtained or if the refinancing agreement imposes a 'disproportionate sacrifice' on the creditor. There is no legislative guidance on what constitutes 'disproportionate sacrifice'. Any such challenge must be brought within 15 days of the publication of the judicial sanction.

Involuntary reorganisations

12 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

Creditors cannot commence an involuntary reorganisation. Creditors can, however, initiate insolvency proceedings (see question 10 for the requirements and effects).

Mandatory commencement of insolvency proceedings

13 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

The directors must initiate insolvency proceedings within the two months following the date on which they knew or should have known that the company was insolvent. A debtor is considered to be insolvent when it is not able to meet regularly its payment obligations as they fall due (see question 1). Breach of this obligation may result in the insolvency being classified as a 'guilty insolvency' in the qualification phase of the insolvency proceedings (see below).

The two-month period can be extended by up to an additional four months by means of an article 5-bis filling.

In order for the debtor to apply for insolvency, it must provide evidence to the court of the amount of its debts and its present or immediate insolvency situation. The following documents must be attached to the application:
- a special power of attorney granting the court representative the authority to request the insolvency;
- a report including economic and legal details of the three preceding years, the premises, offices and all assets owned by the debtor, the factors causing the debtor's current situation, a complete valuation of the debtor's assets, liabilities, etc, proposals for its economic viability, the identification of the shareholders, directors or liquidators, auditor, the companies that form part of the same group (if any) and whether the company is listed;
- an inventory of assets and rights expressing the nature of the asset, place of location, registry identification data, acquisition value, estimates of current value, attachments, seizures and charges;
- a list of creditors, including identity, amount, maturity, personal or in rem securities granted and any current judicial proceedings;
- the annual accounts, managing reports and auditors' reports of the past three years;
- the details of any significant changes in the debtor's assets that have taken place post-closing of the annual accounts and of any other operation not in the ordinary course of business (because of its nature, object and amount);
- a list of the employees and, as the case may be, identification of the workers' representatives;
- a report of the operations carried out between members of the debtor group in the past three years; and
- an anticipated settlement proposal (if any).

The relevant court will issue the insolvency order provided that the above requirements are met ordering the registration of the insolvency order in the relevant commercial and land registries. The order declaring the opening of the insolvency proceeding shall be published on the Public Insolvency Register and in the Spanish Official Gazette.

The main consequences of the debtor initiating insolvency proceedings are as follows:
- The court will issue an insolvency order declaring whether the requirements for opening insolvency proceedings have been met and will appoint an insolvency receiver who will provisionally be in charge of managing the debtor's assets and activities. It is possible that the directors will continue to manage the business but under the supervision of the insolvency receiver. Whether directors are

entirely released from their duties or continue in office under the supervision of the insolvency receiver will be at the court's discretion in view of the particular circumstances of the case. In some cases, the court may appoint a second insolvency receiver.
- The debtor must not enter into any new transactions, unless approved by either the insolvency receiver (where the directors have been released from their duties) or the directors with the authorisation of the insolvency receiver (in the event of supervision of the directors). In each of these cases, the court will have to analyse the relevant transaction and authorise it. Several transactions are carved out from this prohibition including disposals that the insolvency receiver considers indispensable to secure the viability of the company, disposals of assets that are not necessary for the continuity of the company's activity and disposals of business units, in each case, subject to certain conditions.
- Accrual of interest is suspended as of the date of the declaration of the insolvency except for those credits secured with rights in rem up to the maximum covered by the security.
- Contracts are maintained: insolvency is not a valid cause for termination of a contract. For agreements where reciprocal obligations were pending at the time of the insolvency declaration, the insolvency receiver can request their termination if such termination is beneficial for the insolvency estate (see further question 21).
- Apart from certain exceptions mentioned below (see question 15), attachment proceedings against the debtor's assets can neither be initiated nor continued.

There are two phases in an insolvency process; the first phase is aimed at determining the debtor's assets and liabilities and the second phase may lead to either an arrangement between the debtor and its creditors or a liquidation of the debtor's assets to satisfy creditors. In addition, there is a 'qualification phase'. This is aimed at investigating the potential liability of directors, accomplices and shareholders. The qualification phase is opened automatically when:
- a settlement inclusive of a delay in the maturity of debts of more than three years or a waiver to more than one third of the amount of the debts is approved;
- a previous settlement agreement is breached; or
- the liquidation phase is opened.

The insolvency proceedings shall be classified as involuntary or guilty. The consequences of the guilty classification may include:
- disqualification of the directors from managing third-party assets or representing or managing any person or company for a period from two to 15 years;
- removal of the directors' rights as creditors of the debtor;
- return of the directors' rights or assets that were unduly obtained from the debtor;
- payment of indemnities for any loss or damage caused; and
- (in certain circumstances) the directors are held liable for the payment of any deficit to the creditor.

Doing business in reorganisations

14 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?

Depending on the particular circumstances of the case, the court may, in its insolvency order, state that the debtor's directors are released from their duties or order that the directors continue in office under the supervision of the insolvency receiver. There is a preference for releasing the directors if the insolvency filing is made by a creditor.

The mere declaration of insolvency does not trigger suspension of the commercial activities of the debtor. Moreover, the Insolvency Act envisages that the insolvency receiver may provide directors with a general authorisation to enter into certain operations, notwithstanding their obligation to report all the operations entered into by the debtor to the insolvency receiver. The debtor or the insolvency receiver (where the debtor's directors are released from their duties) are able to sell assets if, among others, this is within the debtor's ordinary commercial activities; or otherwise, provided that the court has authorised such sales subject to certain exceptions (see question 13).

The winding up of the business can only be agreed by the court at the request of the receiver and having previously heard the employee representatives.

Claims in relation to goods supplied or services rendered to the debtor will be considered as debts of the insolvency estate and will have full preference in payment over any other claim, other than specially privileged claim) (see question 33).

Stays of proceedings and moratoria

15 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Any declarative proceeding (ie, seeking an order declaring a certain right, requiring the debtor to pay a certain amount or ordering the debtor to do something or to refrain from doing something) pending at the time of the insolvency declaration will continue except for those proceedings regarding damages caused by the debtor's directors, liquidators or auditors, which will be accumulated ex officio as long as these are at first instance and the hearing has not been held. New declarative proceedings can be initiated but must be filed with the insolvency court.

Any unsecured claim for the attachment of assets ongoing at the time of the insolvency declaration can continue in certain circumstances, provided that the assets attached are not required to continue running the business. No new unsecured claims for the attachment of assets can be initiated during the insolvency proceedings.

Security over the assets that are necessary for the continuity of the debtor's business cannot be enforced until a settlement agreement that does not affect the security or secured claim is approved, or a year elapses since the insolvency declaration without the liquidation phase being opened. The enforcement of security interests over the shares of ring-fenced and self-standing special purpose vehicles is not suspended provided certain requirements are met.

In addition, the moratorium does not apply to secured claims over assets that are not related to the business or to certain 'financial collateral'. The determination as to whether the assets encumbered are related to the business of the insolvent company will be made by the commercial court in charge of the insolvency proceeding.

Further, during the additional period to file for insolvency following the filing under article 5-bis (see question 13) any existing enforcement actions over assets and rights necessary for the continuity of the business will be suspended and the creditors will be prevented from commencing any enforcement action against these assets and rights. During this period, no enforcement will be possible by financial creditors over any of the assets if financial creditors holding at least 51 per cent of the indebtedness owed to such creditors have expressed their support for the commencement of refinancing negotiations and have agreed not to initiate (or continue with) enforcement proceedings. Enforcement by secured creditors will be permitted but will be suspended as from the article 5-bis filing.

Post-filing credit

16 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

The Insolvency Act does not expressly regulate the debtor's right to obtain secured or unsecured loans but provides that during the insolvency proceedings it is possible to resume loan agreements that have been accelerated in the three months prior to the insolvency declarations (ie, acceleration will be of no effect and the parties' obligations under the contract will be restored).

The creditor's claims will be deemed to be debts of the insolvency estate and will have full preference in payment over any other insolvency debt other than specially privileged claims (see question 33).

If new money is granted by a party that is not related to the debtor within the context of a refinancing agreement or a court-sanctioned agreement, 50 per cent of the principal amount would be treated as claims against the estate (in broad terms, ranking alongside the insolvency receiver's fees and ordinary course of business-related costs of the debtor necessary to maintain the business activity during the insolvency proceedings). The remaining 50 per cent of the principal amount of the new money would be treated as generally privileged. Separately all new money granted (including by a party related to the debtor) pursuant to any refinancing agreement entered into on or before 2 October 2016 shall, for a period of two years from the granting of such new money, be treated as preferred claim. New money provided by means of a capital increase is excluded.

Set-off and netting

17 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

In general, set-off is not permitted in an insolvency proceeding unless the requirements for set-off have been met prior to the insolvency declaration.

As an exception to the general regime, set-off provisions that comply with the requirements set out in Royal Decree-Law 5/2005 (which implements EU Directive 2002/47 on financial collateral) will be enforceable in an insolvency scenario.

Set-off is allowed if the claim is not governed by Spanish law and where the applicable law allows such set-off in insolvency proceedings, subject to certain limitations.

Sale of assets

18 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

During insolvency proceedings both specific assets and business units may be sold subject to the regime summarised below:

During the common phase, the sale of assets can only be completed with the prior authorisation of the insolvency judge, except where the insolvency administrator determines that such sale is required to sustain the continuation of the insolvent company and the sale is subsequently communicated to the judge.

Depending on the phase of the insolvency proceedings, the decision as to whether the sale of a specific asset or business unit needs to be disposed of lies with the insolvency administrator (subject, as the case may be, to the approval of the judge as discussed above) or the liquidator, in cases where the liquidation phase has been opened and subject to the terms of the relevant liquidation plan, which has to be approved by the judge.

Generally, and except in circumstances where the urgency of the sale advises otherwise, the insolvency receiver or liquidator will try to maximise the proceeds of any such sale by establishing auction processes, where credit bids are allowed. In these auctions not only the bid price but also criteria such as the continuation of the business, the preservation of employment and the solvency of the bidder will be taken into consideration.

The sale of business units may take place during the first or the second phase of the insolvency proceedings, subject to the following rules:

- The sale of a business unit shall imply the transfer (without requiring the consent of the counterparty) of the rights and obligations arising from any agreements that are attached to the continuity of the relevant professional or business activity (unless their termination has been requested in the framework of the insolvency proceedings).
- The sale of a business unit shall also imply the transfer of any administrative licences or authorisations that are attached to the continuity of the relevant professional or business activity, to the extent the purchaser carries on the relevant activity in the same premises.
- The sale of a business unit shall not imply that the purchaser assumes any debt of the insolvent company that remains outstanding at the time of the sale, subject to certain exceptions and unless the purchaser is a related party to the insolvent company.

In the case of liquidation, the following rules apply in respect of secured assets pertaining to a business unit, depending on whether they are transferred free of charges or still subject to the relevant security:

- transfer subject to security: no consent of the relevant secured creditor shall be required; and
- transfer free of charges:
  - creditors shall receive a portion of the purchase price equal to the proportion that the value of the relevant secured asset represents in respect of the total value of the relevant business unit; and
  - if the purchase price to be received is lower than the value of the relevant secured asset, the sale shall require the support of 75 per cent of the secured creditors pertaining to the same class which are affected by the sale.

In addition, where offers do not differ by more than 15 per cent, the judge may award the business unit to the lower offer if it secures to a greater extent the continuity of the relevant business and employment, and also a better satisfaction of the claims of the creditors.

Intellectual property assets in insolvencies

19 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

The Insolvency Act does not contain any particular rule with respect to IP assets or contracts over IP assets. By application of the general rules on contracts:

- the mere existence of the insolvency proceedings does not itself allow for termination of a contract;
- contracts may continue in force during the insolvency proceedings but any obligation arising from such contracts for the debtor will be classified as a debt of the insolvency estate and will have full preference in payment over any other insolvency claims (other than specially privileged claims);
- contracts can be terminated in the event of insolvency when one of the parties breaches its contractual obligations; and
- contracts can be terminated by the insolvency receiver if he determines that the termination is beneficial for the debtor.

However, in all cases permitting a termination this must be approved by the court.

Personal data in insolvencies

20 Where personal information or customer data collected by an insolvent company is valuable to its reorganisation, are there any restrictions in your country on the use of that information in the insolvency or its transfer to a purchaser?

The Insolvency Act does not contain any particular rule with respect to the use or transfer of personal information or customer data.

By application of the general regulation on personal or customer data (Data Protection Act) the transfer of personal data is only authorised with the consent of the data subject. Nevertheless, Spanish regulations stipulate a series of exceptions to this rule. In particular, Royal Decree 1720/2007 establishes that no data transfer will be deemed to occur in the case of modification of the controller as a result of a merger, spin-off, global transfer of assets and liabilities, contribution or transfer of business or branch of business, or any corporate restructuring operation of a similar nature contemplated by commercial legislation.

Rejection and disclaimer of contracts in reorganisations

21 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

The insolvency receiver may ask the insolvency court to terminate agreements under which the debtor had pending obligations to be fulfilled if he or she considers that such termination is beneficial for the insolvency proceedings. The basis on which such termination can be agreed is quite open and only requires convenience for the debtor. On termination, the non-insolvent party is entitled to claim damages arising as a consequence of such termination, such damages being considered as a debt of the insolvency estate and with full preference in payment over any other insolvency debt (except for specially privileged claims). For more information of the ranking of the debts of the insolvency estate please see question 33.

In addition, if the debtor breaches the agreement after the insolvency declaration, the counterparty is entitled to ask the insolvency court to terminate it, based on the breach. However, even if a cause for termination concurs, the court may decide not to terminate the agreement in the interests of the insolvency estate. In such a case, the debtor's obligations that may arise will be considered as a debt of the insolvency estate.

The above is without prejudice to other clawback remedies, as described in question 39.

Arbitration processes in insolvency cases

22 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

In general terms, arbitration clauses will continue to be effective, with the Insolvency Act not limiting the types of insolvency disputes that may be subject to arbitration. However, the insolvency court may suspend the effect of arbitration clauses if the court considers these to damage the insolvency proceedings.

Ongoing arbitration proceedings will, however, continue, but the insolvency receiver may stand in for the debtor in such arbitration proceedings.

In general terms, cases arising after insolvency has been declared will be arbitrated if an arbitration clause had been entered into between the parties. If one of the parties filed the relevant claim with the insolvency court instead of submitting it to arbitration, the other party could file a plea for motion of jurisdiction and the insolvency court would normally instruct the parties to submit the dispute to arbitration.

Successful reorganisations

23 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

Settlement proposals may be filed by the debtor or by the creditors, and may consist of:

- a delay in the maturity of debts up to five years or a waiver for to up to half the company's debts (these limits may be exceeded if the settlement agreement is supported by the 65 per cent of the ordinary claims);
- alternative proposals to all or some classes of creditors except for public creditors (see question 33 for a description of the classification of creditors), such as the conversion of the debt into equity; or
- proposals for the sale of certain assets or business units, but not the winding up of the company (see question 18).

The debtor can make an advanced settlement proposal aiming for a kind of 'pre-packaged' reorganisation, which can be filed from the date when the debtor files for insolvency until the term for the creditors to communicate their claims has expired. Such advance settlement must be agreed by creditors holding at least one-fifth of the total debts before it can be filed.

Settlement proposals must include a plan for the payment of the debts and, if they foresee the continuation of the business, a business viability plan. The Insolvency Act prohibits any proposals for settlement that consist in the amendment of the priority of the creditors and limits the assignment of assets to the creditors to cases where those assets are not necessary for the debtor's business and whose fair value (calculated according to the Insolvency Act) is equal or less that the value of the credit extinguished. The Insolvency Act does not regulate whether the settlement proposal can include a release of third-party liability.

Settlements must be approved by a majority of creditors. Pursuant to an amendment made by Law 9/2015, the majorities required for the approval of settlement agreements and their extension to dissenting and abstaining creditors are as follows:

	To bind non-privileged creditors	To bind privileged creditors
Full payment of ordinary claims within a term of up to three years	Votes in favour exceeding votes against	
Immediate payment of any due and payable ordinary claims with a discharge lower than 20 per cent		
Discharge up to 50 per cent	50 per cent of ordinary claims	60 per cent of claims within the same class*
Moratorium up to five years		
Conversion into profit participating loan (PPL) for a term of up to five years (except for public or employee claims)		
Discharge above 50 per cent	65 per cent of ordinary claims	75 per cent of claims within the same class
Moratorium up to 10 years		
Conversion into PPL for a term of up to 10 years (except for public or employee claims)		

* Law 9/2015 introduces the concept of class for privileged creditors, which are now divided into four classes: employee creditors, public creditors, financial creditors and other creditors

The following rules apply to the calculation of majorities:

- in the case of syndicated debt, all syndicated creditors are deemed to have voted in favour if creditors representing at least 75 per cent do so (unless the relevant syndication arrangements contemplate a lower majority, in which case the lower majority applies);
- in the case of creditors with a special privilege (ie, secured creditors), majorities shall be calculated in light of the proportion that the aggregate value of the security held by all the secured creditors supporting the settlement proposal represents compared to the total value of the security granted in favour of creditors pertaining to the same class; and
- in the case of creditors with a general privilege, majorities shall be calculated in light of the proportion that the privileged claims supporting the settlement proposal represents compared to the total amount of the privileged claims of the creditors pertaining to the same class.

Law 9/2015 included several rules for the calculation of the value of secured assets (which are similar to those introduced by Law 17/2014 for refinancing agreements). The portion of secured claims exceeding the value of the underlying secured assets does not qualify as specially privileged.

Upon approval of a settlement the court grants creditors who have not attended the meeting or who have voted against the settlement proposal the opportunity to oppose it.. The settlement approved by the relevant majority of creditors and accepted by the court will be binding on the creditors that approved it, on any ordinary and subordinated creditors and on privileged creditors when the majorities set out in the table above are met (see question 33 for a description of the classification of creditors).

With regard to the release of non-debtor parties, there is no express provision in the Insolvency Act, and, thus, the general regime applies. Therefore, if a creditor agrees to a settlement that foresees a release of a certain amount of debt, such release could also extend, in certain circumstances, to the potential liability of third parties (eg, personal guarantees).

Expedited reorganisations

24 Do procedures exist for expedited reorganisations?

Procedures do not exist for expedited reorganisations. Nevertheless, the amendment to the Insolvency Act made pursuant to Law 38/2011 provides for summary insolvency proceedings where procedural terms are reduced to 50 per cent.

Unsuccessful reorganisations

25 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

Failure to approve a settlement agreement (or the absence of a settlement proposal) will trigger commencement of the liquidation phase. The purpose of the liquidation phase is to liquidate all the assets of the debtor according to a liquidation plan filed by the insolvency receiver. The debtor and the creditors can comment on the plan so proposed.

In addition, a debtor's breach of the settlement agreement duly approved by the court also triggers commencement of the liquidation phase upon a request being made by the creditors to the insolvency court.

Insolvency processes

26 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

The insolvency declaration is notified to the debtor's creditors that join in the proceedings, is recorded with the relevant commercial registry and the land registries where the debtor's assets are registered and is published in the Spanish official gazette. The court is entitled to order additional measures to give sufficient publicity to the insolvency declaration.

Additionally, the insolvency declaration and any other resolution that, according to the Insolvency Act, must be publicly available, is recorded in the Public Insolvency Registry.

The only meeting held is a creditors' general meeting (if any), during which the settlement proposals, if any, can be discussed and agreed. The Insolvency Act does not regulate the formation of a creditors' committee.

During the insolvency proceedings, a creditor has, among others, the following rights:

- to communicate the amount of the debt and prove it throughout the proceedings;
- to request the termination of certain contracts based on breach of the contractual obligations;
- under certain legal requirements, to exercise some of the remedies attributed to the insolvency receivers (clawback claims);
- to file a settlement proposal;
- to participate in the creditors' meeting and vote for or against a settlement proposal; and
- to apply for liquidation in the event of breach of the settlement.

The creditors' meeting is called by the court and served, through court proceedings, on all those creditors who have appeared at the insolvency proceedings. However, additional publicity can be agreed to by the court, for example, by an announcement in the Official Gazette.

The insolvency receiver has the obligation to prepare, among others, a report on the causes of the insolvency, a list of creditors and a list of assets and rights. The insolvency receiver also has to prepare a report on the settlement proposal (if any).

As explained in question 23, the effects of settlement agreements may extend to non-privileged or privileged creditors or both to the extent that certain majorities are met. In turn, settlement agreements may not affect the relationship between the creditors and third parties who are not part of the debtor group unless otherwise stated in the settlement agreement and provided that such creditors have voted in favour.

Enforcement of estate's rights

27 If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

If the insolvency receiver refuses to exercise a certain remedy, the creditors can exercise such remedy in the interests of the insolvency estate themselves. This means that, if such remedy succeeds, the consequences of the litigation will be attributed to the debtor, but the creditor will have the right to obtain reimbursement of the costs that it incurred against the insolvency estate.

Creditor representation

28 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

The Insolvency Act does not foresee the possibility of forming a creditors' committee. Creditors are, of course, free to appoint their own counsel or advisers whose fees will be paid by such creditors.

Insolvency of corporate groups

29 In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

The Insolvency Act contains specific regulations related to groups filing for insolvency. In particular, the Insolvency Act allows groups of companies to apply together for insolvency proceedings.

The limited liability principle applicable to Spanish companies prevents the assets and liabilities of companies within a group from being combined, although, in some specific cases, it would be possible to perform such consolidation for the purposes of the insolvency receiver's report. This is without prejudice to the fact that intra-group credits are generally subordinated claims and the possibility of (among others) the insolvency receivers challenging those claims if they prejudice the insolvency estate.

Appeals

30 What are the rights of appeal from court orders made in an insolvency proceeding? Does an appellant have an automatic right of appeal or must it obtain permission to appeal? Is there a requirement to post security to proceed with an appeal and, if so, how is the amount determined?

The remedy of appeal is the action to take against a court's decision accepting or rejecting an insolvency petition. This appeal does not have suspensive effect unless the court resolves otherwise. Other issues contained in the court's decision that are not in relation to the acceptance or rejection of the insolvency petition may be subject to appeal for reversal before the same court that passed the decision appealed.

Besides, there are other types of court order that can arise during the course of insolvency proceedings and that are not related to the acceptance or rejection of the insolvency petition. For non-final court decisions and orders, an appeal for reversal without suspensory effect can be lodged before the same court that passed the decision appealed. For judgments and final rulings, the remedy of appeal can be lodged before a second instance court.

There is no requirement for the appellant to obtain permission to appeal.

However, the right of appeal against final court rulings is subject to the payment of certain fees.

If the court's decision regarding an insolvency proceeding is appealed, a fixed amount of €800 must be paid. Further the appellant must pay 0.5 per cent of the amount of the proceeding in cases regarding claims up to €1 million, and for cases exceeding €1 million the appellant shall be charged 0.25 per cent of the claim amount, with a maximum limit of €10,000.

Claims

31 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

Creditors' claims must be filed within one month after the publication of the insolvency declaration in the official gazette. If they are excluded from the creditors' list, or their claims are not fully recognised, they have the opportunity to file a claim with the court to obtain recognition of their credit claim. An appeal is available in certain circumstances before the relevant provincial court.

Generally, creditors that have prior to the insolvency declaration acquired a debt that is due and payable cannot initiate insolvency proceedings until six months have elapsed following the acquisition.

Pursuant to recent amendments of the Insolvency Act, creditors acquiring claims against the insolvent debtor after its formal declaration of insolvency shall now be entitled to vote at the creditors' meetings, unless they qualify as a related party to the insolvent debtor.

Finally, creditors who acquired a debt at a discount are allowed to file their claim for the full face value of the credit. Accrual of interest is suspended as of the date of the declaration of the insolvency except for those credits secured with rights in rem up to the maximum covered by the security.

Modifying creditors' rights

32 May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

The Insolvency Act provides that certain claims are subordinated if, inter alia:

- the creditor fails to comply with the obligation arising from contracts with reciprocal obligations pending at the time of the insolvency declaration, subject to certain conditions;
- the creditor is related to the debtor (ie, family members, directors and shadow directors, shareholders and companies belonging to the same group or to a shareholder holding at least 5 per cent (if the insolvent company has listed shares or debt) or at least 10 per cent (if not) of the share capital of the insolvent company); or
- the claims arise from a transaction that has been rescinded by the court where the court understands that the creditors acted in bad faith. For more information on the rescission regime please see question 39.

Priority claims

33 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

The insolvency debts are classified as follows (see also question 38):

- debts of the insolvency estate: these include, among others, debts originating within the insolvency proceedings (eg, judicial expenses, loan agreements that are 'restored by the court), debts originating after the insolvency declaration (eg, debts arising from the continuation of the business) and salary claims for the 30 days immediately preceding the declaration of insolvency. Additionally Law 17/2014 provided that all new money granted pursuant to a collective, individual or judicially sanctioned refinancing agreement entered into on or before 2 October 2016 shall, for a period of two years from the granting of such new money, be treated as a debt of the insolvency estate. Once that period has elapsed, only 50 per cent of the new money granted will be classified as a debt of the insolvency estate and the other 50 per cent of the new money shall be classified as generally privileged debt; and
- insolvency debts: these debts are classified into:
  - specially privileged debts (among others, debts secured with mortgage or pledges, rental payments arising from lease agreements and instalments arising from hire-purchase agreements);
  - generally privileged debts (among others, salaries and severance payments up to certain limits, certain taxes, credits arising from tort liability and 50 per cent of the debt of the creditor who applied for the insolvency);
  - ordinary debts; and
  - subordinated debts, including, among others, debts owed to parties related to the debtor (see question 32).

Debts of the insolvency estate will be paid out of the debtor's assets (other than those assets attached to the specially privileged debts) with preference to any other debts. Secured debts are generally paid with the proceeds resulting from the enforcement of the security. If the secured creditor has not been entirely satisfied from the security enforcement proceeds, he will be considered an ordinary creditor for the remaining unpaid amount.

Employment-related liabilities in restructurings

34 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

It is very common that, as a result of an insolvency proceeding, a company will start to make redundancies. Termination-related disputes would be dealt by the insolvency court rather than by the employment courts.

Depending on the number of employees affected by the termination, this will be dealt with through individual dismissal or through a collective redundancy. A termination is characterised as a collective redundancy if the redundancy applies to at least the number of employees within the following thresholds:

- 10 employees in a company with fewer than 100 employees;
- 10 per cent of the employees in a company with 100 to 300 employees;
- 30 employees in a company with more than 300 employees; or
- the redundancy involves the termination of the employment contracts of all the staff, because of the closing down of the company's activities, provided that there are more than five employees.

Apart from termination procedures, employees may initiate claims in order to request payment of unpaid salaries.

Pension claims

35 What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

Pension-related claims will be considered as ordinary claims given that they fall outside of what is considered salary under Spanish law. Any pension-related disputes will be dealt with by the insolvency court.

Environmental problems and liabilities

36 In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The Insolvency Act does not set out particular rules as regards liability arising in connection with environmental problems. Therefore, the responsibility for controlling the environmental problem will lie with the company's directors or its insolvency receiver, depending on who is in charge of managing the company. For more information on directors' duties after the insolvency declaration please see question 14.

Liabilities that survive insolvency proceedings

37 Do any liabilities of a debtor survive an insolvency or a reorganisation?

Privileged creditors will not be bound by the terms of a settlement agreement unless they have approved it (ie, the vote will have the effect of qualifying that creditor's claim and privilege in the manner provided for in the settlement proposal) or unless the required majority of creditors of the same class voted in favour of the settlement agreement, as set out in question 23. Therefore, the privileged creditors will be able to enforce their credits against the debtor in accordance with their own terms at the times provided for in the Insolvency Act.

The settlement agreement may also include proposals for the sale of certain assets or business units (but may not consist of a winding up of the company) where the purchaser is subrogated in full in the related debtor's obligations. See question 18.

Additionally the court may decide, upon the receivers' request, to sell an asset that is subject to security with the attached security. In this case, the purchaser is subrogated in full in the debtor's obligation, which will cease to be a debt within the debtor's insolvency proceeding.

Distributions

38 How and when are distributions made to creditors in liquidations and reorganisations?

The Insolvency Act provides the following rules on the payment of debts when the proceedings end with the liquidation of the debtor's assets:

- debts of the insolvency estate will be paid upon their respective maturity dates out of the debtor's assets (other than those assets attached to the specially privileged debts) with preference to any other debts;
- secured debts are generally paid out of the proceeds resulting from the enforcement of the security. If the secured creditor is not entirely satisfied from the security enforcement proceeds, he is considered as an ordinary creditor for the remaining unpaid amount;
- generally, privileged debts will be paid by segregating from the debtor's estate those assets covering the aggregate amount of such credits. The Insolvency Act lists the generally privileged debts. Each category will have priority over those below it. Within the same category, payments are made on a pro rata basis;
- ordinary debts will generally be paid on a pro rata basis after the debts of the insolvency estate, the specially privileged debts and the generally privileged debts have been satisfied; and
- subordinated debts will be paid once the remaining debts have been satisfied in full. Again, the Insolvency Act lists the subordinated debts. Each category will have priority over those below it. Within the same category, payments are made on a pro rata basis.

Transactions that may be annulled

39 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

Rescission is a remedy that allows the insolvency receiver (or the creditors, in the absence of action by the insolvency receiver) to rescind acts and contracts entered into by the debtor in the two years before the insolvency declaration based on the fact that these acts or contracts are harmful to the insolvency estate.

The decision of whether a certain act or contract is harmful to the insolvency estate is to be assessed by the insolvency court in view of the pleadings and evidence put forward by the claimant. Having said that:

- certain acts and contracts are presumed by law to be harmful to the insolvency estate, without any possibility for the parties to file evidence against this presumption. This is the case for gifts and prepayments of unmatured and unsecured debt;
- the Insolvency Act also presumes (although this presumption is rebuttable), that certain acts or contracts damage the insolvency estate. This is the case of the creation of security in favour of pre-existing obligations disposals in favour of related parties (see question 32), or prepayments of unmatured secured debt;
- in the remaining cases, the claimant will have to put forward the arguments and evidence that the alleged act or contracts damages the insolvency estate; and
- transactions made within the ordinary course of business cannot be rescinded on the basis of being harmful to the insolvency estate.

The above remedy is without prejudice to the possibility to rescind those acts and contracts that the debtor had entered into in the four previous years in fraud of creditors.

If the court declares a transaction rescinded, the parties' reciprocal obligations must be restored, and the credit rights of the relevant creditor (if any) will be classified as a debt of the insolvency estate. This principle does not apply where the court understands that the counterparty acted in bad faith, in which case its claim shall be classified as a subordinated debt.

Proceedings to annul transactions

40 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

Yes. In general, the suspect period is two years prior to the insolvency declaration and four years in the case of fraud (see question 39).

Directors and officers

41 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

Directors and de facto directors (which, under Spanish law, include the concept of shadow directors), and general managers are liable to the company, the shareholders, the company's creditors and in some instances third parties, for harm caused as a result of actions or omissions that are contrary to the law or to the by-laws or that are in breach of the duties inherent to their position. Pursuant to the amendments introduced by Law 17/2014, creditors who have entered into the refinancing agreement described in question 39 will not be considered de facto directors by reason only of the obligations assumed by the debtor as a consequence of the viability plan within the framework of the refinancing agreement.

Spanish corporate law specifically provides for two types of actions for breach of a directors' duty:

- a corporate action that aims to protect and recover the company's assets damaged by the actions of the directors; and
- an individual action that aims to protect and recover the personal assets of the claimant to the extent damaged by the actions of the directors.

Additionally, directors can be held jointly and severally liable with the company for the company's debts if the company ceases to comply with certain subscribed capital-to-equity ratios and such ratios are not re-established, in which case the directors are under the legal duty to procure the liquidation of the company. In such circumstances, the liability of directors would be for the debts borne after the breach of the capital-to-equity ratio.

Furthermore, the insolvency court may declare the director liable for any damage during the qualification phase of the insolvency (ie, the phase that aims to investigate the potential liability of third parties) if the insolvency is classified as 'guilty'. An insolvency would be deemed 'guilty' when, in the creation or worsening of the state of insolvency there was wilful misconduct or gross negligence by the company or, among others, its directors. The judicial decision may order:

- disqualification of the directors from managing third-party assets or representing or managing any person or company for between two and 15 years;
- removal of the directors' rights as creditors of the debtor;
- return of the directors' rights or assets that have been unduly obtained from the debtor;
- payment of indemnities for any loss or damage caused; and
- (in certain circumstances) that the directors are liable for the deficit to creditors.

Finally, the Criminal Code includes a number of criminal offences that may apply to a director, for instance, when falsifying the annual accounts in such a way to cause financial damage to the company, to any of its shareholders or to a third party, with this offence being punished with imprisonment from one to three years and a fine from six to 12 months.

Groups of companies

42 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

In the framework of an insolvency proceeding classified as 'guilty', the parent company would be liable if the parent had given instructions to the insolvent company that caused or exacerbated the insolvency. In such a case, the parent company's directors could be deemed de facto directors (ie, persons who, without being formally appointed as directors, are acting as such) of the insolvent company who, as such, could ultimately be responsible for indemnifying third parties for any loss or damage caused by the insolvent company. Furthermore, if the insolvency proceeding ends with the liquidation of the company, the court may also rule that the de facto directors pay any outstanding amounts upon liquidation to the company's creditors.

Separately, if a refinancing agreement is frustrated because the debtor rejects, without a reasonable cause, the terms of a debt-for-equity swap transaction that complies with certain requirements, the shareholders (and directors) of the debtor may face personal liability in the event of any future insolvency.

The Insolvency Act only envisages that the insolvency of companies belonging to the same group are heard before the same judge, but the different proceedings are not unified or amalgamated. Therefore, each insolvency proceeding follows its own separate regime, with the relevant insolvency estates remaining separate. The judge in charge of the proceedings shall seek good coordination of the different proceedings.

Insider claims

43 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

Yes, 'related party' claims rank as subordinated, with the consequence that these debts will only be repaid once the remaining debts have been satisfied in full (for more information on the ranking of the credits, please see question 38).

If the insolvent debtor is a natural person the following will be considered a 'related party':

- the spouse of the insolvent debtor or a person who has been such during the two years prior to the insolvency declaration, or individuals who cohabit with a similar relation of affection or who have done so during the two years prior to the insolvency declaration;
- the ascendants, descendants and siblings of the insolvent debtor or of any of the aforementioned persons;
- the spouses of the ascendants, descendants and siblings of the insolvent debtor;
- legal entities controlled by the shareholder or his or her relatives and the de iure or de facto directors of such legal entities;
- legal entities forming part of the same group of companies as those mentioned above; and
- legal entities in respect of which the individuals or legal entities mentioned above qualify as de iure or de facto directors.

If the insolvent debtor is a company, the following will be considered a 'related party':

- shareholders and if they are natural persons, the related parties set out above, who are, pursuant to the law, personal and shareholders of an unlimited company;
- the insolvent company's directors and de facto directors, the insolvent company's liquidators and the attorneys with general powers to run the insolvent company, as well as those who have acted as such during the two years prior to the insolvency declaration;
- shareholders that, when the relevant debt arose, directly or indirectly owned at least 10 per cent of the shares of the insolvent company, except when the insolvent company is a listed company or a company with listed debt when this level is 5 per cent; and
- companies in the same group as the insolvent company and their common shareholders, provided that they meet the requirements set out in the immediately preceding point.

Creditors' enforcement

44 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Seizure of the debtor's assets can only take place by obtaining a court order. Initiation of insolvency proceedings automatically triggers a moratorium on the seizure of the debtor's assets (see question 15).

Corporate procedures

45 Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

All commercial entities may be liquidated for any of the following reasons:

- expiry of the term fixed by the shareholders or partners in the by-laws;
- completion of the corporate purpose for which the commercial entity was set up; or
- loss of capital.

As previously mentioned, most Spanish companies are either corporations or limited liability companies. These companies may be liquidated in the following circumstances:

- if it is no longer possible to accomplish the purpose for which the company was incorporated or, as a result of the paralysis of the management bodies of the company its continued operation becomes impossible;
- the losses have reduced the equity to an amount below 50 per cent of its share capital, unless the share capital is restored to the necessary amount;
- if the share capital is reduced to below the legal minimum amount;
- if there is a merger or split of the company; or
- for any other cause established in the by-laws.

Conclusion of case

46 How are liquidation and reorganisation cases formally concluded?

Insolvency proceedings are always concluded by an order issued by the relevant court in the following circumstances:

- an appeal against the insolvency order is successful;
- the debtor has fully complied with the court-approved settlement;
- all claims have been paid or creditors have been fully satisfied;
- if there is evidence that there are no available assets to pay the creditors; and
- if all creditors waive the outstanding claim.

International cases

47 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The EU Regulation on Insolvency Proceedings applies in Spain (see the chapter on the European Union). Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings (the Recast Regulation) will apply to insolvency proceedings from 26 June 2017. This new regulation updates European Union rules on cross-border insolvency procedures with respect to the currently applicable Regulation 1346/2000.

In addition, the recognition of non-EU insolvency proceedings is available in Spain through the exequatur proceedings contained in the

Civil Procedure Act, provided that the following requirements set out in the Insolvency Act are met:

- the foreign decision refers to collective proceedings grounded in the insolvency of a debtor by virtue of which all of its assets and activities are controlled or supervised by a tribunal or authority in relation to its liquidation or reorganisation;
- the foreign decision is final;
- the competence of the foreign court is based on the jurisdictional criteria provided by the Insolvency Act (ie, centre of main interests or domicile) or there is a reasonable connection equivalent to the aforementioned criteria;
- the decision has not been rendered in the absence of the debtor, or it has not been rendered after the summoning of the debtor in due form and with sufficient time for it to properly defend itself; and
- the decision is not against public policy.

Foreign insolvency proceedings will be recognised as main insolvency proceedings (if foreign insolvency proceedings are opened in a country where the debtor has its centre of main interests) or as a territorial foreign proceedings (if foreign proceedings are opened in a country where the debtor only has an establishment or assets devoted to a certain business activity). The UNCITRAL Model Law was taken into consideration by the drafters of the international conflict rules contained in the Insolvency Act, however, Spain has not formally adopted the UNCITRAL Model Law.

COMI

48 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

In case of a legal person the Insolvency Act establishes that the place of the registered office shall be presumed to be the COMI. To this effect, a change of registered office carried out in the six months prior to the insolvency declaration is ineffective. The Recast Regulation (Regulation (EU) 2015/848) applicable to insolvency proceedings from 26 June 2017 establishes that the presumption that a debtor's COMI is in the place of the registered office will not apply if the COMI has shifted in the preceding three months. For more information on the COMI regulation under the EU Regulation and the Recast Regulation, see the chapter on the European Union.

Spanish courts have had the chance to examine the COMI of companies on several occasions, in which they have mainly analysed the location in which the management decisions are taken. In general, factors that have been held to be relevant to determine a debtor's COMI (in addition to the rebuttable registered office presumption) are: location of internal accounting functions and treasury management, governing law of main contracts and location of business relations with clients, location of lenders and location of restructuring negotiations with creditors, location of human resources functions and employees as well as location of purchasing and contract pricing and strategic business control, location of IT systems, domicile of directors, location of board meetings and general supervision. Spanish courts have in the past tended to focus on the location of the principal business operations and the location of assets.

As regards a corporate group of companies, in Spain there is no specific test to determine the COMI. Hence, in general, the parent company and each subsidiary of a corporate group is subject to an individual and entirely separate insolvency proceeding (but see question 29 on the insolvency of corporate groups). See the chapter on the European Union for new EU Regulation on group insolvencies.

Cross-border cooperation

49 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

Recognition in Spain of EU insolvency proceedings is available through EU Regulation 1346/2000 and the Recast Regulation (Regulation (EU) 2015/848), with this recognition being automatic. For more information on recognition of foreign insolvency proceedings, please see the chapter on the European Union.

In addition, the EU Regulation 1346/2000 on cross-border insolvency proceedings, the Recast Regulation and the Insolvency Act (which contains similar rules to those contained in the EU Regulation for non-EU insolvency proceedings) establish the duty of reciprocal cooperation for domestic and foreign administrators. Cooperation is basically focused on exchange of information, coordination of the administration of assets and the possibility of enacting concrete cooperation rules.

We are not aware of any case where Spanish courts have refused to recognise foreign proceedings or to cooperate with foreign courts.

Cross-border insolvency protocols and joint court hearings

50 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

The international rules contained in the Insolvency Act contain specific provisions on the coordination of parallel insolvency proceedings, including duties of cooperation on insolvency receivers (by exchange of information, coordination of administration and supervision and the possibility for the Spanish courts or authorities to render rules on the coordination of proceedings). We are not aware of any public protocols or agreements reached between courts or authorities.

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