

Restructuring & Insolvency

Contributing editors

Catherine Balmond and Katharina Crinson

 Freshfields Bruckhaus Deringer



2019

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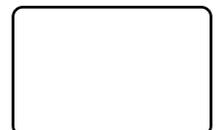


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Preface

Restructuring & Insolvency 2019

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Restructuring & Insolvency*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China, Japan and Korea.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Catherine Balmond and Katharina Crinson of Freshfields Bruckhaus Deringer, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
November 2018

Global overview

Richard Tett Freshfields Bruckhaus Deringer

Alan W Kornberg Paul, Weiss, Rifkind, Wharton & Garrison LLP

September 2018 marks 10 years since Lehman's collapse and the last global recession (in the UK it would seem that the long saga of the Lehman insolvency will be coming closer to an end with the scheme of arrangement having been sanctioned by the court in June 2018, bringing to a close nearly a decade's worth of disputes and litigation). Despite some prophecies of doom, 2018 did not herald the start of the next recession, indeed financing continued to be readily available and the distressed markets were benign. Looking into the crystal ball, commentators are divided – some say the current loose financing has echoes of 2007/08. However, the majority expects the global economy to continue with reasonable macro growth, but with some sectors and regions suffering. So, what did 2018 bring and what can we expect going forward?

Economic activity has been and remains relatively strong – driven by trade growth, easy monetary policies, and overall more positive consumer sentiment. However, risks – in the form of high household debt, increasing uncertainties because of geopolitical events, rising protectionist rhetoric, and a move away from a multilateral trading order – could derail the current growth story. As in every year, the end of 2017 and the start of 2018 also saw some large companies facing insolvency or significant restructuring. At the time of writing, Nobel's shareholders have approved the restructuring plan that sees much of the company's equity being passed to its lenders. Steinhoff, too, is in the midst of a restructuring process. Interestingly (and as further stated below) both companies either contemplated (Nobel) or are seeking to use (Steinhoff) an English restructuring process. In Nobel's case, the company reportedly implemented a COMI shift to effect a restructuring via a UK administration should shareholders vote against the deal – in Steinhoff, the COMI is changed from Austria to the UK to make use of a company voluntary arrangement (CVA).

In this year's Global overview, we summarise some of the recent developments in the markets and legal regimes, and we try to peer into the future regarding what that might bring.

Interest rates

In 2018, interest rates have continued rising both in the US and, for the first time in more than 10 years, in the UK. It was only a small rise in the UK, from 0.25 to 0.75 per cent, but still it is the first time that the rate has been raised since July 2007. Some say that rising interest rates might tip some 'zombie companies' over the edge. However, there is no evidence of that thus far, and it seems unlikely if increases remain so small and well spread out, particularly in the context of abundant covenant lite debt instruments.

The year of the CVA

In the UK, 2018 was the year of the high street restructuring, with a stark rise in company voluntary arrangements (a tool currently predominantly used by retailers to cut the spend on commercial rent). The culmination of online growth, Brexit uncertainty (impacting on staff costs, especially an issue for the casual dining sector), higher business rates, and a softening in overall consumer spending meant that the retail and casual dining sectors had to take a long hard look at what could be done to reduce their costs. Many looked to the CVA for an answer. For some companies, this may very well be true – but, sadly, for others the CVA was only a sticking plaster and the company ended up in an insolvency process regardless – such is the story of Toys 'R' Us and House of Fraser

(although the latter succeeded in selling most of its business to a third-party buyer, thereby preserving jobs and the underlying business).

The CVA is now also being rolled out beyond compromising leases. In Steinhoff, perhaps the largest Europe restructuring at present, one part of the group is shifting COMI from Austria to use a UK CVA to restructure its unsecured debt. If successful, perhaps it will herald the true arrival of the CVA on the international restructuring stage (sadly just in time for the UK to lose the benefit of the EU Insolvency Regulation – considered further below). You can read more about what exactly a CVA is in the England chapter of this book.

Cov lite or loose financings

The trend of 'cov lite or loose' incurrence-only financings has continued and means that most sizeable new finance structures have no meaningful triggers until maturity or they run out of cash. Interestingly, European loans now mimic high yield bonds' cov lite terms. With this, financings have seen a marked shift towards loans away from high yield, though both remain strong. From the companies' and sponsors' viewpoint, this absence of triggers gives them breathing space to fashion a recovery. However, from the creditors' perspective, it can mean that they don't get a seat at the table until it is too late. Be that as it may, it has certainly resulted in fewer active distressed situations this year as, until liquidity runs out or maturity beckons, underperforming structures can limp on.

Supply chain

The collapse of Carillion, a major UK multinational construction and facilities management group that entered into compulsory liquidation in January 2018, highlighted the dangers of supply chain insolvency. In relation to banks and financial institutions, there is a sophisticated regime for companies that are considered to be 'too big to fail'. In other sectors and industries, this is not the case and ordinary insolvency rules will apply. With ever larger conglomerates (but ones that are not so systemic that a government will intervene directly to ensure a bail-out), this topic will be with us for some time. Indeed, taking a look at the UK insolvency statistics, recently construction was the second largest industry grouping for companies entering into insolvency. Many companies will be looking at the Carillion situation and examining their own supply chain and how they can protect themselves.

New (and changing) US trade and sanction measures

By the time this is published, whatever we write on this topic will be long out of date! That said, the change in the US to the accepted norm of fostering international trade in priority to almost everything else continues to drive volatility. For example, at the time of writing, the Turkish lira has fallen by over 40 per cent against the US dollar, which it seems must drive restructurings in at least some Turkish sectors. As to wider impacts around the globe, again that seems like 'when and where, not if'.

Brexit

Finally, this introduction cannot avoid a mention of Brexit. Article 50 has been triggered and the UK is scheduled to leave the EU on 29 March 2019. And yet, there remains significant uncertainty about how the process and exit will play out – and still more uncertainty about what happens post-Brexit. You can read more about this in the England &

Wales chapter of this book, although events may overtake the writing of this piece! At the time of writing, and as March 2019 comes ever closer, companies and individuals are preparing themselves for a 'no deal' Brexit, which seems to be no-one's preferred outcome.

The law and its enforcement

Globally, the most significant legislative changes this year have been in Singapore. Those are intended to make the Singaporean regime much more attractive for restructurings. The changes are 'good on paper' and Singapore seems committed to making them work in practice. It will be interesting to see if Singapore can become the regional restructuring hub that is its goal.

India passed its new bankruptcy regime in 2016 (the Insolvency and Bankruptcy Code). In July 2017, the Reserve Bank of India instructed the banks to put 12 of the country's biggest distressed companies into bankruptcy (the 'Dirty Dozen'). At the time of writing, only one of these cases has played out as success – when Bhushan Steel announced in May 2018 that it was being sold to Tata Steel in a billion-dollar deal. Part of this is down to 'teething issues' with who is (dis)qualified from bidding. The Indian legislators are showing a commendable desire and ability to amend the regime in light of how things work out on the ground. So, while it remains a nascent regime, there are strong grounds to believe that, in due course, the Indian regime will be a significant success.

EU Legislation

In Europe, the rather ponderous juggernaut that is the EU legislation procedure is moving towards introducing the directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures (part

of the EU's 2015 Capital Markets Union Action Plan). This proposed Directive is a very well thought through and powerful piece of draft legislation. If implemented and followed, it would transform the EU's restructuring regimes, making them far more restructuring-friendly. The proposal does not prescribe a single European restructuring regime, but sets 'minimum standards' that all member states' insolvency laws must meet. While progress is slow, there are indications that a resolution on the entire text of the draft directive (or at least some parts of it) will be reached by early 2019 and ahead of the European Parliament elections in May 2019. It is hoped that this process will accelerate and not be delayed in the corridors of Brussels.

In individual European countries, the main interest is in the long promised 'Dutch Scheme'. After a long hiatus, this Dutch reform is making headway. There are indications that the regime may be in place before the end of 2019. It promises to be a very powerful restructuring regime (partly finalised with one eye on the proposed Directive). We look forward to it being finally rolled out into the Dutch courts. Also, the UK government has proposed some fundamental changes to the UK regime, including – for the first time – cross-class cram down. This is discussed in the relevant chapter; however, as no draft legislation has been produced yet and with the challenges on parliamentary time of Brexit, it is unclear when these proposals will be implemented.

Conclusion

While a quieter year for restructurings and with a benign near term, there remain both interesting restructurings and many positive developments in legal regimes. Accordingly, this publication has never been more important as an excellent way to keep track of the changing legislation around the world. We hope that you enjoy reading and using it.

COMI shifting: a fluid determination in international insolvencies?

David Ward, Larry Ellis and Erin Craddock

Cassels Brock & Blackwell LLP

Insolvency professionals tend to think of the centre of main interest (COMI) determination in cross-border insolvencies as a once and for all fixed determination. However, as with many decisions in a restructuring proceeding, it sometimes makes sense to revisit them as matters develop and new facts are uncovered. The occasionally 'shifting nature' of COMI is readily apparent in an international pyramid scheme wind-down involving courts in Canada and the Isle of Man.

Banners Broker International Limited (BBIL) was an Isle of Man corporation that operated an online enterprise whereby registered members could advertise their business on the Banners Broker network of websites while, at the same time, earn revenue as an advertising publisher through websites designed and hosted by Banners Broker associated companies. BBIL was central to a corporate network of entities and operations around the world including in Belize, Canada, India, Portugal, the United Kingdom and the United States, that operated under the trade name Banners Broker.

In December 2015, two of Banners Broker's principals were arrested and charged under the Criminal Code, RSC 1985, C. C-46 (Canada) with defrauding the public, possession of proceeds of crime, and laundering proceeds of crime. They were also charged under the Competition Act, RSC 1985, C. C-34 (Canada), with operating a pyramid scheme and making false or misleading statements. (They subsequently pleaded guilty to certain of the charges.)

Prior to charges being laid, in February 2014, winding-up proceedings in respect of BBIL were commenced in the Isle of Man (Isle of Man Proceeding) and joint liquidators of BBIL were appointed (joint liquidators) by the High Court of Justice of the Isle of Man (Manx Court).

The joint liquidators were authorised by the Manx Court to administer the property and affairs of BBIL for the purpose of liquidation. The joint liquidators were empowered under the Companies Act 1931 (Isle of Man) to carry on the business of BBIL, bring proceedings on behalf of BBIL, pay classes of creditors in full, compromise creditors' claims and dispose of BBIL's property.

In the months following their appointment, the joint liquidators determined that BBIL had significant connections to Canada and that it would be necessary to commence restructuring proceedings in Toronto as well. Accordingly, in August 2014, upon the application of the joint liquidators, the Ontario Superior Court of Justice (Commercial List) (Canadian Court) granted an order recognising the Isle of Man Proceeding as a 'foreign main proceeding' and appointed the joint liquidators 'Foreign Representatives' for the purposes of Part XIII of the Bankruptcy and Insolvency Act, RSC 1985, C. B-3 (Canadian proceeding).

In connection with the recognition proceedings, a receiver was also appointed over BBIL's assets in Canada (receiver). The Receiver was authorised by the Canadian Court to assist the foreign representatives in the winding up of BBIL, including the identification of and realisation of BBIL assets.

An important ground for the Canadian proceeding and the appointment of a Canadian receiver was that BBIL appeared to have property in and business connections to Canada, as well as financial dealings that were deserving of investigation.

The Canadian Court granted recognition of the Isle of Man proceeding as a foreign main proceeding under the COMI test despite the fact that the Isle of Man is not a signatory to the UNCITRAL model law.

From August 2014 to May 2016, the joint liquidators and the receiver (collectively, the court officers) investigated BBIL's affairs, pursued claims on behalf of BBIL, and realised upon BBIL assets.

Importantly, as the insolvency administration progressed, it became clear that BBIL's connections to Canada were far more extensive than initially believed. Indeed, BBIL's connections to Canada vastly outweighed its connections to the Isle of Man, or any other single jurisdiction. It became apparent that the business of BBIL was effectively run by Canadian citizens from offices in Canada. Banners Broker's principals controlled multiple Canadian corporations that were operated under the Banners Broker trade name. The Banners Broker websites, computer program and back office support function were designed and managed from Canada.

Relatively speaking, Banners Broker's connections to the Isle of Man now appeared much more limited. It was determined that BBIL was in many respects a 'letterbox company', incorporated to hold rather than operate assets. BBIL deposited substantial funds in a bank account in the Isle of Man but only for a limited period of time. BBIL did not employ Manx residents and communications with creditors and investors were mostly initiated from Canada.

Given the Canadian focus of the proceedings, the court officers concluded that it was no longer economical to administer the insolvency proceedings as a conventional cross-border recognition proceeding. Instead, the court officers determined that it would be more economical for BBIL to be wound up in a single insolvency jurisdiction.

As a result, in May 2016 the court officers brought a motion to stay the Isle of Man proceeding in favour of the proceedings in Canada and to empower the receiver to conclude the administration of BBIL in Canada by transitioning the insolvency administration activities from the joint liquidators to the receiver (transition motion).

In connection with the Transition Motion, the Court Officers sought authorisation from the Canadian Court to enter into a transition services and assignment agreement whereby the joint liquidators would assign to the receiver any and all residual property, assets, claims and undertakings of BBIL that had accrued to the joint liquidators by virtue of their appointment and activities as joint liquidators (assignment agreement).

The receiver also sought certain limited additional authority to deal with any and all interests assigned under the assignment agreement, to respond to creditor inquiries, and to take possession of the joint liquidators' records.

On 26 May 2016, the Canadian Court granted the relief sought by the court officers on the transition motion and authorised the transition of the insolvency administration activities from the joint liquidators to the receiver.

Later that year, the Manx Court granted an order directing that the BBIL liquidation proceedings in the Isle of Man be stayed until further Order of the Court.

The Manx Court reasoned that while it was initially the view of the joint liquidators that COMI was in the Isle of Man, as matters progressed it became apparent that COMI was 'in reality and substance Canada'. The Manx Court further found that it made 'a great deal of commercial and practical sense for the receiver to progress matters in Canada and for the joint liquidators in the Isle of Man to stand down'.

The Manx Court noted that the stay of the Isle of Man Proceeding would not cause ‘undue prejudice to anyone’ nor would it ‘offend against “commercial morality” or the “interests of the public at large”’.

Although unique, the BBIL insolvency proceedings are an important reminder that insolvency professionals may choose to reassess

an initial COMI determination where new facts are uncovered and it is otherwise in stakeholders’ interests to ‘shift’ COMI. The possibility of having a COMI move mid-case is probably highest in cross-border insolvencies having aspects of fraud and concealment of assets and operations.

Australia

Dominic Emmett and Peter Bowden

Gilbert + Tobin

General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The Corporations Act 2001 (Cth) (the Act) is the primary piece of federal legislation that governs the registration, administration, insolvency and reorganisation of companies incorporated in Australia. The Act prescribes, among other things, the manner to administer and regulate the winding up, liquidation, administration and distribution of assets vested in insolvent corporations and other prescribed commercial vehicles.

2 Excluded entities and excluded assets

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

The Act governs the insolvency proceedings of all companies incorporated in Australia and companies incorporated or possessing separate legal personality in foreign jurisdictions that carry on business in Australia along with building societies, credit unions and managed investment schemes.

The provisions of the Act do not govern the potential insolvency proceedings for: government agencies; state or federal corporate bodies; and entities created by statute that are not companies.

The individual statutes creating these bodies will normally provide for their dissolution or winding up.

3 Public enterprises

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

There is no precedent in Australia for a government-owned enterprise becoming insolvent. Generally, each government-owned enterprise is established under a specific piece of legislation separate to the Act (be it federal or at a state level). This legislation will provide for the winding-up procedure and remedies creditors may have available (noting they are limited compared to a corporate insolvency). Also worth noting is that the test for insolvency is often different under such legislation. As noted, creditors do have remedies; however, as the provisions will vary from enterprise to enterprise, and as there has never been an actual example of these provisions being tested, it is difficult to generally comment on how they would work in practice.

4 Protection for large financial institutions

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

No.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The Federal Court of Australia and the supreme courts of each state and territory have jurisdiction to hear matters relating to the insolvency of a corporation (both civil and criminal offences arising from insolvency proceedings). Matters pertaining to debt recovery and monetary compensation can also be dealt with by other courts such as district courts, county courts and magistrates' courts within their jurisdictional limits. The judicial institutions have discretion to transfer matters between them if considered appropriate. It is generally only the Federal Court and the supreme courts that have jurisdiction to wind up a company.

An appellant has an automatic right to appeal any final decision of the court, including an order for the winding up of a company.

Three of the more common insolvency processes (voluntary administration, deeds of company arrangement and receivership) often have no court involvement.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Under the Act, both the members of the company and also the creditors have the option under certain circumstances to commence a voluntary winding up of a company. Neither procedure requires court sanction. The determinative factor for which voluntary regime may be pursued is the company's solvency position.

Members' voluntary winding up

A members' voluntary liquidation is a solvent winding up. It requires that the directors of the company make a declaration of solvency under section 494 of the Act. The declaration of solvency requires that the directors of the company must form the opinion, after an inquiry into the affairs of the company, that the company will be able to discharge its debts in full within 12 months of the commencement of winding up. This is coupled with a special resolution (ie, at least 75 per cent of votes cast by members entitled to vote on the resolution) of the members to wind up the company. Subsequently, a copy of this resolution must be lodged with the Australian Securities and Investments Commission (ASIC) within seven days, to be published in the gazette within 21 days.

Creditors' voluntary winding up

A creditors' voluntary winding up arises when the company is in fact insolvent. It can occur in a number of circumstances, including, in situations where a liquidator appointed by the members forms the opinion that the company is in fact insolvent. This will convert the process from a members' voluntary winding up into a creditor's voluntary winding up. A company may also enter a creditors' voluntary winding up at the end of an administration if the creditors resolve to at the second creditors' meeting.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Voluntary administration

The purpose and operation of voluntary administration is outlined in Part 5.3A of the Act. Voluntary administration has been compared to the Chapter 11 process in the United States; however, unlike the Chapter 11 process, voluntary administration is not an in situ debtor process. In a voluntary administration the creditors control the final outcome to the exclusion of management and members. The creditors ultimately decide on the outcome of the company, and in practice it rarely involves returning management back to the former directors.

The purpose of Part 5.3A is to either: maximise the chances of the company, or as much as possible of its business, continuing in existence; or result in a better return for the company's creditors and members than would result from an immediate winding up, if it is not possible for the company or its business to continue in existence.

An administrator may be appointed in three possible ways under the Act:

- by resolution of the board of directors that in their opinion the company is, or is likely to become, insolvent;
- a liquidator or provisional liquidator of a company may, by writing, appoint an administrator of the company if he or she is of the opinion the company is, or is likely to become, insolvent; and
- a secured creditor who is entitled to enforce security over the whole or substantially whole of a company's property may, by writing, appoint an administrator if the security interest is over the property and is enforceable.

An administrator has wide powers, and will manage the company to the exclusion of the existing board of directors. Once an administrator is appointed, a statutory moratorium is activated that restricts the exercise of rights by third parties under leases and security interests and in respect of litigation claims, which is designed to give the administrator the opportunity to investigate the affairs of the company, and either implement change or be in a position to realise value, with protection from certain claims against the company. A secured creditor with security over the whole or substantially the whole of the assets of the company has 13 business days following the appointment of the administrator to exercise its right under the security granted in its favour (ie, appoint a receiver).

There are two meetings over the course of an administration that are critical to the outcome of the administration. Once appointed, an administrator must convene the first meeting of creditors within eight business days (at such meeting the identity of the voluntary administrator is confirmed, the remuneration of the administrator is approved and a committee of creditors may be established). The second creditors' meeting is normally convened 20 business days after the commencement of the administration (this may be extended by application to the court). At the second meeting, the administrator provides a report on the affairs of the company to the creditors and outlines the administrator's views as to the best option available to maximise returns. There are three possible outcomes that can be put to the meeting: enter into a deed of company arrangement (DOCA) with creditors (discussed further below); wind the company up; or terminate the administration.

The administration will terminate according to the outcome of the second meeting (ie, either by progressing to liquidation, entry into a DOCA or returning the business to operate as a going concern (although this is rare)). When the voluntary administration terminates, a secured creditor that was estopped from enforcing a security interest because of the statutory moratorium becomes entitled to commence steps to enforce that security interest unless the termination is because of the implementation of a DOCA approved by that secured creditor.

DOCA

A DOCA is effectively a contract or compromise between the company and its creditors. Although closely related to voluntary administration, it should in fact be viewed as a distinct regime, where the rights and obligations of the creditors and company differ from those under a voluntary administration.

A DOCA may incorporate terms that make its operation similar to a voluntary administration (giving similar rights to a deed administrator as a voluntary administrator), but may also provide for, inter alia, a

moratorium of debt repayments, a reduction in outstanding debt and the forgiveness of all, or a portion of, the outstanding debt. It may also involve the issuance of shares, and can be used as a way to achieve a debt-for-equity swap.

Entering into a DOCA requires the approval of a bare majority of creditors both by value and number voting at the second creditors' meeting. A DOCA will bind the company, its shareholders, directors and unsecured creditors.

Upon the execution of a DOCA, the voluntary administration terminates. The outcome of a DOCA is generally dictated by the terms of the DOCA itself. Typically, however, once a DOCA has achieved its goal it will terminate. If a DOCA does not achieve its goals or is challenged by creditors it may be terminated by the court.

Schemes of arrangement

A scheme of arrangement is a restructuring tool that sits outside of formal insolvency: the company may become subject to a scheme of arrangement whether it is solvent or insolvent.

A scheme of arrangement is a proposal put forward (with input from management, the company or its creditors) to restructure the company in a manner that includes a compromise of rights by any or all stakeholders. The process is overseen by the courts and requires approval by all classes of creditors. The pre-existing management remains in control of the company during the process (and also depending on the terms of the scheme itself after its implementation). In recent times, schemes of arrangement have become more common, in particular for complex restructures involving debt for equity swaps in circumstances where the number of creditors within creditor stakeholder groups may make a contractual and consensual restructure difficult.

A scheme of arrangement must be approved by at least 50 per cent in number and 75 per cent in value of creditors in each class of creditor. Classes are determined by reference to commonality of legal rights and only those creditors whose rights will be affected, compromised or amended by the scheme need be included. It must also be approved by the court in order to become effective. The test for identifying classes of creditors for the purposes of a scheme is that a class should include those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to a 'common interest'. The outcome of a scheme of arrangement is dependent on the terms of the arrangement or compromise agreed with the creditors, but most commonly, a company is returned to its normal state upon implementation as a going concern but with the relevant compromises having taken effect.

The scheme of arrangement process does, however, have a number of limiting factors associated with it, including cost, complexity of arrangements (ie, class issues), uncertainty of implementation, timing issues (ie, because of various procedural requirements for holding the meetings, and as it must be approved by the court it is subject to the court timetable and can only be expedited to a certain extent) and the overriding issue of court approval (ie, a court may exercise its discretion to not approve a scheme of arrangement, despite a successful vote, if it is of the view that the scheme of arrangement is not equitable).

These factors explain why schemes of arrangement tend only to be undertaken in large corporate restructures and in scenarios with sufficient time for execution and implementation to accommodate the procedural and courts' requirements.

8 Successful reorganisations

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

Scheme of arrangement

A scheme of arrangement must be approved by a majority of creditors voting on the resolution and holding at least 75 per cent in value and 50 per cent in number of voting creditors in each class. Classes are determined by reference to commonality of legal rights and only those creditors whose rights will be affected, compromised or amended by the scheme need be included. If approved by the creditors, supplementary approval by the court is required at the second court hearing. Schemes of arrangements may provide for the release of third parties (as opposed to DOCAs where the courts have held it is not possible).

DOCA

In the context of a voluntary administration, a majority of creditors with at least 50 per cent in number and 50 per cent in value may resolve that the company should execute a DOCA. The company must execute the instrument within 15 business days of such a resolution. A DOCA can be varied by either a subsequent resolution of creditors or by the court. A DOCA will bind the company, its shareholders, directors and unsecured creditors. A validly passed DOCA can bind all creditors but does not prevent a secured creditor from dealing with their security interest so long as the secured creditor does not vote in favour of the DOCA. Unlike a scheme of arrangement, court approval is not required for a DOCA to be implemented provided it is approved by the requisite majority of creditors.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Under Australian law, a compulsory liquidation will involve application to and orders from the court. A creditor or other eligible applicant must lodge an application with the court to wind up a company. On an application to wind up the company in insolvency, the creditor must show that the company is unable to pay its debts as and when they fall due.

There are two situations in which a company will be held to be unable to pay its debts: if the company has not paid a claim for a sum due to a creditor exceeding A\$2,000 within 21 days of service of a prescribed written statutory demand (the Act sets out specific requirements); or if it is proved to the court as a question of fact that the company is unable to pay its debts as they fall due.

Grounds are also available for a creditor to apply to the court for winding-up orders against a company not necessarily related to solvency, including that it is 'just and equitable' to do so or because of a deadlock at a shareholder or director level affecting the ability to manage the company.

After a winding-up order, management of the company is removed from the directors and the company will likely cease as a going concern (except as is necessary to proceed with the winding up). The liquidator appointed will take control of the affairs of the company and his or her duties include realising the company's assets for the benefit of the creditors.

There are no material differences between a liquidation ordered by the court and a creditors' voluntary liquidation.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Receivership

Unlike in the United Kingdom, receivership is still an option available to secured creditors in Australia. Receiverships, particularly coordinated appointments at a holding company level, can and have been used to effect corporate restructures and reorganisations.

There are two ways in which a receiver or receiver and manager may be appointed to a debtor company. The most common manner is pursuant to the relevant security document granted in favour of the secured creditor when a company has defaulted and the security has become enforceable. Far less common in practice is the appointment of a receiver pursuant to an application made to the court. Court appointments are normally done to preserve the assets of the company in circumstances where it may not be possible to otherwise trigger a formal insolvency process. However, given the infrequency of court-appointed receivers, this chapter focuses on privately appointed receivers.

For a privately appointed receiver, the security document itself will entitle a secured party to appoint a receiver, and will also outline the powers available (supplemented by the statutory powers set out in section 420 of the Act). Generally, a receiver has wide-ranging powers including the ability to operate, sell or borrow against the secured

assets. The appointment is normally effected contractually through a deed of appointment and indemnity, and the receiver will be the agent of the debtor company, not the appointing secured party.

On appointment, a receiver will immediately take possession of the assets subject to the security. Once in control of the assets, the receiver may elect to run the business if the receiver is appointed over all or substantially all of the assets of a company. Alternatively, and depending on financial circumstances, a receiver may engage in a sale process immediately. While engaging in a sale process a receiver is under a statutory obligation to obtain market value, or in the absence of a market, the best price obtainable in the circumstances. This obligation is enshrined in section 420A of the Act. It is this duty that has traditionally posed the most significant stumbling block to the adoption of prepackaged restructure processes through external administration. Often referred to as a 'prepack', this is where a restructuring is developed by the secured lenders prior to the appointment of a receiver and is implemented immediately or very shortly after the appointment is made. There is a concern that a prepackaged restructuring that involves a sale of any asset without testing against the market could be seen to be in breach of the duty under section 420A. Sales processes conducted immediately prior to appointment or the potential for immediate dilution of value are increasingly facilitating receivership sales without a full testing of the market.

Once a receiver has realised the secured assets and distributed the net proceeds to the secured creditors (returning any surplus to subordinated security holders or the company) he or she will retire in the ordinary course.

The appointment of a receiver to all or substantially all of the assets of a company will usually lead to, or will closely follow, the appointment of voluntary administrators by the directors, with both processes proceeding in tandem.

Voluntary administration

As referred to in question 7, a secured creditor can often appoint an administrator to effect a reorganisation as an alternative to exercising its security. Once the voluntary administration occurs, the creditors are in control of the company's fate (including any restructuring or reorganisation), the success of which will be dependent on the relevant majority, by number and dollar value, voting in favour of it. The effects of this procedure are referred to in questions 7 and 8 above, 'voluntary administration' and 'DOCA'.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

The voluntary administration regime was introduced into the Act to provide distressed companies with a process to initiate an expedited reorganisation without court approval. A voluntary administrator is required to complete the investigations relating to the company's business, property, affairs and financial circumstances about four to six weeks after his or her appointment. The administrator is then required to convene a creditors' meeting at which the administrator provides the creditors with a detailed report of the investigation and recommendations.

The creditors then decide between three alternatives: to execute a DOCA, to wind up the company or to end the administration. There is no legislation that specifically facilitates prepackaged reorganisation (Productivity Commission Inquiry Report 'Business Set-up, Transfer and Closure' dated 7 December 2015 (<https://www.pc.gov.au/inquiries/completed/business/report/business.pdf>, accessed 20 September 2018)).

As to a 'prepackaged restructure' in the context of a receivership, see the response to question 10.

12 Unsuccessful reorganisations

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?

Scheme of arrangement

A scheme of arrangement may either be defeated by a creditors' vote or if it is not sanctioned by the court. Should either of these occur,

there is no automatic process that occurs; rather, the company reverts back to its pre-existing state (which may include financial difficulties).

DOCA

A proposed reorganisation through a DOCA may be defeated by a majority of creditors at the second meeting. At such meeting the creditors may vote for the company to be wound up or to give back the control of the company to the directors, thus ending the administration, rather than executing a DOCA. Further, if the company fails to execute a DOCA within 15 business days of a successful resolution at a second creditors' meeting, the company will enter into a creditors' voluntary winding up. Once executed, if there is a material contravention of the DOCA by the debtor company, a creditor or other interested person may apply for the termination of an executed DOCA by an order of the court. If an order is granted, the company again enters into a creditors' voluntary winding up.

An aggrieved creditor might also look to terminate a DOCA on the grounds of, for example, unfair prejudice.

13 Corporate procedures

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

Deregistration can be voluntary upon the application of the company, a director, a member or a liquidator, and can be initiated by ASIC or court-ordered in circumstances where the company has no assets or liabilities or its winding up has been finalised. Upon the deregistration of the company, it ceases to exist as a corporate identity.

In addition, ASIC may unilaterally deregister a corporation if it has reason to believe that the company is no longer carrying on its business, has been fully wound up, has been at least six months late in lodging its annual return or has not lodged the relevant corporate documentation (including financial reports) required by the Act in the preceding 18 months. There is, however, a process under the Act for the reinstatement of deregistered companies in certain circumstances.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Voluntary administration

As described above, there are three outcomes of a voluntary administration upon which the creditors decide: entering into a DOCA; winding the company up; or terminating the administration.

The outcome chosen will dictate how the voluntary administration ends. Once a DOCA is executed, the company comes out of voluntary administration, and if the administration terminates, the administrative control vests back in the board of directors.

Liquidation

At the conclusion of a liquidation, the company is deregistered. The process of deregistration is regulated by Chapter 5A of the Act. After the company's affairs are fully wound up, the liquidator must produce an account showing how the winding up has been conducted and the company's property disposed of. For a creditors' voluntary liquidation ending before 1 July 2018, the liquidator must convene a final meeting of members and creditors. ASIC must deregister the company when three months have elapsed after the liquidator has lodged the account, or minutes if a final meeting is held, with ASIC.

In a compulsory winding up, the liquidator may also apply to the court, pursuant to section 480 of the Act, for an order that the liquidator be released and that the company be deregistered after the liquidator has realised all the property of the company or so much of that property as can in his or her opinion be realised without needlessly protracting the winding up; has distributed a final dividend (if any) to the creditors, has adjusted the rights of the contributories among themselves and made a final return (if any) to the contributories. The court must be satisfied that no creditor will be adversely affected by the order.

Receivership

A receivership concludes when the secured assets are realised and the secured creditors are repaid (either in full or to the fullest extent

possible). In such circumstances, control of the company is handed back to either the directors or voluntary administrator, and in most instances the company is deregistered or wound up.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

Section 95A of the Act states that a company is solvent if it can pay its debts as and when they fall due and payable. A company that cannot pay its debts when due and payable – or in other words is not solvent – is insolvent.

The focus in Australian case law is the cash-flow position of the company as opposed to a balance-sheet test. The courts have held that any assessment of solvency should be considered in light of the commercial reality of the company's financial position taken as a whole as opposed to a point in time assessment of the balance sheet taken in isolation.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

When a company is insolvent or likely to become insolvent, its board of directors can appoint a voluntary administrator under Part 5.3A and the appointment itself is a defence under the Act to insolvent trading. There is, however, no explicit statutory provision obliging companies to commence such insolvency proceedings. Refer to the directors' duties to prevent insolvent trading discussed in question 17.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Under section 588G of the Act, directors have a duty to prevent insolvent trading. If a company enters into liquidation, Part 5.7B, division 4 makes directors who breach this duty liable to compensate the company for all new debts incurred from the time a company is found to have become cash-flow insolvent. Therefore, a director may suffer civil or criminal liability for insolvent trading where he or she knew, or had reasonable grounds for suspecting, that the company was insolvent or would become insolvent. These provisions are intended to compel directors to take active steps (such as the appointment of a voluntary administrator) in an expeditious manner, thereby protecting members and creditors from the continuation of insolvent businesses.

In September 2017, new section 588GA was introduced into the Act to afford directors protection in certain circumstances to enable a company to delay entering into a formal insolvency process, and instead pursue a turnaround plan (ie, provide directors with a 'safe harbour protection'). Under this new section, a director will not be liable for debts incurred by a company while it is insolvent if, 'at a particular time after the director starts to suspect the company may become or be insolvent, the director starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company' than the 'immediate appointment of an administrator or liquidator to the company'.

A director that seeks to rely upon section 588GA of the Act bears the evidential burden in relation to that matter. That is, adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. It is important to note that the safe harbour protection will not apply in certain circumstances, including where, at the time the debt is incurred, the company has failed to pay employee entitlements or comply with certain reporting or taxation requirements. The new safe harbour provision also extends to providing a safe harbour for holding companies from liability to compensate its subsidiaries' creditors where directors of those subsidiaries hold the benefit of the safe harbour. Holding companies bear the same evidential burden as directors to adduce evidence that suggests a reasonable possibility

that the company took steps to ensure that the directors did enjoy the benefit of the safe harbour provisions.

While the introduction of this 'safe harbour' provision is seen as a positive development, section 588GA of the Act will not provide protection for directors against more general breach of duty claims. For instance, a liquidator might well bring a claim against directors for loss suffered by a company for developing a course of action that would clearly not be acceptable to stakeholders where consent would be required.

In addition to the potential liability of directors, should the company continue to carry on business while insolvent, certain transactions the company enters into with third parties may be subject to challenge and ultimately be held to be void if the company formally enters into liquidation (for example, unfair preference or uncommercial transaction). See question 46 for further information.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

A director or officer of a company may be held liable under the Act for civil and criminal penalties or to compensate the company if the company incurs a debt while insolvent (otherwise known as insolvent trading). Directors and officers may also attract liability for breaching their statutory duties of reasonable care and diligence in the exercise of their powers and to act in good faith and for proper purposes. Statutory liability may also be imposed where directors or officers improperly use their position or information acquired because of their position to gain an advantage for themselves or cause detriment to the company.

In some situations, directors may become personally liable for unremitted amounts of income tax or goods and services tax. The Commissioner of Taxation must give 14 days' notice to the directors setting out the details of the unpaid amount and the penalty. Directors may avoid a penalty if the company pays the unremitted amount, the company enters into an agreement relating to the unremitted amount, an administrator is appointed or the company goes into liquidation.

The courts maintain discretion under the Act to excuse directors from liability in some circumstances if they can be shown to have acted honestly and reasonably.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

In discharging their duty to act in good faith and in the best interests of a company, directors must have regard to the interests of the company's creditors as the company is nearing insolvency.

However, it is not an independent duty to creditors, and any claim must be brought by the company (or more likely, its external administrators).

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Upon the appointment of a voluntary administrator or while the company is being wound up, company officers are not removed from office but, in general, they cannot, without the administrator or liquidator's written approval, perform or exercise a function or power as an officer of the company.

If the receiver is appointed over all or most of the assets of a company, the receiver effectively has control, although the directors still have certain responsibilities and duties, and may retain residual control.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

With effect from 1 July 2018, the federal government's new ipso facto laws (which were introduced by the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017 (Cth)), impose an automatic stay on the enforcement of ipso facto clauses in certain contracts entered into on or after 1 July 2018 (Automatic Stay).

The Automatic Stay will apply where one of the following insolvency events occurs in relation to a company:

- voluntary administration;
- a receiver or controller is appointed over the whole or substantially the whole of the company's assets;
- the company announces, applies for or becomes subject to a scheme of arrangement in order to avoid a winding up; or
- the appointment of a liquidator immediately following an administration or a scheme of arrangement.

The Automatic Stay will not apply retrospectively (ie, for agreements entered into prior to the new provisions coming into force on 1 July 2018). Relevantly, the Automatic Stay does not apply to other types of contractual defaults – for example, if the company has failed to meet its payment or other performance obligations under the relevant agreement.

The length of the Automatic Stay depends on which formal insolvency process applies to the company, as follows (subject to courts order extending the stay):

- in the case of a scheme of arrangement: the stay will end within three months of the announcement, or where an application is made within that three months, when the application is withdrawn or dismissed by the court or when the scheme ends or the company is wound up;
- in the case of a receivership or managing controllership: the stay will end when the receiver's or managing controller's control ends; and
- in the case of a voluntary administration: the stay will end on the latest of when the administration ends or the company is wound up.

The scope of the Automatic Stay, specifically what contract types, rights and self-executing provisions are excluded by the Automatic Stay are set out in the Corporations (Stay on Enforcing Certain Rights) Regulations 2018 (Regulations) and the Corporations (Stay on Enforcing Certain Rights) Declaration 2018 (Declaration). The Regulations prescribe the types of contracts, agreements or arrangements that are excluded from the operation of the Automatic Stay and rights in those kinds of arrangements remain available to the parties to those arrangements should a trigger event occur. The Declaration declares the various rights (including self-executing clauses that, when executed, provides those rights) that are excluded from the operation of the Automatic Stay and those rights that remain available to the parties should a trigger event occur.

The Automatic Stay does not prevent secured creditors from appointing a receiver during the decision period pursuant to section 441A of the Corporations Act (if they have security over the whole or substantially the whole of the company's property) or enforcing security interests over perishable goods or prevent secured creditors or receivers from continuing enforcement action that commenced before the administration.

Receivership

Further to our comments above, during a receivership no moratorium exists, and creditors may take action against the company including initiating court proceedings, but such actions are treated as unsecured claims (subordinated to the claims of the secured creditors who appointed the receiver). The receiver is likely to be in control of the company's material assets and is permitted to realise such assets for the benefit of the secured creditor only (any surplus is provided

to the company and would be available for distribution to unsecured creditors).

Voluntary administration

In addition to the Automatic Stay referred to above, the Act provides for a moratorium over legal proceedings as an automatic consequence of a company entering into voluntary administration. Consequently, no legal proceedings can be initiated or proceeded with except with the administrator's written consent or leave of the court. An exception, however, is made in the case of criminal proceedings.

The Automatic Stay referred to above does not apply once, or if, a company executes a deed of company arrangement (DOCA). The Automatic Stay ends when the 'administration ends', that is when a DOCA is executed by the company and the Deed Administrator. Accordingly, if a company does execute a DOCA and needs the protection of the Automatic Stay, then subject to limited exceptions, it will need to obtain court orders.

Liquidations

The Automatic Stay does not apply where a liquidator is appointed, unless the liquidation immediately follows an administration or a scheme of arrangement

After the commencement of a winding up of a company, or after appointment of a provisional liquidator, legal proceedings are not to be commenced or continued against a company without leave of the court, pursuant to section 471B of the Act. Secured creditors are generally granted immunity from this process by section 471C, assuming the validity of their security, as they remain entitled to realise their security despite the liquidation.

Where a statutory moratorium exists, while not determinative, a court is more likely to grant leave for a claimant to proceed against the company if there is a public interest aspect to the claim, such as in the case of claims brought by regulators for statutory breaches, or where the claimant will have access to insurance proceeds.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

During an informal reorganisation or formal scheme of arrangement, the ability of a debtor company to carry on its business will depend upon the terms of agreement with its creditors.

This position differs, however, if the restructuring occurs within the context of a receivership or an administration. Control of the company is transferred from the directors to the administrator or receiver. An administrator has wide-ranging powers to carry on the business of the company where that is consistent with the purpose of the administration, whereas a receiver has wide-ranging powers provided for under the Act and the security agreement itself.

For the purposes of carrying on the business, the administrator has the power under section 437A to pay creditors who supply goods or services to the company after the company has gone into administration in preference to ordinary unsecured creditors. An administrator may seek directions from the committee of creditors (see question 33) or from the court. Creditors may also apply for relief against the administrator, which could involve removal.

A receiver may continue to run the business as a going concern with a view to maximising the return available to the secured creditor. Services engaged (including the providers of goods and services) are treated as costs of the receivership and the preferential payment of such costs is provided for in the appointment document. The sale of the assets of the business is addressed in response to question 24.

Generally, after formal insolvency proceedings are commenced, the power and roles of company officers are at the discretion of the insolvency administrator appointed (receiver, administrator or liquidator) who is ultimately responsible for those roles (for example, carrying on the business of the company). In an informal workout where there has been no formal appointment, the company officers continue to be able to exercise all powers unless otherwise agreed with creditors.

23 Post-filing credit

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

Voluntary administration

A voluntary administrator is given the power under section 437A of the Act to manage the affairs of the company and to raise loans on security over company assets to carry on the business of the company. The repayment of this credit is treated as an expense of the administration and is given statutory priority over ordinary unsecured creditors.

DOCA

Whether a deed administrator has the power to raise loans will depend on the terms of the DOCA. The repayment of this credit will usually be treated as an expense of the deed administration and will be given priority over distributions to creditors.

Liquidation

Liquidators are expressly permitted to obtain credit under section 477, whether on the security of company property or otherwise, as far as is necessary for the beneficial disposal or winding up of the company. Such credit will have priority over ordinary unsecured creditors but only in respect of the new funds and up to the value of the security.

Receivership

The terms of the appointment document and section 420 of the Act provide receivers with wide-ranging powers (including the ability to borrow). Such borrowings are treated as expenses of the receivership and are provided priority, or alternatively the original security document may provide that such financing is to be afforded the same priority as the first-ranking security.

Schemes of arrangement

Obtaining financing and use of assets as security in a scheme of arrangement or an informal voluntary reorganisation is solely a matter for agreement between the company and its creditors.

24 Sale of assets

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?

Receivership

As noted, a receiver is under a statutory obligation to obtain market value or, in the absence of a market, the best price obtainable in the circumstances under section 420A of the Act. Upon a sale, the receiver will transfer the assets free of security interests (a release will be provided by the appointing secured creditor) and often the terms of any inter-creditor arrangements will provide for the automatic release of subordinated security. In circumstances where an automatic release mechanism is not provided for, direct negotiations will need to take place with the secured subordinated creditors.

Voluntary administration

A voluntary administrator may sell assets, noting, however, it is not permitted to sell assets subject to security without consent (normally, a receiver will be appointed and have control over such assets). Administrators can apply to the court if such consent is not given and the court may make an order if it is satisfied that the secured creditor is adequately protected.

Liquidations

Liquidators appointed in the context of either voluntary or compulsory liquidations can sell or otherwise dispose of unencumbered property of the company without needing to seek approval from the court or other parties to the liquidation. The purchaser will acquire the assets unencumbered unless there are debts or liabilities passing to the purchaser as provided for in the sale documentation. If assets are encumbered, consent of the encumbrancer will be required unless a court directs otherwise.

A liquidator owes fiduciary duties to the company. In realising company property, a liquidator (or administrator) has a duty to obtain the highest possible price for the assets of the company, keeping in mind that the winding up should not be unnecessarily protracted. Property may be sold in any way the liquidator deems fit, including private contract and, usually, public auction. While creditors may purchase assets of the company, the purchase price will not be able to be set off against the debt owed to the creditor by the company. Instead, any funds raised by the sale of company property will be for the benefit of the creditors as a whole, to be distributed according to the relevant distribution rules.

Schemes of arrangement

The terms of the scheme itself will provide for the disposal of assets and any associated release of security required. Such releases will not be automatic, however, and will need either agreement from the creditors or the provision of such release in associated finance and security documents.

Informal reorganisations

In an informal reorganisation of a company, the conditions of the reorganisation and sale or use of assets are as negotiated with the relevant creditors.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Stalking horse bids

While there is nothing to prevent stalking horse bids, they seldom occur in the Australian context.

Credit bids

Credit bids are permissible under Australia law and are a means of pursuing loan-to-own strategies. The offer will be assessed in light of the relevant sales process conducted and the nature of the insolvency administration to which the company is subject. Courts generally have limited involvement in assessing a credit bid (save as part of a scheme of arrangement or where a sale has been challenged). In such circumstances the court will scrutinise the credit bid in light of the situation generally, against other proposals received and in light of any sale process run (if required). There is no prohibition on an assignee of the original secured creditor making a credit bid (provided the assignment was valid under law).

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

Liquidators are given the specific ability to disclaim property or uncommercial contracts under Part 5.6, division 7A of the Act. A liquidator can, subject to objections being made to the court by aggrieved parties, disclaim onerous property in writing. Court approval is required for disclaiming contracts as this is likely to adversely affect third-party interests. There are no specific provisions for disclaimers in a voluntary liquidation, although the court has wide powers to control these reorganisations and application can be made to the court.

Receivers and administrators are not given specific powers to disclaim contracts; they may, however, look to ignore contracts with any resulting damages claim being unsecured against the company (not the receiver or the administrator personally).

If the debtor (either acting by the insolvency administrator appointed or otherwise) breaches the contract after formal insolvency has commenced, then the aggrieved counterparty has all remedies available to it under contract law (including claim for damages and any right to terminate). Any such damage will be an unsecured claim as against the debtor company itself and only in very limited circumstances will an order for specific performance be made against the debtor company.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Pre-existing contractual arrangements will govern a licensor's ability to terminate a debtor's entitlement to use intellectual property. Such rights may be affected by the Automatic Stay provisions (ie, the 'ipso facto' protection) referred to in paragraph 21 above where the debtor enters into a relevant formal insolvency process.

A company administrator's power under section 437A to carry on and manage the property of the business extends to the use of intellectual property granted under an agreement with the debtor. Likewise, a receiver, in the absence of a licensor exercising termination rights, may also continue to use intellectual property.

28 Personal data

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

There are no restrictions on the use of personal information or customer data that apply in an insolvency that would not have otherwise applied to use by the company in a solvent context. For example, while there are restrictions against the use of personal information under Australian privacy laws, those laws will generally not prevent the transfer of that information to a purchaser as part of the sale of the company's business.

An administrator's power under section 437A to carry on and manage the property of the business extends to the use of customer data collected by the company in its business. Likewise, a receiver, in the absence of specific contractual terms to the contrary, may also continue to use customer data collected by the company in the course of the business.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

There are no restrictions under Australian law preventing a distressed company or its creditors from pursuing alternative dispute resolution options, such as arbitration or mediation. The success or willingness to engage in these procedures will obviously be dictated by the parties involved. These arrangements, however, are not without their limitations. For example, there is no obligation on creditors to agree to an informal arrangement and any one creditor can veto a proposed arbitration or mediation outcome if its rights with regard to the other creditors are directly affected (or act outside its restrictions). Its non-binding nature provides sufficient disincentive for creditors to consider these procedures, and it is rarely seen.

It should be noted that courts will generally allow arbitration proceedings to continue while insolvency proceedings remain open to aid the just and expeditious resolution of creditors' claims.

Creditor remedies

30 Creditors' enforcement

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 main way in which a secured creditor may enforce its security over assets of the company outside of court proceedings is through the private appointment of a receiver as discussed in response to question 10. The security agreement (ie, charge or mortgage) will normally grant the secured creditor the ability to appoint a receiver. Once appointed, the receiver will realise the company's assets solely for the benefit of the secured creditor to the exclusion of the rest of the company's creditors.

A creditor may also exercise rights as mortgagee in possession and take control of the property with a view to realising value.

Retention of title clauses are another way a creditor may enforce proprietary and contractual rights outside court proceedings. If effective, this will allow the creditor to reclaim property supplied to the company in the event of the company's receivership, administration or liquidation. Retention of title clauses fall within the definition of 'security interest' under the Personal Property Securities Act 2009 (PPSA), and are therefore required to be registered under the provisions of the PPSA. A traditional retention of title arrangement will be considered a 'purchase money security interest' under the PPSA, and, upon registration, will give the holder priority over other registrable interests. In this sense, while the requirements for enforcing a retention of title clause will change, the effect shall remain the same.

A number of common law and statutory liens are also available (and do not require registration under the PPSA).

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

A creditor may commence proceedings through the courts to recover outstanding amounts owing by a recalcitrant debtor company. A creditor, at the same time, may also request that the court order injunctive relief to freeze the assets of the company if there is a risk of assets or value being dissipated. A failure to plead a substantive defence will generally enable a default judgment to be granted and the creditor may, after this, take steps to wind the debtor company up.

The court has extensive powers to compel compliance and enforce a range of remedies including seizure of assets, diversion of a debtor company's income and orders for winding up of the company. Foreign creditors may be required to provide security for costs (ie, a sum of cash to the courts) of enforcing a judgment in Australia.

The options available to unsecured creditors of an insolvent company or company in distress are limited. Once a company is placed into administration or liquidation, a statutory moratorium will apply to any proceedings commenced, including any enforcement proceedings. The statutory moratorium is addressed in greater detail in response to question 21.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Meetings and notices – voluntary administration

Notice of the appointment of an administrator must be lodged with ASIC within one day and creditors must be notified of the appointment within three days.

The administrator must convene a meeting of creditors within eight business days of his or her appointment. Notice of this meeting must be given in writing to as many creditors as is reasonably practicable at least five business days before the meeting and published on ASIC's insolvency notices website. At this meeting, creditors have the opportunity to appoint a different administrator and may also decide whether to appoint a consultative committee of creditors to assist the administrator. Although the committee cannot give directions to the administrator, it can compel the administrator to report on matters relating to the administration. The committee is also in a fiduciary relationship with the creditors and thus cannot profit from their role.

The second creditors' meeting must be convened by the administrator within five business days after the 'convening period'. The convening period is 20 business days from the date the administration begins, and the same notice requirements apply. This is extended to 25 business days if the administration begins in December or occurred less than 25 days before Good Friday. The notice of the meeting must be accompanied by a report setting out the company's business,

property, affairs and financial circumstances and a statement expressing the administrators' opinion on each of the options available to the creditors (executing a DOCA, returning control of the company to the directors or winding up the company). If the administrator proposes a DOCA, details of the proposed DOCA must also be provided. At the meeting, the creditors decide and vote on which of the three available options they wish to pursue. The administrator presides at both the first and second meetings.

The reporting obligations of an administrator include the following:

- lodge notice of appointment with ASIC by the next business day following appointment, and publish on ASIC's insolvency notices website within three business days;
- prepare and lodge a report with ASIC where it is suspected that an officer, employee or member of the company has committed an offence in relation to the company; and
- where the creditors vote to wind up the company, to lodge a copy of that resolution with ASIC within five business days of it being passed.

Meetings and notices – creditors' winding up

In a creditors' winding up, no meetings of creditors are automatically held. A liquidator must hold a meeting if requested by a creditor with a minimum percentage of overall debt by value and if the liquidator considers that it is reasonable to do so. It would not be reasonable for a creditor to request a meeting if complying with the request would prejudice the interests of one or more creditors or a third party, there is insufficient property to hold the meeting, a meeting of creditors dealing with the same matters has been held or will be held within 15 business days, or if the request is vexatious.

A liquidator must send to creditors:

- within 10 business days of their appointment, notice of their appointment, information about creditors' rights, and a summary of the company's affairs and information about the company's creditors;
- within three months of their appointment, a statutory report that includes information about the estimated assets and liabilities of the company, inquiries undertaken and to be undertaken by the liquidators, the likelihood of receiving an interim dividend and possible recovery actions; and
- any other reports the liquidator decides or that are reasonably requested by creditors (see below).

These notices and reports must be lodged with ASIC.

Meetings and notices – receivership

During a receivership there is no obligation to call a creditors' meeting, but notice of the appointment must be lodged with ASIC. Reports must be lodged with ASIC during the course of the receivership and notification must be given on its termination.

Requests for information

Creditors of a company in administration or liquidation have a right to request information at any time. An administrator or liquidator must provide the information required if the information is relevant to the administration or liquidation, the provision of the information would not cause the administrator or liquidator to breach their duties, and if the request is reasonable. A request for information would not be reasonable if complying with the request would prejudice the interests of one or more creditors or a third party, if the information is the subject of client legal privilege or disclosure would be actionable for breach of confidence, if the request is vexatious, if there is not sufficient property to comply with the request, or the information has already been provided or is required to be provided within 20 business days of the request. In relation to the last three reasons, the administrator or liquidator will still have to provide the information if the creditor meets the cost of complying with the request.

33 Creditor representation

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?

Committees in the Australian insolvency regime are creatures of statute and are not seen in the context of representing creditor stakeholder groups as they might be in the United States.

At any stage during the winding up, the members or creditors of the company may request that a committee of inspection be appointed. In such a case, the liquidator must call separate meetings of creditors and members for the purpose of determining whether a committee of inspection should be appointed and, if a committee is to be appointed, the numbers of creditors and members to be appointed and the persons who are to be members of the committee.

In a voluntary administration, a committee of inspection may be formed at the first creditors' meeting.

The role of the committee of inspection is to supervise and assist the administrator or liquidator. Examples of the types of direction the committee may make include approving the remuneration of the administrator or liquidator, approving the institution of legal proceedings on behalf of the company, and directions as to the compromise of debts owing to the company. Committees of inspection are most often used in large liquidations or administrations where it is difficult for the liquidator to engage with the entire body of creditors on a regular basis.

The committee must have at least two members, drawn from the body of creditors and members. A company can be a member, acting through an authorised agent. Generally, the members of the committee of inspection will comprise those with a substantial interest in the winding up of the company, such as large creditors, employees and members holding a large proportion of the company's shares.

The administrator or liquidator of the company must have regard to the directions of the committee, but is not required to comply with such directions.

Members of the committee of inspection owe the general body of creditors and members fiduciary duties and therefore must act in the best interests of the creditors and members rather than for their own benefit.

There is no statutory provision governing the remuneration of the committee of inspection. Except with leave of the court, a committee member may not derive any income from their position. They also must not become the purchaser of any property of the company.

It is almost unheard of for such committees to retain counsel and advisers.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

An administrator, liquidator or provisional liquidator can sell or otherwise dispose of, in any manner, all or any part of the property of the company. As a claim available to an estate forms part of the company's property, a liquidator may assign the claim to a creditor for consideration. The beneficiary of the 'fruits of the remedies' is thus dependent upon the terms of the assignment. When the liquidator is without funds, creditors may provide an indemnity or funding to the liquidator so that apparently meritorious claims may be pursued for the benefit of all creditors. In such circumstances, the creditors providing the indemnity or funding may be entitled to receive a higher dividend than they would otherwise receive by operation of section 564 of the Act (see response to question 37).

In addition to administrators' and liquidators' power to assign causes of action, third-party litigation funding has been increasing in acceptability and prevalence since the endorsement of the practice in the non-insolvency context by the High Court of Australia in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386. This has brought with it increased access to litigation funding for liquidators and administrators, and more recently the receivers of the Brisconnections group of companies have accessed third-party funds to bring proceedings against the traffic forecaster.

35 Claims

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

A liquidator will notify creditors of the submission date and may do so by advertising it in a newspaper and also on the centralised insolvency notice website. This date may not be less than 14 days after the date of notice being given to creditors. Once the particulars of a debt are submitted by a creditor, the liquidator may admit all or part of the claim; reject all or part of the claim; or require further evidence to be submitted in support of it. If further evidence is required, the liquidator must notify every creditor in writing of the day on which the formal proof must be submitted. A liquidator must deal with submitted formal proof of claims within 28 days of receipt.

Where a proof of debt is rejected by a liquidator, grounds for the rejection must be provided to the creditor within seven days. A creditor can appeal the liquidator's decision in court within the time specified in the notice (at least 14 days after service).

It is possible for a creditor's claim to be assigned in writing. An assignee may apply to the liquidator and the court to have its new proof of debt stand as substituted for the assignor's proof of debt. Such an assignee will be able to enforce the full value of the claim irrespective of whether it was acquired at a discount (ie, below par).

Claims for contingent debts are admissible in the winding up of a company. When a proof of debt is contingent in nature, the liquidator may either make an estimate of the value of the debt or claim as at the date of winding up, or refer the question to the court for judicial consideration. A creditor aggrieved with the estimate made by the liquidator may appeal to the court. If the contingent event occurs after the date of winding up, the creditor is entitled to prove for the actual amount of the claim.

A creditor can claim for interest accrued after the opening of the insolvency case and there is a prescribed rate in the Act of 8 per cent. Payment of such interest will rank behind all other claims (except subordinated equity claims).

36 Set-off and netting

To what extent may creditors 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?

Liquidation

Set-off refers to the right of a creditor to plead a debt due from the debtor as a defence to all or part of the debtor's claim made against it. Section 553C of the Act provides that statutory set-off is available in a liquidation scenario where there have been mutual dealings between the distressed company and relevant creditor. In such circumstances an automatic account is taken of the sum due from the one party to the other in respect of those mutual dealings and the sum due from the one is to be set off against any sum due from the other.

Only the balance of the account is admissible as proof against the company or is payable to the company. The Act allows a broad range of claims to be set off. The rule entitles creditors who are also debtors to have preference over the general body of creditors. Only creditors that choose not to rely on their security may take advantage of the rule.

A creditor is, however, unable to claim the benefit of set-off if he or she had, at the time of the relevant transaction, notice of insolvency of the company. Further, a creditor cannot offset any existing claim or debt of the company against new claims or debts that may arise during the period of administration.

Other reorganisations

In other reorganisations, there is no statutory right of set off and the creditor must rely on any contractual rights they may have. Those rights will be subject to a statutory lien that has attached to the company's property at the time that the set off is made. In practice, however, administrators and deed administrators will ordinarily recognise set off as if section 553C did apply as generally creditors can claim prejudicial

treatment if they receive less from administrators or under DOCAs than they would under a liquidation scenario (and often wording similar to section 553C is built into a DOCA).

37 Modifying creditors' rights

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

Generally speaking, unsecured claims rank *pari passu* (with some exceptions), with secured creditors afforded a level of priority by virtue of the security arrangements in place.

The court has power to change the rank of a creditor's claim in only very limited circumstances. Section 564 of the Act provides an incentive to creditors to give financial assistance or indemnities to liquidators to pursue asset recovery proceedings or to protect or preserve property. If creditors provide such assistance, the liquidator may apply to the court for an order that the contributing creditors receive a higher dividend from the company's assets than they would otherwise be entitled to.

In assessing any claim under section 564, the court will consider all the circumstances surrounding the claim. Therefore, it is difficult to assess the frequency and likelihood of success attributable to any individual claim. The courts, in exercising their discretion, will have particular regard to factors such as the amount of risk to creditors, the amount recovered and the proportion between the debts of participating creditors and others, as well as the public interest in encouraging creditors to provide indemnities to enable assets to be recovered. Litigation funding can also be obtained outside the court process (see question 34).

A DOCA may determine the creditors to be paid and how much they are to be paid (noting that a level of protection is afforded to employees unless they agree otherwise). Aggrieved creditors can apply to the court to overturn a DOCA if they are discriminated against.

38 Priority claims

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 Act, certain unsecured debts are given priority ahead of other unsecured debts. Sections 556 to 564 of the Act govern this, and the priority debts include expenses incurred by the administrator or liquidator in realising the assets of the company and in carrying on the company's business and the costs in relation to any applications to the court in respect of the winding up and employee-related entitlements (discussed further below).

A company's debts to the Commonwealth government do not receive any special priority. Amounts in respect of unpaid income tax rank as unsecured debts and are payable only if there are sufficient funds left over after all preferential debts have been paid.

Certain employee entitlement claims will have priority over secured debts, which are secured by a security interest of circulating assets (ie, receivables, stock, etc).

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Outstanding employees' wages, superannuation, leave entitlements and redundancy payments are given priority over payment of ordinary unsecured creditors in the distribution of assets in the winding up. Pursuant to the Commonwealth's Fair Entitlement Guarantee (FEG), when a company is placed into liquidation leaving employee entitlements unpaid, the Commonwealth government, through FEG, can make payments to employees of certain levels of unpaid wages, leave and other entitlements. The Commonwealth then becomes a creditor of the company and is afforded the same priority in the distribution as the employee claims it paid.

Upon the making of a winding-up order by the court, the publication of that order acts as a notice of dismissal of all employees of the company. An employee who was engaged subject to a contract of employment for a fixed term, or was entitled by his or her contract of employment to a period of notice prior to termination of the contract, may lodge a proof of debt for damages for breach of contract. While the appointment of a voluntary liquidator does not necessarily operate as a notice of dismissal, the liquidator has the power to terminate contracts of employment.

In relation to a company in administration and receivership, upon appointment the administrator or receiver takes control of the company's business, property and affairs. The retention of employees will depend upon the outcome of the administration process. If the business continues to operate, employees may be retained. An administrator and receiver can also terminate employment contracts in the same way as management of the company could when the company was operating as a going concern.

The Act affords a level of protection to employee entitlements following the company and its creditors entering into a DOCA. The Act provides that the entitlements of employees be given certain priorities in a deed, those priorities to be at least equal to what they would receive if the company were being wound up.

40 Pension claims

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

Employee entitlements are afforded a level of priority in liquidations, receiverships and administrations. Under section 556 of the Act, employee entitlement claims are afforded a level of priority over other unsecured claims (noting that expenses of the liquidation still rank higher). It should be noted that a cap applies to the level of employee entitlements that are afforded priority for former officers of the company. In a receivership, employee entitlements are afforded priority over secured claims that are only secured by a security interest of circulating assets (the old floating charge).

A claim for unpaid employee entitlements is lodged in the same manner as other unsecured claims (ie, a proof of debt in the ordinary course). As noted in response to question 39, a statutory regime also exists (FEG) to supplement amounts available for employee claims.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Ultimate responsibility for any environmental issues will continue to rest with the relevant distressed debtor company. Upon appointment, an insolvency administrator will not automatically assume responsibility for such liabilities, but will need to be aware of any such concerns and damage should they seek to continue to trade the company. Should further damage accrue during the course of the insolvency administrator trading the business, they may be held liable in the same way that directors have been held liable pre-appointment. Further, in scenarios where the insolvency administrator seeks to sell or realise the relevant asset, engagement with the environmental regulator will be required where there is pre-existing environmental damage and often remediation will be a contractual condition to the sale.

Creditors will not be held liable for controlling or remediating any environmental damage. The debtor's officers and directors could potentially be held liable for such liabilities in circumstances where the company enters formal liquidation and it can be shown the company was cash-flow insolvent at the time such liabilities were incurred. Third parties may be liable, but it will depend on the circumstances surrounding the environmental damage and any contractual obligations in place at that time.

42 Liabilities that survive insolvency or reorganisation proceedings

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

The liabilities of a corporate debtor do not subsist after a liquidation has concluded. Under either a voluntary or involuntary arrangement, the creditors will receive compensation from the company's assets in proportion to the debts owing to them in satisfaction of their claims. The company's debts will be discharged in the context of these restructuring proceedings and thus the creditors' claims will not subsist after winding up. As noted below, upon deregistration a company will cease to exist as a corporate entity and any surplus assets will vest in the corporate regulator.

Unsecured claims subsist after a receivership has concluded and such creditors may bring an action against the company (noting they are unlikely to do so unless significant assets remain).

The outcome of the second creditors' meeting during a voluntary administration will determine what creditors' claims subsist (ie, either a DOCA or winding up is likely to commence).

Under a scheme of arrangement, those creditors whose rights are not compromised or affected will continue to have their original claim against the company.

43 Distributions

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

In liquidation, distribution will occur when funds are available. Under a DOCA or a scheme of arrangement, the distribution arrangements are generally set out in the terms of the respective instruments. It is possible for interim distributions to be made as funds become available.

Security

44 Secured lending and credit (immovables)

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

The principal type of security that is taken on real property in Australia is a mortgage, for which a registration system exists (referred to as the Torrens Title system). Under this system, a mortgagor who has registered a mortgage with the relevant state or territory land title register grants a legal charge over the land as opposed to transferring legal title to the mortgagee. The mortgagor and mortgagee thereafter both possess a legal interest in the land. The mortgagor is free to deal with the land (subject to any restrictions in the terms of the mortgage itself) and retains the beneficial and legal interest in the land. The mortgagee holds a legal charge that will confer actionable rights in the event of default by the mortgagor.

It is also possible under the Australian system for an equitable mortgage over land to exist. This arises in circumstances where the mortgage is not yet registered but the parties have an intention (often a written agreement) to enter into one or the mortgagor deposits the title deeds with the mortgagee.

45 Secured lending and credit (movables)

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

In 2012, the PPSA came into force in Australia, modelled largely on equivalent legislation in New Zealand and Canada. This legislation consolidated all of the existing registers on which security interests were previously registered and amended many of the concepts and terms associated with taking security over assets.

Security interest

The PPSA introduced a uniform concept of a 'security interest' to cover all existing forms of security interests, including mortgages, charges, pledges and liens. It applies primarily to security interests under which an interest in personal property is granted pursuant to a consensual transaction that, in substance, secures payment or performance of an obligation. It also applies to certain deemed security interests such as certain types of lease arrangement for certain terms, retention of

title arrangements and transfers of debts, regardless of whether the relevant arrangement secures payment or performance of an obligation. 'Personal property' is broadly defined and essentially includes all property other than land, fixtures and buildings attached to land, water rights and certain statutory licences.

The legislation has introduced a new lexicon relating to security in Australia. For instance, the traditional concept of a fixed and floating charge has now been replaced by 'general security agreement' and the PPSA now determines whether an asset is, in effect, subject to a floating charge on the basis that only circulating assets, as defined by the PPSA, will be treated as being subject to a floating charge for the purposes of other legislation including the provisions of the Act that provide priority of certain claims over floating charge assets. Generally, attachment and perfection of a security interest occurs when the grantor and the secured party execute a security agreement, although the parties can defer attachment, and the security interest is registered on the PPSA register. However, security interests over certain assets can be perfected other than by way of registration, for example, by the security holder controlling the relevant asset in the manner prescribed by the PPSA.

It should be noted that the concept of security interest is broad enough to capture pre-existing forms of security and the documentation creating security has not changed significantly (ie, charges, debentures, mortgages and pledges may still be used with certain amendments).

One of the most significant changes implemented by the PPSA is to require the registration of retention of title arrangements in order to protect a supplier's title to the relevant supplied goods.

If a security interest is not perfected in accordance with the PPSA the security interest will, on liquidation of the grantor, vest in the grantor. This has created a paradigm shift for retention of title arrangements as failure to perfect the retention of title arrangement (by registration) will vest title in the relevant goods in the recipient of the goods, despite the agreement between supplier and recipient that the supplier retains title to those goods until they are paid for.

Non-PPSA property

The PPSA does not cover security interests in land or fixtures and buildings attached to land and a mortgage over real property must be registered under the Torrens Title system, which operates under Australian law by registration on the relevant state or territory land title register (see question 44).

There are also certain assets such as statutory licences (such as mining licences), which, by virtue of statute, are expressed to be outside the operation of the PPSA and any security interest over any such asset is governed by common law.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

The following types of transactions may be held to be void and set aside after a company has entered into liquidation:

- insolvent transactions (which includes both unfair preferences and uncommercial transactions);
- unfair loans;
- unreasonable director-related transactions; and
- transactions entered into for the purpose of defeating, delaying or interfering with creditors' rights on a company's winding up.

Uncommercial transactions and unfair preferences are voidable if the company was insolvent at the time of the transaction or at a time when an act was done to give effect to the transaction. The courts have held a transaction 'uncommercial' if a reasonable person in the company's circumstances would not have entered into it. An unfair preference is one where a creditor receives more for an unsecured debt than would have been received if the creditor had to prove for it in the winding up. The other party to the transaction or preference may prevent it being held void if it can be shown that they became a party in good faith, they lacked reasonable grounds for suspecting that the company was insolvent and they provided valuable consideration or changed position in reliance on the transaction.

Update and trends

The federal government has sought public consultation on draft legislation aimed at reducing illegal phoenix activity. Among other things, the draft legislation includes reforms to introduce new phoenix offences for directors and advisers who engage in creditor-defeating transactions. The public consultation period ended on 27 September 2018. Subject to any amendments following consideration of the public submissions, the draft legislation will soon be introduced for consideration by the federal government.

Loans to a company are 'unfair' and thus voidable if the interest or charges in relation to the loan were, or are, not commercially reasonable. Any 'unreasonable' payments made to a director or a close associate of a director are also voidable, regardless of whether the payment occurred when the company was insolvent.

A liquidator can seek a court order under section 588FF of the Act with respect to suspected voidable transactions. Potential orders include the repayment of money paid or retransfer to the company of property it transferred. Orders may also be made varying a contract that is part of the transaction.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

No. However, related party claims are likely to be subject to greater scrutiny.

Groups of companies

48 Groups of companies

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

Cross-collateralisation and group guarantees are often sought by lenders into a corporate group. Such guarantees provide comfort that a holding company will stand behind special purpose vehicles or operating companies. There is also a statutory form of cross-guarantee lodged with ASIC allowing corporate groups to lodge consolidated financial statements. This statutory cross-guarantee provides for a group to be liable for each other group member's debts, and is designed to afford a level of comfort to creditors providing services or lending to operating subsidiaries.

Further, under section 588V of the Act, a holding company of a company may, in certain circumstances, be held liable for the insolvent trading of a subsidiary.

Pooling

As noted below at question 49, under the Act a court can make a 'pooling order' such that in the liquidation of a group of companies each of the separate group companies are treated as if they were a single company. This means that the creditors of the group will have their claims 'pooled' so that, in effect, they are treated as creditors of one entity with a combined pool of assets for distribution.

Notwithstanding that the Act makes no provision for the pooling of assets and liabilities of a group of companies in administration, Australian courts have sanctioned the use of pooling arrangements for groups in administration proposing to execute a pooled DOCA. Ultimately this will be a decision of the creditors voting; however, a pooled DOCA will be persuasive if the return to creditors of the group as a whole will provide greater return than if the individual entities ratified separate DOCAs or were placed into liquidation.

49 Combining parent and subsidiary proceedings

In 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?

Identity

In insolvency proceedings involving corporate groups, a consolidated group is not considered as a single legal entity. Where companies operate as a consolidated group, the starting legal position is that the 'separate personality' principle prevents creditors of an insolvent company from gaining access to the funds of other companies for payment of their debts.

The Act, however, provides for a holding company to be liable for the debts of their insolvent subsidiaries in certain circumstances. These provisions enable the subsidiary's liquidator to recover amounts equal to the loss or damage suffered by creditors from the parent company if the parent failed to prevent the subsidiary from incurring debts while there were reasonable grounds to suspect that the subsidiary was insolvent.

The corporate veil may also be lifted in circumstances where an insolvent subsidiary is deemed to be acting as a mere agent, conduit or partner of its parent company. Australian courts have, however, displayed greater reluctance than their UK counterparts to lift the corporate veil in these circumstances.

The only form of external administration that expressly permits combining proceedings by parent and subsidiary companies is under a scheme of company arrangement. To enable a scheme, an application must be made to the court requesting a meeting of the creditors and members (refer to the response to question 7). Where a scheme of arrangement is proposed involving a large corporate group, the application may request for the meeting to occur on a consolidated basis. An application for an order to transfer the whole of the assets and liabilities of the subsidiaries to the parent company may also be made when seeking approval of a proposed scheme.

This scheme requires significant court involvement and thus execution is generally slower and more expensive than voluntary administration.

Pooling

Pooling of group funds may occur in limited circumstances, as prescribed by division 8 of Part 5.6 of the Act, being sections 571 to 579L. Generally, those circumstances are where there is a substantial joint business operation between members of the same corporate group and external parties, such that members of the group are jointly liable to creditors. The liquidator of the corporate group being wound up makes what is called a pooling determination, after which separate meetings of the unsecured creditors of each company must be called to approve or reject the determination. The court may vary or terminate any approved pooling determination.

In relation to a company in liquidation, the court may make orders for the transfer of assets from a winding up in Australia to an external administration outside Australia, either pursuant to section 581 of the Act or pursuant to the UNCITRAL Model Law, incorporated into Australian law by the Cross-Border Insolvency Act 2008 (Cth).

International cases

50 Recognition of foreign judgments

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?

The Foreign Judgments Act 1991 (Cth) creates a general system of registration of judgments obtained in foreign countries. This act only extends to judgments pronounced by courts in countries where, in the opinion of the governor-general, substantial reciprocity of treatment will be accorded by that country in respect of the enforcement in that country of judgments of Australian courts. Judgments of other foreign countries may also be recognised under the common law rules for the recognition of foreign judgments.

The application to register a foreign judgment must be made by a judgment creditor to the appropriate court (usually the state or territory supreme court) within six years of the date of judgment or, if an appeal has been taken, within six years of the last judgment in the appeal proceedings.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Australia formally adopted the UNCITRAL Model Law on Cross-Border Insolvency by implementing legislation called the Cross-Border Insolvency Act 2008 (Cth) (Cross-Border Act).

This legislation adopts the Model Law with as few changes as necessary to adapt it to the Australian context. Some of the most important features of the legislation include:

- the participation by foreign creditors in local insolvency proceedings;
- facilitated cooperation between courts and insolvency practitioners from different countries;
- allowing a person administering a foreign insolvency proceeding to have access to local courts and in which circumstances this is possible;
- the setting out of conditions for recognition of an insolvency proceeding and for granting relief to representatives of such a proceeding; and
- the ability to effectively coordinate insolvency proceedings occurring concurrently in different states.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Under the Cross-Border Act, foreign creditors, save for tax and penal debts, have the same rights regarding the commencement of, and participation in, insolvency proceedings as an Australian creditor. All foreign claims must be converted into Australian currency for the purposes of the proceedings.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

In relation to a company in liquidation, the court may make orders for the transfer of assets from a winding up in Australia to an external administration outside Australia, either pursuant to section 581 of the Act or pursuant to the Cross-Border Act.

54 COMI

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?

As noted in question 51, Australia formally adopted the UNCITRAL Model Law on Cross-Border Insolvency by implementing legislation called the Cross-Border Act. Under the Cross-Border Act there is a rebuttable presumption that the centre of the debtor's main interest is its registered office, or in the case of a natural person, his or her habitual residence. The Model Laws are silent on the standard required for COMI determination.

Given this, the Australian courts have looked to and adopted similar reasoning when considering COMI as similar jurisdictions (such as the bankruptcy courts in the United States) and have equated the concept of COMI with the principle place of business. In considering where the COMI of a debtor or group of companies exists, the courts will look at a number of factors, including:

- the location of the debtor's headquarters;
- the location of those who actually manage the debtor;
- the location of the debtor's primary assets;
- the location of the majority of the debtor's creditors or a majority of creditors who would be affected by the case; and
- the jurisdiction whose law applies to most disputes.

55 Cross-border cooperation

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?

Section 581 of the Act provides that an Australian court may request a foreign court with jurisdiction in external administration matters to render assistance in the recovery of overseas property of the company. In deciding whether to authorise a letter of request, one important consideration will be how likely it is that the foreign court will act upon the request.

The Cross-Border Act provides an alternative method whereby an Australian insolvency practitioner may seek recognition under the Model Law in a foreign jurisdiction and thereby give the foreign court independent jurisdiction to provide assistance. Under the UNCITRAL Model Law, the insolvency practitioner may then have authority to recover assets in the foreign jurisdiction.



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In relation to insolvency proceedings conducted in a foreign jurisdiction, section 581 of the Act also provides that an Australian court must assist bankruptcy courts of prescribed countries and has a discretion to assist courts of other countries. The prescribed countries are Canada, Jersey, Malaysia, New Zealand, Papua New Guinea, Singapore, Switzerland, the United Kingdom and the United States. Once again, the Model Law provides an alternative procedure, whereby a representative in a foreign jurisdiction may approach an Australian court requesting assistance in the recovery of property located in Australia belonging to the foreign company. In *Re Cow Cho Poon (Private) Limited* (2011) 249 FLR 315 a Singaporean liquidator made application to an Australian court pursuant to section 581 of the Corporations Act seeking declarations that he was authorised to open, close, redesignate and operate certain bank accounts held by the company in Australia. In granting the relief sought, the Australian court noted that to so order would be of utility and would aid the effectuation of the winding-up orders made by the Singapore court. It is likely that a similar result would have been reached had the Model Law been invoked.

While in most cases Australian courts have formally recognised foreign proceedings under section 581 of the Act when requested to do so, there have been exceptions. For example, in *Yu v STX Pan Ocean Co Ltd (South Korea), in the matter of STX Pan Ocean Co Ltd (receivers appointed in South Korea)* [2013] FCA 680 the court was reluctant to grant additional relief as the relief sought would adversely affect any rights that other Australian creditors may otherwise have had, whether under the Act or otherwise.

There are no reported cases of an Australian court refusing to recognise foreign proceedings or grant relief sought under the Cross-Border Act in relation to a corporate insolvency.

56 Cross-border insolvency protocols and joint court hearings

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?

Many of the cases involving cross-border elements heard in Australian courts involve the protection of assets and the issuance of injunctions or stay orders. One such example was the case of *Lawrence v Northern Crest Investments Limited (in liq)* [2011] FCA 672, where an interim injunction was granted against the Australian directors of an insolvent New Zealand company restraining them from dealing with the company's assets, pending an application by the liquidator for orders that the winding-up proceedings in New Zealand be classified as a 'foreign main proceeding'.

There have been no joint hearings or formal arrangements made to coordinate proceedings with courts in other countries to date.

Austria

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

Insolvency proceedings, including bankruptcy proceedings, reorganisation proceedings with self-administration and reorganisation proceedings without self-administration, are governed by the Austrian Insolvency Code (the Insolvency Code).

In addition to the Insolvency Code, the Business Reorganisation Law of 1997 (the Business Reorganisation Law) governs a specific form of 'reorganisation' supporting the restructuring of a solvent debtor's business. 'Reorganisations' under the Business Reorganisation Law are not insolvency proceedings and do not affect creditors' rights.

2 Excluded entities and excluded assets

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

In general, both individuals and legal entities can be subject to insolvency proceedings. This includes general partnerships, limited partnerships, professional partnerships, professional limited partnerships and European economic interest groupings as well as a deceased person's estate. The Supreme Court has ruled that even municipalities may be subject to insolvency proceedings.

Owing to a lack of legal standing, civil partnerships, silent partnerships and cartels cannot enter into insolvency proceedings. Only their partners may be subject to insolvency proceedings.

Reorganisation proceedings with or without self-administration and reorganisations under the Business Reorganisation Law do not apply to credit institutions, insurance companies and pension funds. For such entities, special provisions set out in the Banking Act, the Insurance Company Supervision Act and the Pension Fund Act apply. The Business Reorganisation Law also does not apply to investment service companies, financial institutions and leasing companies.

The following assets are excluded from insolvency proceedings and are exempt from claims of creditors: inheritances, legacies and gifts to the extent not accepted by the insolvency administrator; any assets that the insolvency court decides to release from the estate; claims arising in the context of legal proceedings asserted by the debtor and assets in the possession of the debtor the restitution of which is subject to legal proceedings to the extent the insolvency administrator does not enter into such proceedings; all rights that are incapable of being transferred to a person other than the debtor; and, when the debtor is a natural person, a certain amount of monetary funds that is granted to the debtor for his or her living expenses.

3 Public enterprises

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

Investments of the Republic of Austria in partially or entirely nationalised companies are in most cases administered via the Austrian State and Industrial Holding Company (ÖBIB), an Austrian limited liability company that holds the shares in these companies. The ÖBIB is the successor of the former Austrian State Industrial Holding Stock Corporation (ÖIAG). This had been turned into ÖBIB in early 2015 by way of a form-changing transformation pursuant to the Austrian Stock Corporation Act.

Other shareholdings in government-owned enterprises (eg, the Federal Railways Company) are directly held by the Republic of Austria and administered by the government.

Because all these nationalised companies and government-owned enterprises are set up under Austrian private law (most often in the form of a limited liability company or a stock corporation), there are no specific procedures as to the insolvency of these enterprises. Consequently, the creditors' remedies are also the same as in ordinary insolvency proceedings.

Statutory bodies under public law (eg, municipalities, cities with their own charter, federal states and the Republic of Austria itself) may also become insolvent. This is generally accepted and derived from their general legal capacity. Therefore, in principle, in the case of an insolvency of a statutory body with general legal capacity, the Austrian Insolvency Code will apply.

4 Protection for large financial institutions

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

On 1 January 2015, the Austrian Federal Act on the Recovery and Resolution of Banks (BaSAG) which implemented Directive 2014/59/EU on the recovery and resolution of credit institutions and investment firms (BRRD) entered into force.

The BaSAG only applies to credit institutions, financial institutions that are subject to supervisory consolidation, and financial holding companies that are part of an Austrian credit institution group. Its main principles are the winding down of assets or the recovery of a bank without severe impact on its value, the protection of taxpayers and the equal treatment of creditors of a credit institution that is subject to bail-in measures ('no creditor worse off than in insolvency'). The BaSAG provides for all early intervention measures and resolution tools as the BRRD, such as the production of recovery and resolution plans by institutions, additional supervisory powers for the Austrian financial market authority (FMA) as national resolution authority to intervene at an early stage and the entrusting of the FMA with necessary resolution powers and tools such as the sale of business or shares, the setting up of a bridge institution, the separation of assets and the bail-in of shareholders and creditors of a failing institution.

Like the BRRD, the BaSAG aims at providing an alternative for credit institutions to standard insolvency proceedings. However, a credit institution can at the same time be subject to both resolution measures under the BaSAG and insolvency proceedings under the

Austrian Insolvency Code. Importantly, the BaSAG modifies the usual ranking of creditors in the course of insolvency proceedings because certain claims (ie, of ensured deposit holders) are satisfied with priority. Payments of subordinated claims will only be made if the first ranking creditors have been fully satisfied.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Insolvency proceedings are generally conducted by the competent provincial court (in Vienna, the Commercial Court) in the area where the debtor's business is located at the time of filing for insolvency. Failing this, for example when the debtor is a private person, proceedings are conducted by the court of the place where the debtor has its permanent residence, its branch office or any assets. In the case of a natural person applying for insolvency proceedings, the competent district court is involved.

Austrian law distinguishes between three types of court orders: those that can be appealed with an autonomous recourse, those that can only be appealed together with another appealable decision and those that cannot be appealed at all. The remedy against court orders is always a 'recourse'. The general rules according to the Civil Procedures Act apply.

The requirements for bringing a recourse are:

- damage ('formal damage', meaning that the court's decision differs from the party's motion, is sufficient);
- legitimacy (every party to the proceedings);
- timeliness (14 days, starting from the day of delivery of the court order);
- no waiver or withdrawal of the appeal;
- form; and
- content (declaration of appeal, reason for appeal and claim).

In insolvency matters, the appellant is allowed to bring new facts or evidence during recourse proceedings, provided that they already existed at the time when the appealed decision was made.

Recourses do not have a delaying effect on the enforceability of the court order. However, the court cannot alter the appealed decision to the detriment of the appellant. This means that, as a worst-case scenario for the appellant, the recourse gets rejected.

If the requirements of a recourse are met, the appellant is entitled to bring an appeal. As a prerequisite to the decision of the appellate court, the trial court where the appeal was submitted decides on the admission of the appeal. After admission, the appeal is submitted to the appellate court, which also has the right to reject the recourse.

Defendants can require non-EU applicants to post security for court fees except where:

- the applicant has its usual place of residence in Austria;
- a court order for compensation would be enforceable in the applicant's usual place of residence;
- in marital disputes;
- in disputes relating to bills of exchange; or
- when the plaintiff has sufficient real estate (secured) assets.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Under Austrian law, the term 'voluntary liquidation' of a company is used to refer to a company being dissolved by its shareholders voluntarily according to its corporate charter, outside the scope of insolvency proceedings. In such a case, all creditors' debts must be fully satisfied before the liquidation can be completed.

The following does not deal with 'voluntary liquidation' in the strict Austrian sense of the word but with the true situation when the directors of a company (as opposed to its creditors) can, and are under certain circumstances required to, file for insolvency proceedings. A debtor is required to initiate a voluntary liquidation if the insolvency test is met (see question 15).

Following the application for opening insolvency proceedings, the court examines the application and decides whether the debtor meets the insolvency test. If this is the case, the court will open insolvency proceedings immediately.

Once the court has formally opened insolvency proceedings (with the exception of reorganisation proceedings with self-administration), the right to make any dispositions with respect to the insolvency estate and the administration thereof passes from the debtor to the insolvency administrator appointed by the court. In such case, only the insolvency administrator is entitled to act on behalf of the insolvent's estate. Transactions concluded by the debtor after the opening of insolvency proceedings are void with respect to the creditors. If the court makes an order for reorganisation proceedings with self-administration, the debtor retains the right to make dispositions with respect to the insolvency estate. However, it will be supervised by a court-appointed reorganisation administrator.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

If the conditions for the opening of insolvency proceedings are met (see question 15) or there is a real threat of the debtor's inability to pay debts as they fall due ('pending illiquidity'), the debtor may apply to court for the opening of reorganisation proceedings. A reorganisation proceeding can only bind unsecured creditors (and secured creditors to the extent that their claim is under-secured). The debtor may also apply for the opening of reorganisation proceedings after insolvency proceedings have been opened as long as such proceedings have not been concluded. An application for the opening of reorganisation proceedings must include a reorganisation plan offering payment of at least 20 per cent of the claims to unsecured creditors within two years of the approval of the reorganisation plan. The court will appoint a reorganisation administrator who is in charge of the company until the reorganisation plan is approved. The approval of the reorganisation plan requires a majority of (unsecured) creditors holding more than 50 per cent of the aggregate claims of those (unsecured) creditors present at the relevant court hearing.

Alternatively, the debtor can apply for reorganisation proceedings with self-administration. In such a case, the reorganisation plan has to provide an offer for the payment of at least 30 per cent of the (unsecured) creditor's claims within two years after approval. An inventory of assets, a current status report as well as a liquidity plan for the following 90 days has to be provided at the time of application. The advantage of reorganisation proceedings with self-administration is that the debtor does not lose control over the assets to an insolvency administrator, allowing the debtor to retain control over its business and the proceedings. Only for legal acts that are not considered to be in the ordinary course of business is the reorganisation administrator's approval required. Note that only an insolvency administrator can take avoidance actions, hence these are not available in a reorganisation. If the reorganisation plan is not approved within 90 days from the beginning of the proceedings, the self-administration will be revoked and an insolvency administrator will be appointed. During the continuation of the proceedings under the supervision of the insolvency administrator, the reorganisation plan itself can still be approved by the creditors.

The approval of the reorganisation plan results in the conclusion of the insolvency proceedings and the termination of the insolvency administrator's appointment. Furthermore, the debtor is relieved of the obligations towards its creditors exceeding the quota offered in the reorganisation plan. Creditors can only set off their claims in accordance with the quota of the reorganisation plan. Whereas, before the approval of the plan, it is possible to set off the entire claim (provided general requirements are met (see question 36)).

A debtor who is neither insolvent nor over-indebted may also apply to the court for the opening of reorganisation proceedings under the Business Reorganisation Law. If certain financial ratios are not met, an application for reorganisation is mandatory. The application should include a reorganisation plan, which may be supplied up to 60 days after the filing of the application. The court will appoint a reorganisation auditor to examine and assess the reorganisation plan. As already mentioned, the opening of reorganisation proceedings under the Business Reorganisation Law will not change the situation of creditors as this reorganisation is not an insolvency proceeding.

8 Successful reorganisations

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

Secured creditors are creditors holding a secured right over the debtor's assets (lien, mortgage, etc). Preferential claims include the costs of the reorganisation proceedings, various disbursements of operating costs and expenses (eg, claims of employees for normal salary accruing after the opening of the reorganisation procedure) and remuneration for certain creditors' associations as defined by law.

Mandatory features of a reorganisation plan include full satisfaction of all secured and preferential claims, as well as the debtor's offer to pay to all unsecured creditors at least 20 per cent of the outstanding claims within two years after the approval of the reorganisation plan. In the case of reorganisation proceedings with self-administration, the debtor has to offer the payment of a quota of at least 30 per cent (as well as satisfaction in full of all secured and preferential claims).

The reorganisation plan must be approved by unsecured and non-preferential creditors representing more than 50 per cent in value of the total outstanding unsecured, non-preferential debts, as well as the (simple) majority of the creditors (by headcount) that are present at the reorganisation hearing.

Generally, the reorganisation plan must treat all unsecured and non-preferential creditors equally. Deviations from this principle are possible if the reorganisation plan is approved by the majority of the unsecured creditors present at the reorganisation hearing (by headcount) and creditors representing at least 75 per cent of the outstanding unsecured non-preferential debt.

The Insolvency Code does not foresee the possibility that a reorganisation plan includes releases in favour of third parties.

In business reorganisation proceedings under the Business Reorganisation Law, the reorganisation plan must include:

- an analysis of the reasons for the need to reorganise;
- the necessary measures envisaged;
- the chances of success;
- the amount of additional credit needed; and
- a timetable.

The reorganisation auditor has to agree on the restructuring plan and the court has to approve this. The creditors have no right of objection.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Each (individual) creditor may also apply for the opening of insolvency proceedings with respect to a debtor. The creditor will need to establish that the debtor is insolvent (ie, either illiquid or over-indebted without a going concern prognosis, although, realistically, a creditor will usually only be able to demonstrate the former) and that he or she has a valid claim against the debtor, even if this claim is not yet due for payment. If the court is satisfied that the insolvency test is met, the court will open insolvency proceedings without undue delay after the creditor's application. The effects of the commencement of the insolvency proceedings – where there are sufficient funds available to bear the costs of the insolvency proceedings – are the same as described in question 6.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Only the debtor may file an application for the commencement of reorganisation proceedings. Creditors may only apply for the initiation of insolvency proceedings with respect to a debtor (see question 9).

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Reorganisations may be 'pre-packaged' or structured within certain limits. This may be the case if the offered settlement does not meet the minimum targets (notably, the satisfaction quota) imposed by law (see question 8) and therefore one or several large creditors need to subordinate their claims for the reorganisation to be approved by the court.

12 Unsuccessful reorganisations

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?

If the reorganisation plan does not secure the necessary majority and quorum of the creditors' vote during the reorganisation hearing, it fails. Furthermore, the court can, and in some circumstances has a duty to, reject a reorganisation plan even though it has been approved by the creditors (eg, if material regulations have not been complied with, or if the reorganisation plan favours certain creditors). If the reorganisation plan is not approved, the reorganisation proceedings are continued as insolvency proceedings.

The approved reorganisation plan may be actively monitored by a reorganisation administrator if agreed upon in the reorganisation plan. During such supervision, the court may issue protective measures with regard to the debtor's assets and may veto certain legal transactions. If a debtor defaults on its payment to a particular creditor, the creditor has to notify the debtor of this and grant it a two-week grace period. If the debtor is still unable to fulfil its obligations after such period, the creditor's original claim is re-established in its totality (ie, not only in the reorganisation quota). Despite a default with respect to a particular creditor, the reorganisation plan and the quota remains in effect with respect to those creditors on whom the debtor has not defaulted.

If a reorganisation plan under the Business Reorganisation Law is not approved by the court, reorganisation proceedings must be closed.

13 Corporate procedures

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

General company law provides for standard procedures for dissolving a corporation (called 'voluntary liquidation' under Austrian law; see question 6). Such procedures are quite different from insolvency proceedings and do not require any involvement of the court, apart from removing the business from the commercial register. In a voluntary liquidation, all creditors must be fully satisfied.

A corporation is already dissolved by operation of mandatory Austrian law upon the opening of insolvency proceedings. In place of the corporation, its assets form the insolvent's estate, which is sold off and the proceeds are eventually distributed to the creditors.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Insolvency cases are concluded by a formal order of the insolvency or reorganisation court after all conditions for the closing of the procedure have been fulfilled.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

An Austrian debtor is deemed to be insolvent when it is either illiquid or (in the case of corporate entities) over-indebted.

According to case law, a debtor is illiquid when it lacks the means to pay all of its liabilities that are currently due. Liabilities due in the future (even if they are already known) are not taken into consideration for this test. The inability to satisfy liabilities when due constitutes illiquidity only if it is permanent rather than merely temporary (as a result of any cash-flow restrictions).

According to case law, a debtor is over-indebted if: the assets (based on their liquidation value) would not be sufficient to satisfy all of its creditors, and a business forecast shows that the debtor is likely to become illiquid (ie, unable to pay its debts) in the future and, as a result thereof, will be liquidated. The first limb of the test is objective and will be satisfied if a debtor's liabilities exceed the value of its realisable assets. It assumes an orderly voluntary liquidation of assets on the valuation date rather than valuing the company as a going concern. The second limb of the test requires an analysis of the probability that the company will become illiquid within a reasonably predictable period (usually at least the current and the following fiscal year).

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Managing directors of a company must file for insolvency without undue delay, but in any case within the first 60 days of the company becoming illiquid or over-indebted within the definition of the Insolvency Code (see question 15). During the 60-day period, the managing directors may make reasonable efforts to restructure the company or may prepare an application for reorganisation proceedings.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

The managing directors will be personally liable for the damage inflicted on the company's creditors by their failure to make a timely application for the opening of insolvency proceedings.

As regards existing creditors, the managing directors will be liable for a reduction in the insolvency quota. As regards new creditors, the managing directors will be liable for the damage suffered by such new creditors having placed confidence in the company being solvent. In addition, managing directors will be liable to the company for any payments made to any counterparties while the company was insolvent. It is generally accepted that this does not apply where insolvency proceedings are diligently prepared and where the payment is necessary to protect the position of the company's general creditors.

Other than civil liability, criminal liability may also arise out of crimes such as fraud, disloyalty or specific actions such as the fraudulent preference of a creditor or the fraudulent infringement of the insolvency law.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

The managing directors of a company are liable to the company for any failure to perform their function in a diligent manner. Any resulting claims the company has against the directors are subject to a five-year limitation. The company may not waive or agree to settle these claims to the extent that payment by the managing directors is required to satisfy the company's creditors. Directors may also be liable directly to creditors if they failed to file for insolvency (see question 17). Also, the Tax Procedure Act and social security legislation impose personal liability on managing directors to the extent that they have failed to diligently manage funds available to the company, where such funds should have been paid on account of taxes or similar circumstances. Under Austrian social security legislation, a managing director may even be subject to criminal liability for having failed to make pro rata social security contributions on any salary payments that were subject to such contributions.

Under the Business Reorganisation Act, managing directors are personally liable for the company's debt up to €100,000 per individual,

if they failed to instigate the opening of business reorganisation proceedings upon having received a report by the company's auditor stating that the company was in need of reorganisation. This is the case if the company's equity ratio is less than 8 per cent, and the implied debt settlement period exceeds 15 years, unless an opinion is issued by a certified auditor confirming that there is no need for reorganisation. The liability arises if, within two years of the managing directors receiving the auditor's report, insolvency is applied for. In certain circumstances, members of the supervisory board or shareholders of a limited liability company may also become liable under the Business Reorganisation Act.

In specific circumstances, the managing directors could also be liable under the Austrian Criminal Act for offences such as fraudulent conveyance or intentional preference of a creditor in the state of insolvency. While other employees may also become liable to the company, that liability is limited under the Employee Liability Act.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

If an insolvency or reorganisation proceeding is likely, the managing directors may proceed to carry out the company's ordinary course of business in an effort to avert insolvency. These actions may not only include daily business but also transactions necessary to maintain the insolvency estate. Directors must perform these duties with the due diligence of a prudent businessman. If the company does become illiquid or over-indebted, the managing directors must file for insolvency without undue delay, but in any case within the first 60 days. During the 60-day period, the managing directors may make reasonable efforts to restructure the company or may prepare an application for reorganisation proceedings.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Only during reorganisation proceedings with self-administration may a debtor (its managing directors respectively) carry on business itself. In reorganisation proceedings with self-administration, the debtor is not required to surrender control of its entire assets to an insolvency administrator. Nevertheless, a court-appointed reorganisation administrator has a right of veto over any ordinary transactions of the debtor and must expressly agree to all transactions of the debtor beyond the ordinary course of business. The reorganisation administrator must also expressly agree to certain specific decisions set out in the Insolvency Code. The sale of assets is also subject to the reorganisation administrator's approval, to the extent that such a sale does not fall within the scope of the debtor's ordinary course of business. A sale of assets may also be subject to the approval of the creditors' committee and the insolvency court. Any actions undertaken by directors or officers during a liquidation or reorganisation proceeding without self-administration are unenforceable.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

After the opening of such reorganisation proceedings, legal disputes with regard to the insolvent's assets may no longer be filed against the debtor and pending lawsuits concerning the debtor's assets will be suspended. Any court order rendered after the opening of insolvency proceedings will be void. Generally, all claims against the debtor must be filed with the insolvency court and examined by the insolvency administrator before litigation proceedings may be continued. Where a creditor had his or her claim rejected in the examination hearing, he or she may initiate proceedings against the debtor.

If the court has ordered a stay of the proceedings, the insolvency administrator is entitled to continue the proceedings.

In business reorganisation proceedings under the Business Reorganisation Law, pending court proceedings are not affected.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

Only during reorganisation proceedings with self-administration may a debtor carry on business itself (see question 20).

With regard to mutual contracts not yet fulfilled by either party, the debtor may choose either to rescind such contracts or to have them fulfilled by both sides (subject to approval by the reorganisation administrator).

To facilitate the continuation of the debtor's business, termination rights in contracts with the debtor may be limited. If termination of a contract with the debtor could put the continuation of the debtor's business at risk, the counterparty may, for a period of six months after the opening of the insolvency proceedings, terminate a contract concluded only for 'good cause'. 'Ordinary termination' without good cause is prohibited (for instance, at mutually agreed periods or dates). Furthermore, the deterioration of the debtor's economic situation and a payment default in relation to obligations due prior to the initiation of the insolvency proceedings do not constitute 'good cause' for termination. However, the restrictions do not apply if the termination of a contract is essential to avoid severe personal or economic disadvantages for the counterparty. In case of unjustified exercise of the termination right during the six-month period, the termination will automatically become effective after expiry of the period unless otherwise agreed.

Further, termination rights based solely on the initiation of insolvency proceedings are invalid. Only certain financial and derivative contracts, which are usually entered into under master agreements that provide for the mutual set-off of claims ('close-out netting'), are exempt from this rule.

The creditors must file their claims against the debtor in court. The court may appoint a creditors' committee to supervise the acts of the insolvency or reorganisation administrator. Apart from that, the creditors meet only once, at the reorganisation hearing where the creditors vote on the reorganisation plan. The main duties of the court are to hold the opening hearing and the reorganisation hearing as well as issuing the necessary decisions.

In reorganisation proceedings under the Business Reorganisation Law, the conditions for the debtor to carry on business are as described in question 7. In essence, the court opens business reorganisation proceedings, appoints and supervises the reorganisation auditor and closes reorganisation proceedings. The creditors do not have any special rights to supervise the debtor's business activities. Indeed, they are not affected by the reorganisation. However, certain bridge loans (and similar measures) granted in the reorganisation are, under certain circumstances, protected from avoidance if the reorganisation is not successful and insolvency proceedings are opened.

23 Post-filing credit

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

Once insolvency proceedings have been formally opened by the court, the administration of the insolvent's assets is exclusively conferred upon an insolvency administrator. The insolvency administrator is, in principle, entitled to conclude credit agreements on behalf of the estate.

In reorganisation proceedings with self-administration, the debtor is not fully deprived of its ability to enter into transactions with respect to its assets (see question 11). The debtor is, however, prohibited from concluding certain transactions, such as selling real estate or granting sureties. Entering into loans (whether secured or unsecured) is not specifically prohibited. Nevertheless, the debtor must obtain the approval of the reorganisation administrator for any transaction beyond the

ordinary course of business. Borrowings might therefore need such approval, depending on the ordinary course of the specific business.

In reorganisation proceedings under the Business Reorganisation Law, no specific limitations on post-filing credit apply.

24 Sale of assets

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?

Insolvency

In insolvency proceedings, the sale (or lease) of specific immovable assets is subject to the prior approval of the court and the creditors' committee, and must be publicly announced at least 14 days (in urgent cases, eight days) in advance. The same applies to the sale (or lease) of the debtor's entire business (or the debtor's controlling share in a business), the debtor's entire movable assets (whether fixed assets or current assets) and assets that are necessary for the debtor's operations. The insolvency administrator must hear the debtor with respect to these transactions before he or she decides to take any action. Generally, assets are sold by the insolvency administrator in a private, out of court sale. A court sale will occur only if determined by the court at the insolvency administrator's application. Thus, it would be permissible for the insolvency administrator to negotiate an interim sale agreement with one party while continuing to seek better bids.

Provisions of Austrian law related to the transfer of liabilities upon the purchase of a business do not apply if the seller of such a business is insolvent. These provisions relate to general liabilities of the seller as well as social security, other pension liabilities and liabilities relating to public charges and taxes. Lease contracts that are filed with the commercial register pass over automatically, but employment contracts do not.

Specific assets may be affected by certain encumbrances and will possibly not be transferred clear of such encumbrances. Such encumbrances may, however, lapse upon bona fide acquisition of ownership of the relevant assets.

Reorganisations

In reorganisations (both with and without self-administration), all transactions (including asset sales) outside the debtor's ordinary business are subject to the reorganisation administrator's prior consent. This is also the case for any sale of real estate, the granting of a lien over any asset, the granting of sureties and transactions without due consideration. All other transactions may be vetoed by the reorganisation administrator.

As Austrian insolvency law states that in the case of an assignment the legal standing of the debtor may be neither improved nor deteriorated, the same must apply to an assignee of the original secured creditor. However, if the assignee has acquired the claim after the opening of insolvency proceedings, he or she will be deprived of voting rights unless he or she was obliged to acquire the claim because of an agreement set up before the opening of the insolvency proceedings (this rule applies to insolvency and reorganisation proceedings alike).

Concerning the transfer of liabilities with certain assets, the same rules apply as in insolvency proceedings, except that employment contracts are transferred to the purchaser of an entire business.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Insolvency

Austrian law prohibits credit bidding in a sale of the insolvent's assets – a creditor only has a claim for receipt of the insolvency quota in insolvency proceedings (principle of equality between creditors). A court would therefore have no discretion to assess a credit bid. Similarly, the credit bid of an assignee of the original secured creditor would not be permitted either.

Reorganisations

In reorganisation proceedings, it is permissible for the insolvency administrator to negotiate an interim sale agreement with one party while continuing to seek better bids. Credit bidding in a sale of the insolvent's assets is also permissible as part of the reorganisation plan, provided that the special majority and quorum requirements are met. As credit bidding would result in the unequal treatment of creditors (the credit bidder is privileged), in addition to the general majority and quorum requirements set out in question 8, such reorganisation plan would have to be approved by the majority of the disadvantaged insolvency creditors who are entitled to vote and are physically present at the voting hearing, with the total claims of the consenting creditors amounting to at least 75 per cent of the claims of the disadvantaged insolvency creditors present at the voting hearing. Apart from that, no further specific assessment concerning the credit bid would be necessary.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 administrator has the right to terminate any contract that has not been fulfilled at the time of opening of the insolvency proceedings (see question 19).

In a reorganisation, the debtor can terminate employment or lease contracts but only with the consent of the reorganisation administrator. Further, employment contracts may only be terminated in relation to employees that work in such parts of the business that will either be closed or reduced in size or, if the continuation of the business was not published in the insolvency register, after four months of the reorganisation proceedings opening. The reorganisation administrator may only give his or her consent to a termination if the fulfilment of the relevant contract jeopardises the conclusion or fulfilment of the reorganisation plan or the continuation of the debtor's business. The employee or tenant can claim damages arising from the termination of the respective contract. Such claims are subject to the reorganisation and will be settled only with the quota set out in the reorganisation plan.

When the insolvency administrator decides to adopt a contract, he or she must comply with the obligations thereunder. Obligations arising under such contract (and with respect to breaches thereof) after the opening of insolvency proceedings lead to a preferential claim of the third party against the debtor or the debtor's estate.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The licensor or the owner of the IP right has, by operation of law, no right to terminate a contract with the debtor simply because insolvency proceedings are opened over the debtor's assets.

In insolvency proceedings, the insolvency administrator has the right to terminate any commercial contract not yet completed in full at the time the insolvency proceedings are opened. If the contract is terminated, the counterparty may claim damages in the insolvency proceedings as an ordinary unsecured creditor. However, the insolvency administrator, on behalf of the debtor, may elect to adopt the contract, in which case the contract remains in force and the contractual obligations of both parties remain intact and have to be fulfilled in full.

The court may set a deadline for the insolvency administrator to declare whether he or she wishes to adopt the contract. Such deadline must not be set earlier than 93 days after the opening of insolvency proceedings. If the debtor is defaulting on a non-monetary obligation, the period for the insolvency administrator to declare his or her position is not more than five working days after the application for declaration by the insolvency administrator by a creditor.

28 Personal data

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

Data processing activities during insolvency proceedings are governed by the General Data Protection Regulation (Regulation (EU) 2016/679 of the European parliament and of the Council of 27 April 2016; GDPR) and the Austrian Data Protection Act 2018 (DSG 2018). The DSG 2018 complements the GDPR's framework using various opening clauses.

Under the GDPR, the debtor's obligation to disclose any necessary information to the insolvency administrator must not infringe the data subject's right to protection of personal data. Further, the insolvency administrator is required to safeguard the interests of the relevant data subjects (eg, the debtor's employees and customers). As long as the debtor has lawfully processed the data to be disclosed, the disclosure of non-sensitive data can be justified based on the legitimate interests pursued by the controller or by a third party, except where overriding interests of the data subject exist. Additionally, the GDPR permits the disclosure (and subsequent processing) as long as legitimate interests of the controller or any third party are not overridden by the interests of the data subject. In general, the disclosure of sensitive data (eg, data relating to a natural person's race, political opinion, trade union membership, religion, health or sexuality) can only be justified by the data subject's explicit consent.

Transfer of personal data to a purchaser is also subject to the provisions set out in the GDPR. If the purchase of a debtor's personal data is conducted via an asset deal (ie, a third party acquires some or all of the operating entity's assets containing personal data), the transfer of such data can only be justified as set out above, (ie, the transfer of non-sensitive data may be justified, except where overriding interests of the data subject exist). Additionally, commencing on 25 May 2018, new and extensive information requirements exist according to which the debtor must inform the respective data subjects about the data transfer. For transferring sensitive data, the affected data subjects' individual explicit consent has to be obtained prior to such transfer. If personal data collected by the debtor is purchased via a share deal (ie, the purchaser acquires the shares of the (insolvent) operating entity from the entity's shareholders) the GDPR does not restrict the transfer of sensitive or non-sensitive data to the purchaser.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Generally, arbitration procedures are rarely used in insolvency proceedings. In insolvency proceedings, the insolvency administrator is generally not bound by any arbitration agreements entered into by the debtor, except for the circumstances described in the following paragraphs. The insolvency court has sole and exclusive jurisdiction to hear the subject matter of the insolvency case. Any prior arbitration agreement between the debtor and its creditors with respect to the conduct and subject matter of insolvency proceedings would be void. As a consequence, an arbitration proceeding would only take place in cases where the administrator agrees to a (renewed) arbitration agreement after the initiation of the insolvency proceedings.

Based on the avoidance rules set out in the Insolvency Code, if insolvency proceedings are opened, the insolvency administrator has the right to challenge the validity of certain business transactions concluded by the debtor prior to the opening of insolvency proceedings. The debtor cannot validly enter into an arbitration agreement with respect to such proceedings prior to the opening of insolvency proceedings. Additionally, the insolvency administrator would not be bound by such an agreement because the avoidance claims arise only after the opening of insolvency proceedings and for the benefit of the insolvent's estate. The debtor cannot legally dispose of such claims. However, the insolvency administrator may enter into arbitration proceedings on its own account with respect to avoidance claims, but this possibility is very rarely used.

Where the insolvency administrator has adopted a contract (see questions 20 and 22), he or she is bound by the contractual provisions and any arbitration agreement contained therein.

Apart from contractual proceedings, an insolvency administrator is typically engaged in court proceedings with respect to some of the creditors' own property that was commingled with the insolvent's estate, or with respect to the realisation of security relating to some creditors' secured claims. Legal scholars hold the view that, in these cases, the insolvency court has no exclusive jurisdiction to hear such proceedings. Consequently, the insolvency administrator remains bound by any arbitration agreement concluded between the debtor and its creditors or third parties and the court will allow any pending arbitration proceedings to continue.

Except for the aforementioned prohibitions, disputes can be arbitrated with the consent of the parties and the insolvency administrator after the insolvency case has been opened.

Creditor remedies

30 Creditors' enforcement

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?

Out-of-court enforcement over the debtor's assets is possible if these assets have been provided to a creditor as security and out-of-court enforcement has been agreed in the agreement for the provision of such security.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

As long as no insolvency proceedings have been opened, unsecured creditors may enforce their claims (court judgments, enforceable notarial deeds, etc) according to the provisions of the Austrian Enforcement Code. In these proceedings, an unsecured creditor may, among others, apply for the compulsory creation of a mortgage over the debtor's real property. Normally, however, enforcement would be directed against the property, receivables, rights and any other assets of the debtor.

Procedures under the Enforcement Code are usually time-consuming, in particular if they involve the forced administration or forced sale of real property.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

The decision on the opening of insolvency proceedings, as well as other decisions issued by the court, must be published. All notices of decisions of the court are published on www.edikte.justiz.gv.at for a limited period.

The court holds several public hearings during insolvency proceedings. The most important hearings are:

- the general creditors' meeting immediately after the opening of the proceedings;
- the examination hearing, at which the insolvency administrator acknowledges or rejects the claims filed by the creditors; and
- the reporting hearing at which the insolvency administrator submits a report on the status of the proceedings. Other meetings can be held at the court's discretion or if requested by the insolvency administrator, the creditors' committee or at least two creditors representing claims of at least one-quarter of the total claims (secured and unsecured) against the debtor. All meetings are called by the court and published on the internet.

In the reporting hearing, the insolvency administrator reports on the prerequisites for the closing of the business or parts of the business or the continuation thereof, as well as on any reorganisation plan and its viability.

The insolvency administrator has to give a statement of accounts at the end of the insolvency proceedings and whenever the court issues instructions to do so. Each member of the creditors' committee may file an application with the court to have the insolvency administrator removed from office. Additionally, the court may at any time remove the insolvency administrator on its own initiative.

Upon final confirmation of the reorganisation plan, the debtor is released from its liabilities in accordance with the reorganisation plan. However, a reorganisation plan may not provide for the release of liabilities owed by third parties. Therefore, while the debtor may also be released from its liabilities towards jointly liable parties (eg, guarantors), all such jointly liable parties will remain liable to the debtor's creditors.

If the debtor is in default of its payment obligations under the reorganisation plan, the original liabilities may be reinstated, provided that the creditor has given due and timely notice of the default. In principle, the liabilities are reinstated proportionally (ie, if 75 per cent of the insolvency quota has already been paid, 25 per cent of the original liability will be reinstated). Thus, provided that the quota pertaining to a certain liability has been paid in its entirety according to the reorganisation plan, such original liability will not be reinstated. In general, the reorganisation plan may not deviate from this provision to the detriment of the debtors. If the whole reorganisation plan is annulled, different rules will apply.

33 Creditor representation

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 creditors' committee, consisting of three to seven members, is appointed by the court on its own initiative or upon application by the creditors, if the particular features of the case indicate that a creditors' committee is necessary. In practice, a creditors' committee is established in all large-scale insolvency cases. The appointment has to be based on proposals by the creditors, representatives of the debtor's employees and other special interest groups.

The creditors' committee has to supervise and support the appointed insolvency administrator and approve the sale or the lease of the debtor's business and all of the debtor's movable or immovable assets. Furthermore, the creditors' committee has to audit the cash administered by the insolvency administrator.

Members of the creditors' committee may not claim any remuneration beyond the compensation of their expenses, such as travelling expenses and necessary costs of experts.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

Generally, if the insolvency court determines that the available assets are insufficient even to cover the costs of instituting insolvency proceedings, it will dismiss the application for the opening of insolvency proceedings for lack of funds. If a claim is available to the estate and the court determines that this claim is worth pursuing, but the estate lacks adequate funds to do so, it may oblige the creditor that filed the application for the opening of insolvency proceedings to advance funds to enable the insolvency administrator to pursue the claim. Managing directors of legal entities and shareholders holding more than 50 per cent of such legal entity's shares can be held liable to pay a proportion of the anticipated costs to cover the insolvency proceedings. Where insolvency proceedings are not initiated because of a lack of funds, neither the debtor nor the creditors would benefit from the effects of insolvency proceedings.

During insolvency proceedings, no creditor may initiate proceedings on behalf of the debtor to pursue remedies (such as avoidance

proceedings) against third parties. Only the insolvency administrator is entitled to do so.

35 Claims

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

After the opening of insolvency proceedings, creditors have to submit a notification of their claims to the court. The deadline for filing creditors' claims is established by the court in its order to open insolvency proceedings. Claims may also be filed after the deadline, but such claims will not disturb preceding distributions to the creditors. Creditors who file late do not have the right to appeal other claims that have been filed in time.

The insolvency administrator accepts or rejects the notified claim at the examination hearing and any creditor may dispute the validity or priority of the claim. Confirmation of a claim by the insolvency administrator has a binding effect with respect to its amount, but not as to whether such claim is a preferential claim or an unsecured claim. Creditors whose claims are rejected by the insolvency administrator or denied by the other creditors (ie, those with contested claims) may bring an application for the court's confirmation that their claims are valid.

Contingent claims may be notified to the court with their complete (maximum) amounts. In the event of suspensive conditions (ie, where the claim arises only after the condition has been met), the quota relating to such contingent claim will be secured by the court and paid to the creditor only after the relevant condition has in fact been met. In the event of resolutive conditions (ie, where an existing claim is extinguished when the condition has been met), the quota relating to such claim may either be secured by the court or ordinarily paid to the creditor, provided that in exchange the creditor provides security to the court in the event that the resolutive condition is met and the claim is extinguished thereafter and the creditor has to pay back the quota.

Unliquidated claims may also be notified to the court. The notification has to provide an estimate by the creditor of the claim's value as at the opening of the insolvency proceedings. The estimate may be challenged by the administrator and, as a result, the court decides upon the value of the claim by appointing expert witnesses.

Claims acquired at a discount can still be enforced for their full face value. However, a party is not entitled to set off an obligation it has regarding the insolvency estate with a claim it has acquired after the initiation of insolvency proceedings (and under certain circumstances when the third party knew or ought to have known of the insolvency of the common debtor, even before the initiation of insolvency proceedings).

Interest accruing from the date of the opening of insolvency proceedings cannot be claimed as an insolvency claim during the proceedings. However, the opening of reorganisation proceedings does not stop interest from accruing, unless the parties agree on a discharge of residual debt during the course of such proceedings.

36 Set-off and netting

To what extent may creditors 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?

Generally, creditors are entitled to exercise their rights of set-off and netting in pending insolvency proceedings, provided that the claims to be compensated were mutual at the time of the opening of insolvency proceedings. A creditor may not, however, set-off a claim that arose before the formal opening of insolvency proceedings if the creditor knew, or should have known, of the debtor's illiquidity. Importantly, as opposed to the general rules of civil law, claims that have not become due at the time of the opening of insolvency proceedings, as well as claims that are subject to a condition, may be set off in the insolvency. Special netting rules apply under the Financial Collateral Act.

In reorganisation proceedings under the Business Reorganisation Law, the situation of the creditors is not affected. Therefore, no special rules on set-off apply.

37 Modifying creditors' rights

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

In general, Austrian insolvency law is based on the principle that in insolvency proceedings all creditors rank equally. However, secured creditors enjoy priority to the extent of their security rights. Preferential creditors also enjoy priority (see question 33). Claims of creditors whose claims arose after the opening of insolvency proceedings rank above other claims.

Only if the insolvency administrator challenges the claim of a particular creditor may the court decide that the creditor's claim is, in fact, different in nature from that alleged by the creditor. The administrator may then assign it to a different class, thereby also changing its priority. However, this happens infrequently and the question in most cases is whether the security of a secured creditor is valid.

38 Priority claims

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

In essence, preferential claims are:

- the costs of the insolvency proceedings;
- the disbursement of expenses for the insolvency estate's maintenance and management;
- certain early termination claims (see question 26);
- claims for fulfilment of mutual contracts (provided that the insolvency administrator has adopted such contracts); and
- the remuneration of certain creditors' associations that participate in the proceedings.

Claims accrued prior to the opening of the proceedings (including taxes, social security contributions, wages and salaries) are not privileged.

Secured creditors' claims are not affected by the insolvency. However, if the enforcement of such rights threatens the continuation of the insolvent's business, satisfaction of such claims may be postponed for a period of six months after the beginning of the insolvency proceedings. Post-opening claims are not satisfied from valid security rights of a creditor (with the exception of costs having arisen specifically with respect to the disposal of the security).

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

The employee's ordinary wages accrued prior to the opening of insolvency proceedings are deemed to be insolvency claims. Ordinary wages accrued after the opening of insolvency proceedings are privileged and will be satisfied prior to the insolvency claims of unsecured creditors.

In insolvency proceedings, the administrator performs the rights and duties of the employer and therefore is generally solely entitled to hire employees or to terminate employment contracts. In certain circumstances the administrator has a privileged right of termination: it applies only in relation to employees who work in such parts of the business that will either be shut down or reduced in size. Further, employments may be terminated:

- during the fourth month after the opening of the insolvency proceedings if the continuation of the business was not published in the insolvency register; or
- within one month after:
 - the publication of the resolution by which the closure of the business or parts of the business is ordered, approved or ascertained; or

- the reporting hearing, provided that the court has decided to continue the business.

Employees can terminate their employment by early termination for cause, subject to the same periods of time as set out in the previous sentence, whereas the opening of insolvency proceedings shall be deemed to be an important cause.

When the termination of an employee's contract is based on the administrator's privileged right, the termination compensation of the employee, according to Austrian employment law (eg, holiday compensation, severance compensation and other damages), is deemed to be an unsecured claim. If the termination of an employee's contract does not fulfil the preconditions of the aforementioned right of the administrator, the termination compensation will be satisfied prior to the insolvency claims of unsecured creditors.

Austrian law does not provide for any insolvency-specific claims arising out of the termination of employment contracts and any specific procedures with regard to such terminations in relation to the affected individual employee. However, section 109 Austrian Labor Relations Act (ArbVG) provides for a number of information and notification obligations towards the works council in the event of mass redundancies. Further, the employer is obliged to report (in writing) the termination of the following large numbers of employment contracts to the office of the Labour Market Service (AMS) within a period of 30 days in accordance with section 45a, paragraph 1, Nos 1-3 Austrian Labour Market Promotion Act; AMFG:

- in businesses usually employing more than 20 and less than 100 employees – at least five employees;
- in businesses with 100-600 employees – at least 5 per cent of all employees; and
- in businesses with normally more than 600 employees – at least 30 employees.

Failure to notify the AMS results in the respective terminations being void. A violation of the information obligations towards the works council can be punished with an administrative penalty of up to €2,180 (section 160, ArbVG).

40 Pension claims

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

Direct pension promises

If an employee is entitled to receive a pension payment directly from his or her employer (direct pension promise) and the insolvency proceedings are opened during an employee's pay-out phase (ie, following the employee's retirement), the retired employee is entitled to a maximum of six monthly pension payments prior to the effective date (ie, the opening of insolvency proceedings); for outstanding pension payments after the effective date, benefits securing entitlements and pension, severance and settlement amounts are capped at a maximum of 24 months, or up to 12 months if the pension promise is not subject to the Austrian Company Pensions Act. Such claims will be covered by a fund established solely for the benefit of employees in the event of the employer's insolvency under Austrian law (Insolvency Compensation Funds; IEF). Deficiencies accrued prior to the opening of insolvency proceedings are deemed to be unsecured claims, whereas deficiencies accrued after the opening of insolvency proceedings are privileged. The latter will be satisfied prior to the insolvency claims of unsecured creditors.

If an employee is entitled to a direct pension promise and the insolvency proceedings are opened before an employee's pay-out phase and the employment relationship is terminated as a result of the insolvency, the employee is entitled to vested benefits and rights. The vesting amount is covered by the IEF up to pension, severance or settlement amounts of 24 months.

Pension fund schemes

If an employee is entitled to receive pension payments from a third-party pension fund, such claims of both an active or a retired employee against third-party pension funds are not affected by the employer's insolvency. Unpaid employer contributions (for active employees) are

deemed to be current wages, so for the period prior to the opening of insolvency proceedings they are insolvency claims, and for the period thereafter, they constitute privileged claims that will be satisfied prior to the insolvency claims of unsecured creditors. Until termination of employment, employer contributions are covered by the IEF.

A retired employee's claim for an additional payment into the occupational defined-benefit pension plan, if any, is qualified as an insolvency claim (as this claim arose before the insolvency proceedings were opened).

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

After the initiation of insolvency proceedings, public regulations, including environmental regulations, continue to be relevant for the affected parties.

The debtor's obligation to take all necessary measures regarding environmental requirements persists. Because the insolvency administrator takes over all duties related to the insolvency estate, the administrator also represents the debtor in dealing with the authorities, including with respect to environmental matters.

Where the relevant requirements are not met, the public authority may initiate substitute performance. Costs arising as a result thereof after the initiation of insolvency proceedings are preferential costs and are therefore incurred to the detriment of the general insolvency creditors.

42 Liabilities that survive insolvency or reorganisation proceedings

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

If insolvency proceedings are terminated, the creditors would again have the right to pursue all their claims against the debtor without limitation. This holds true for any type of liability. Any funds received by them during the insolvency proceedings would be taken into account. However, if the debtor is a commercial entity and the insolvency proceedings lead to a liquidation of the debtor, the debtor would be deleted from the commercial register and cease to exist after the termination of the insolvency proceedings (unless assets of the debtor emerge, in which case the debtor would be deemed to continue in existence).

43 Distributions

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

Distributions may only be made after the general examination hearing has been held. The final distribution may only take place after all assets have been sold, all decisions have been issued by the courts on contested creditors' claims, the insolvency administrator's fees have been determined and the final accounts of the insolvency administrator have been approved by the court. This can only be done on the basis of a draft distribution document and a distribution hearing.

In reorganisation proceedings, payments must be made in accordance with the approved reorganisation plan.

Security

44 Secured lending and credit (immovables)

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

The two principal types of security available for immovable property are mortgages and the transfer of title in property. In a mortgage, the debtor remains the owner. In a transfer of title in property, the transferee is registered as the owner but merely holds the property as a trustee for the transferor.

Both types of security are valid only when registered with the Land Registry. The priority of one of several mortgages on the same piece of immovable property usually depends on the chronological order of the entry into the Land Registry.

45 Secured lending and credit (movables)

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

The principal types of security available for movable property are pledges and transfers of title for the purpose of taking security. The most common is the assignment of receivables as a security device. However, for such assignments and pledges to be effective as regards third parties, strict publicity requirements must be complied with. For example, for receivables, by notification of the assignment to the third-party debtor or alternatively, by appropriate notes in the assignor's accounts from which it is readily ascertainable when and in whose favour the assignment was made. The priority of a pledge or assignment depends on the time the publicity requirement was met.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Only the insolvency administrator is entitled to challenge transactions undertaken by the debtor prior to the opening of insolvency proceedings (covering liquidations as well as reorganisations) during the respective 'suspect period'. In this respect, the Insolvency Code provides for various cases of avoidance on a number of grounds and with different suspect periods. The decision lies within the insolvency court. For example, transactions in which the debtor intentionally put certain creditors at a disadvantage relative to one or several other creditors who knew of such an intention result in a suspect period starting 10 years before the opening of insolvency proceedings. In other cases, suspect periods range between six months and two years. Such cases include: the transfer of assets without due consideration (two years); provision of security or settlement of an obligation not due at such time (one year); and business transactions with the insolvent debtor when the counterparty knew or should have known of the insolvency (six months). The provisions, and relevant settled case law, are complicated and sometimes make it difficult to predict whether a particular transaction may become subject to avoidance in a future insolvency.

If the avoidance motion is successful, the transaction will be declared as being without any effect as regards the other creditors.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

In this respect, annulment of transactions as described in question 46 should be taken into consideration, as any provision of security or settlement of an obligation towards the parent or affiliated company not due at such time (60 days before the opening of the insolvency proceedings) could be challenged by the insolvency administrator and payments made to these 'insiders' clawed back.

Under the Austrian law on equitable substitution, loans from shareholders to companies suffering a 'crisis' (when applying for insolvency proceedings or 'reorganisations' under the Business Reorganisation Law) are classified as substitutions of equity and are therefore treated differently. According to the Insolvency Code, shareholders' claims in this respect are subordinated and can only be satisfied after satisfaction of all unsecured and preferential claims and only if the insolvency court agrees to accept these claims in the course of the insolvency proceedings. Shareholder loans granted outside of a 'crisis' rank *pari passu* with other senior claims.

Groups of companies

48 Groups of companies

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

In general, the assets of parent (and also affiliated) corporations have to be separated from the assets of subsidiaries (and affiliates) (principle of separation). Therefore, parents or affiliated corporations can only be held responsible for the liabilities of subsidiaries or affiliates if they have contractually agreed to be liable. However, certain circumstances can arise under which shareholders can be held directly liable. However, this is highly controversial in legal literature and little case law exists. The following situations could give rise to direct responsibility of parent or affiliated corporations:

- mingling of assets: if the assets of the parent or affiliate cannot be clearly separated from the assets of the subsidiary or affiliate (ie, because of lack of accounting);
- qualified material undercapitalisation: if the subsidiary or affiliate has been provided with little equity, imposing a higher risk of creditors not being satisfied than in the ordinary course of business; however, intentional dealing would be required from the parent or affiliate to be held liable in this respect;
- factual management of the shareholder: if the shareholder conducts the subsidiary's or affiliate's business in a way the managing director would normally do;
- infringement of the subsidiary's or affiliate's assets leading to illiquidity: if the shareholder treats the assets of the company in a way that leads to loss of the subsidiary's or affiliate's liquid funds; and
- infringement of a legal nature: if the shareholder abuses the legal structure of the subsidiary or affiliate in order to minimise liabilities.

Moreover, Austrian capital maintenance rules may also give rise to claims of subsidiaries or affiliates against their parents or affiliated corporations if they breach the foregoing rules. Austrian corporate law prohibits the return of equity from a company to its shareholder. A company may not make any payments to shareholders other than the distribution of profit or during the course of a formal reduction of statutory capital. Provisions on the repayment of capital also cover benefits granted by the company to its shareholders where no 'adequate consideration' is received in return. Such consideration must, as a minimum standard, be no lower than a comparable consideration that the company would have received from an unrelated third party. Any agreement between a company and its shareholder or any third party granting an advantage to the shareholder that would not, or not in the same way, have been granted for the benefit of an unrelated third party is void and any profit received has to be returned. In insolvency proceedings, the insolvency administrator can enforce this claim against the parent or affiliated corporation. In the case of an Austrian stock corporation, claims can be enforced directly by the creditors of the subsidiary or affiliate.

Austrian case law has clearly stated that with respect to group companies considered one economic entity, the principle of legal separation must be respected regardless of economic considerations. This applies not only for the purpose of general corporate law, but also specifically with respect to insolvency law. Moreover, it was reiterated that in insolvency proceedings there can be only one debtor – the individual company whose assets must be considered individually. Thus, the transfer of assets between several insolvent debtors is prohibited and a court cannot order the distribution of company assets among these, even if they are companies within the same group.

49 Combining parent and subsidiary proceedings

In 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?

Under Austrian insolvency law, insolvency proceedings against a parent and its subsidiary may only be combined for procedural purposes and must be heard by the same judge. The proceedings themselves remain independent of one another and the assets and liabilities are not combined into one pool for distribution purposes.

According to article 49 of the EU Council Regulation (EU) 848/2015 on Insolvency Proceedings, any assets remaining in Austria shall be

transferred to an administrator outside of Austria only if it is possible to meet all claims in Austria by the liquidation of assets in Austrian secondary proceedings.

If insolvency proceedings of members of a group of companies are opened, Austrian insolvency law provides for the application of the rules on cooperation and communication according to articles 56 to 60 and on coordination pursuant to articles 61 to 77 EU Council Regulation (EU) 848/2015.

International cases

50 Recognition of foreign judgments

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?

The Insolvency Code includes rules on cross-border insolvency proceedings. These provisions apply insofar as no international treaty or the EU Council Regulation (EU) 848/2015 on Insolvency Proceedings is applicable. Most importantly, assets located outside Austria may become the subject of insolvency proceedings in Austria. Further, Austrian courts will recognise and enforce foreign insolvency proceedings insofar as the standards of the foreign insolvency proceeding are comparable to Austrian insolvency proceedings and provided that the debtor's centre of main interests is located in the foreign jurisdiction. Generally, according to Austrian conflict-of-laws provisions, the laws of the place where the insolvency proceeding is initiated govern the entire proceedings. Special conflict-of-laws provisions apply in certain situations or matters (eg, real property). These principles also apply to reorganisation proceedings.

Directives 2001/17/EC on the reorganisation and winding-up of insurance undertakings (replaced by Directive 2009/138/EC) and 2001/24/EC on the reorganisation and winding up of credit institutions were implemented in Austria.

Austria is also subject to the EU Regulation on Insolvency Proceedings replacing existing bilateral insolvency treaties.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model Law on Cross-Border Insolvency is under consideration in Austria. There are ongoing working sessions of the 'special task force for insolvency law' of the Ministry of Justice.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Generally, foreign creditors are treated on an equal footing with Austrian creditors during insolvency proceedings taking place in Austria, and are

free to file the same applications and notifications of claims as Austrian creditors. However, they must appoint a person residing in Austria who is empowered to accept service on behalf of the foreign debtor.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

According to article 49 of EU Council Regulation (EU) 848/2015 on Insolvency Proceedings, any assets remaining in Austria shall be transferred to an administrator outside of Austria only if it is possible to meet all claims in Austria by the liquidation of assets in Austrian secondary proceedings. Other than such transfer of surplus assets, Austrian law does not provide a mechanism to transfer assets subject to insolvency proceedings in Austria to an administration in another country.

54 COMI

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 emerges from European Union Law. There is a general presumption that the COMI of a corporate debtor is at its registered office. See further in the chapter on the European Union. Austrian courts focus on objective criteria and therefore the COMI should be ascertainable by third parties. This presumption can be rebutted whenever there are signs indicating that the main administration is in another country. In the case of a group insolvency, the COMI of each subsidiary has to be determined individually.

55 Cross-border cooperation

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 Insolvency Code allows for cross-border cooperation in several ways. The Austrian insolvency court and the Austrian administrator have to provide to the foreign administrator any information deemed to be of importance for conducting the foreign insolvency proceedings without undue delay. Furthermore, the foreign administrator shall be granted an opportunity to submit its own proposals relating to the liquidation or the utilisation of assets located in Austria or to submit statements in relation to reorganisation plans.



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In addition, in the case of recognition of foreign insolvency proceedings, the foreign administrator may also exercise the powers granted to it by local laws in Austria except with regard to coercive actions and decisions over legal or other disputes.

The Austrian Supreme Court has not yet dealt with a case where a lower court has refused to recognise foreign proceedings or to cooperate with foreign courts.

According to the Insolvency Code, the effects of foreign insolvency proceedings are recognised if the debtor's centre of main interests lies within a foreign country and the basic principles of these proceedings are similar to those in Austria, in particular the treatment of Austrian and foreign debtors (see question 50).

Within the European Union, any insolvency proceedings are recognised in other member states as soon as the opening of the proceedings are in effect (see the chapter on the European Union).

We are not aware of a case where recognition has been refused.

56 Cross-border insolvency protocols and joint court hearings

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?

We are not aware of any such protocols or hearings. There is no basis for these in Austrian law as currently in force.

Bahamas

Roy Sweeting and Glenn Curry

Glinton Sweeting O'Brien

General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The main pieces of legislation that address insolvency are The Companies Act, 1992 and The International Business Companies Act, 2000, each of which has been extensively amended by legislation passed subsequently for that specific purpose. Equally important are several pieces of subsidiary legislation, these being the Companies Liquidation Rules 2012, the Foreign Proceedings (International Cooperation) Liquidation Rules 2012, the Insolvency Practitioners Rules, 2012, as well as the Foreign Proceedings (International Cooperation) (Relevant Foreign Countries) Liquidation Rules, 2016.

2 Excluded entities and excluded assets

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

Bahamian legislation does not exclude any specific entity from being the subject of insolvency proceedings.

Generally, no assets are excluded from insolvency proceedings or are exempt from claims of creditors. Assets held by a company in trust or by the company as custodian, however, do not make up any part of the company's insolvent estate.

3 Public enterprises

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

Government-owned entities in the Bahamas are governed by the same insolvency rules as a private company. Accordingly, the procedures and remedies for creditors of government entities are the same as for any other company. That said, there are no recorded instances of a government-owned entity being liquidated on an involuntary basis.

4 Protection for large financial institutions

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

No such legislation has been enacted in the Bahamas.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

In the Bahamas, the Supreme Court has original jurisdiction to handle insolvency disputes. Appeals of interlocutory and final orders of the Supreme Court lie to the Court of Appeal. An appeal of an interlocutory order may only be made with the leave of the Supreme Court or, failing

that, the Court of Appeal and must be lodged within 14 days of the date of the order. In practice, leave to appeal an interlocutory ruling is rarely denied by the Supreme Court. The only exceptions to the requirement for leave to appeal an interlocutory order are where the order in question grants or denies an injunction or the appointment of a receiver, or determines the claim of a creditor in insolvency proceedings or the liability of a contributor, company director or company officer.

An appeal of a final order may be lodged in the Court of Appeal as of right, within six weeks of the date of the order. The Court of Appeal has a discretion to extend this and other time periods when circumstances justify such an extension.

In the Bahamas, no appeal shall lie:

- from any order allowing an extension of time for appealing from a judgment or order;
- from an order of a Justice of the Supreme Court giving unconditional leave to defend an action; or
- without the leave of the Supreme Court or of the court, from an order made with the consent of the parties or as to costs only where such costs are by law left to the discretion of the Supreme Court (leave to appeal such an order is much more difficult to obtain than in respect of other interlocutory orders).

There is no prima facie requirement for an appellant to post security for the costs of the appeal, although an appellant ordinarily resident outside the jurisdiction may be required to do so upon the application of the respondent. At the hearing of the Summons to Settle the Record (a directions hearing) the registrar of the Court of Appeal may (and in practice, always does) order that the Appellant deposit a sum of money with the court to secure the due prosecution of the appeal. The amount is entirely within the discretion of the registrar and is usually between B\$2,000 and B\$5,000.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Per the Companies Act, a debtor may be wound up voluntarily if:

- the period fixed for the duration of the company by the articles expires or if any specific event as outlined in the articles were to arise that would allow the company to be dissolved;
- a resolution requiring the company to be wound up voluntarily has been passed by a majority of not less than three-quarters of such members of the company entitled to vote; or
- the members of the company have passed a resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and it is advisable to wind up the same.

It is important to note that a voluntary winding up shall be deemed to commence at the time of the passing of the resolution authorising such winding up. Further, upon voluntary liquidation, the property of the company shall be applied in satisfaction of its liabilities and be distributed among the members according to their rights and interests in the company.

Once liquidation has begun, the company must cease all business activity – except those required for the liquidation. Ordinarily, if an event were to occur as stated in the articles of association that would cause the company to dissolve, the articles of association would discuss how the matter is to be dealt with and may even state who the voluntary liquidator is to be. If no such person is named, a liquidator will be appointed by the directors of the company.

Per the Companies Liquidations Rules, 2012 (CLR), within seven days of the commencement of a voluntary liquidation, the voluntary liquidator must:

- file with the registrar of companies a notice of the winding up;
- file with the registrar of companies the voluntary liquidator's consent to act;
- regarding a company carrying on a regulated business, send to the regulator copies of the notices and any declaration registered with the registrar of companies; and
- publish notice of the voluntary winding up in the newspaper.

The CLR also require that within 35 days of the commencement of a voluntary liquidation, the voluntary liquidator must file with the registrar of companies the directors' declarations of solvency or, in the absence of any declaration, a notice stating that a supervision petition has been presented to the court.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

There are no legislative provisions extant in the Bahamas specifically relevant to the reorganisation of a company or its debts. However, the court has a broad statutory discretion to stay liquidation proceedings on the application of a liquidator, a creditor or a contributory of a company and order that the company's name be restored to the register of companies. Such an order can be made on whatever grounds the court sees fit. In addition, among the powers specifically granted to a liquidator is the power to 'promote a scheme of arrangement' pursuant to a specific section of the Companies Act. The language of the relevant section is not happily drafted, but would appear to at least allow for an agreement to be made between a company and its creditors and for liquidation proceedings to be stated indefinitely when such an agreement has been made.

8 Successful reorganisations

How are creditors classified for purposes of a reorganisation 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 when preparing or executing a reorganisation plan (a 'scheme' or 'plan' of arrangement in the language of the statute).

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

A creditor desirous of placing a debtor company into involuntary liquidation must present a petition to the Supreme Court of the Bahamas. A company may only be placed into involuntary liquidation if one or more of the following circumstances arise:

- a creditor to whom a company is indebted in a sum of more than B\$1,000 has presented a statutory demand to the company and three weeks have elapsed without payment of the debt or securing of the debt;
- an executed judgment in favour of a creditor is returned unsatisfied;
- it is proved to the court's satisfaction that the company is unable to pay its debts;
- it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities; or
- the court considers that it is just and equitable that the company be wound up.

The court may appoint a provisional liquidator to take control of the estate and assets of the company pending the hearing of the petition. Any dispositions of property of the company by members of the company between the time of the hearing of the petition and the winding up of the company are void unless authorised by the court.

Save for the above, the proceedings in an involuntary liquidation are identical to those in a voluntary liquidation subject to the supervision of the court.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

As there is no legislation expressly addressing involuntary reorganisation, no procedures are provided for a creditor seeking to impose reorganisation on a company.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

No such procedures exist.

12 Unsuccessful reorganisations

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?

There are no statutory provisions setting out the consequences of an unsuccessful reorganisation or procedures for obtaining relief therefrom.

13 Corporate procedures

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

In the Bahamas, 'bankruptcy' is a strictly personal remedy (ie, only natural persons can be declared bankrupt, and not corporate entities). The articles of association of a company may provide for specific procedures to be followed if the company is voluntarily dissolved, and these will be binding upon the shareholders, assuming the company is solvent. The directors of a company in voluntary liquidation are obliged to prepare and agree a plan of dissolution including certain required information and submit it to the registrar for registration. Insolvent companies can only be wound up subject to the supervision of the court and, although the court may consider the terms of the articles and make orders that reflect them, its jurisdiction cannot be ousted by them and the court will retain all its various powers and discretions in the winding up and eventual dissolution of the company.

If the company is wound up voluntarily, the liquidator is obliged to file a return with the registrar at the completion of the winding up, following which the registrar registers the return and the company is deemed dissolved following the expiry of three months from the date of registration. If the company is wound up involuntarily or subject to the supervision of the court, the court will make an order at the completion of the winding up declaring the company dissolved. The liquidator is then obliged to deliver a copy of that order to the registrar for registration.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Liquidations are formally concluded in one of three ways:

- by the court making an order terminating the liquidation;
- by the filing of a certificate of compliance by the liquidator in compliance with the Liquidations Rules of the Bahamas; or
- by the court making an order exempting the liquidator from compliance with certain rules.

An order for such termination can be made by the court on an application by the liquidator, a creditor, or a member of the company or a receiver. The liquidator may have to file a report with respect to matters relevant to the application. Upon such an order being made by the court, the company ceases to be in liquidation and the liquidator ceases to hold office with effect from the date of the order or such later day as may be specified in the order. The company is then either declared dissolved or (much more rarely) returned to the register.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

The statutory tests employed when determining whether or not a debtor is insolvent are the cash-flow test as well as the balance sheet test. Accordingly, a company is considered insolvent if it is unable to pay its debts when they fall due or the value of the company's liabilities outweighs its assets.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Under Bahamian law, companies are not required to commence insolvency proceedings. Under the Companies Act, however, the directors are obliged to act honestly and in good faith when exercising powers and discharging duties. If winding up is the best option for the company (particularly to satisfy its debts and liabilities), then the directors are obliged to have the company wound up.

Directors and officers

17 Directors' liability - failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

If directors or officers of a company continue business with knowledge of the company's insolvency, the court may make an order requiring that the individuals concerned make such contribution to the company's assets as the court considers proper. There is no statutory penalty for failing to commence liquidation proceedings, however.

18 Directors' liabilities - other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Generally speaking, officers and directors of a company are not personally liable for the obligations of the company. Directors and officers of a company are not liable for any actions carried out in good faith. They are, however, liable to repay any money or contribute to the assets of the company on proof of specified forms of misconduct. Specifically, directors may be liable to repay the company for passing resolutions issuing shares for consideration other than money, to make good any amount by which consideration received is less than fair equivalent of money. Directors are also liable for passing resolutions authorising prohibited loans, prohibited purchases, redemption or acquisitions of shares, prohibited commissions and prohibited payment of dividends.

Directors or officers of a company are also liable for criminal offences committed or permitted by them.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Subject to their obligation not to cause the company to continue trade when it is insolvent, the directors remain obliged to act in the best

interests of the company until the company is either ordered to be wound up or a resolution to wind up the company is passed. At that time, the directors are stripped of their powers, which vest in the liquidator. Thereafter, the directors remain obliged to cooperate fully with the liquidator, providing him or her with all relevant information etc, including provision of a written statement of the company's affairs.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Directors and officers of the company remain in office, but they cease to have any duties, functions or powers other than those sanctioned by the court in furtherance of the liquidation.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

According to the Companies (Winding Up Amendment) Act, at any time after the presentation of a winding-up petition, the company or any creditor or contributory may apply to the court to have any proceedings, whether criminal or civil, stayed. Continuation of any proceedings may only be sanctioned by the court. Accordingly, a creditor would have to apply to the court for the continuation of any proceedings or to commence any proceedings after a company has been wound up. No such prohibition exists with a voluntary winding up.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

The liquidator of a company being wound up involuntarily or voluntarily but subject to the supervision of the court enjoys certain specific powers, some of which are exercisable at his discretion, and some of which may only be exercised with the leave of the court. The liquidator may carry on the business of the company with the leave of the court where that is thought to be in the best interests of an orderly winding up. No special treatment is given to creditors who supply goods and services after the commencement of the proceedings, in respect of those goods and services. Any creditor in those circumstances would be best advised to supply any goods and services on a 'cash' basis or on terms that otherwise guarantee payment. If a creditors' committee is appointed by the court, the committee will customarily be given a right of consultation with, and supervision of the liquidator. The same is true of a committee simply formed by the creditors that makes itself known to the court.

23 Post-filing credit

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

Under both the Companies Act and the International Business Companies Act, a liquidator is empowered to do any of the following:

- with the leave of the court, carry on any business of the company so long as it is necessary for the winding up;
- with the leave of the court, draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, also to raise upon the security of the assets of the company from time to time any requisite sum or sums of money; and
- do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

Accordingly, secured or unsecured loans may be obtained for the winding up of the company. No specific priority is given to such loans. These loans would, however, take priority over ordinary unsecured creditors.

24 Sale of assets

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 compulsory liquidations, the liquidator is obliged to receive the approval of the court before making any disposition or sale of assets of the company. In voluntary liquidations, however, the liquidator need not seek prior approval of the court before disposing of or selling assets of the company.

With regard to a liquidation that is supervised by the court, the liquidator can only act in accordance with the directions of the court.

Purchasers who buy assets generally acquire the assets 'free and clear' of any claim. If, however, the assets are subject to third-party security interests, the purchaser may acquire the assets subject to such third-party interests.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Bahamian rules do not include any specific provision allowing or forbidding stalking horse bids for assets of the debtor. However, we see no reason why the court would not give a liquidator leave to conduct a sale in this manner where that approach (employed with complete transparency) appeared to be the one most likely to secure the best result for the creditors. The same view applies to the question of creditors providing a reduction of their claims as consideration for the purchase of assets of the debtor (ie, there are no rules allowing or forbidding such transactions, but it is certainly within the court's power to approve them).

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

Under the Companies Liquidation Rules, a liquidator may, with leave of the court, file a notice of disclaimer with the court to disclaim any onerous property. The Companies Winding Up Amendment Act defines onerous property, *inter alia*, as an unprofitable contract. Disclaimer of onerous property operates so as to determine, with effect from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed. If the debtor company breaches a contract after the insolvency proceedings are commenced, the other party to the contract will require the leave of the court to seek relief from that breach against the company, but any damages due to the party will simply rank among the unsecured debts of the company.

Any person party to a contract with a company in liquidation can also apply to the court for rescission of the contract and the court may order that the contract be rescinded on such terms as it thinks just in all the circumstances.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Bahamian rules do not include any specific provisions regarding the rights of owners or licensors of intellectual property upon the insolvency of a user of that property. These rights would therefore be governed principally by the agreements in place between the licensor or

owner and the debtor. If the continued use of such property were considered necessary to the orderly liquidation of the company, the liquidator would be able to apply to the court for leave to pay for that use from assets obtained in the course of his or her duties.

28 Personal data

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

Under the Data Protection (Privacy of Personal Information) Act of The Bahamas, personal information gathered by the company prior to liquidation may only be used for the original purpose of collecting such data. Therefore, if a database of personal information is one of the assets of a debtor, it may be sold to a third party on the condition that the third party use it solely for the original purpose for which it was compiled. Furthermore, the data cannot be kept for longer than is necessary for the intended purpose.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Arbitration of disputes generally is less common in the Bahamas than in many other jurisdictions, and we are unaware of any instances in which arbitration has been used in lieu of insolvency proceedings or as a means of liquidating a debtor company. However, there is no reason why disputes arising within the context of the insolvency proceedings could not be referred to arbitration with the agreement of the parties. In cases where a creditor claim depends for its validity on an agreement with the debtor that provides for binding arbitration of any disputes, the creditor will need the leave of the court before he or she can commence or continue arbitration proceedings. Whether that leave can be obtained will depend in each case on the unique circumstances prevailing. Bahamian law does not exclude any specific types of disputes from being arbitrated.

Creditor remedies

30 Creditors' enforcement

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?

Assets of a business other than real property, which are the subject of an enforceable security interest, can be seized by the secured creditor as of right. Also, a business that leases premises may have assets stored on those premises seized by a landlord distraining for rent, although the landlord will require the leave of the court before such assets can be sold. If the assets have been seized within the three months preceding the winding-up order, the statutory preferential debts of the debtor company (eg, unpaid wages etc) will operate as a first charge over them. A mortgagee of real property owned by the business may exercise a statutory right of sale, but cannot foreclose on mortgaged property without court proceedings.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Bahamian law provides that any money judgment that goes unpaid operates as a charge on the real property of the judgment debtor, meaning that the judgment debtor cannot pass an unencumbered title to a purchaser without first paying the judgment debt (or in practice, agreeing to pay it from the proceeds of sale). There are other means by which judgments can be enforced against assets other than real property, including garnishments of bank accounts, writs of possession and charging orders. There are no real remedies available to an unsecured

creditor without a judgment or an arbitral award, but in cases where the expense and risk are warranted, an injunction over assets may be obtained from the court to secure the claim pending judgment.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Once a debtor is ordered to be wound up and a liquidator is appointed, the court will give directions to the liquidator concerning the publication of public notices of the liquidation and for the issuance of a call for claims or a series of such calls. The court will also give directions for the liquidator to provide regular, detailed reports on the progress and expenses of the liquidation. These are exhibited to sworn affidavits and are available for inspection by creditors. The modern practice is to post these reports on a website set up specifically for the liquidation of the debtor.

33 Creditor representation

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 liquidation committee can be established by a creditor, a liquidator or shareholders of the company. Such committee may only be sanctioned by the court (through application to the court). The liquidation committee is empowered to appoint counsel to provide legal advice, make resolutions in reference to the liquidation and distribution of assets and in matters incidental thereto.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

Creditors are not permitted to pursue estate remedies. Only the liquidator may pursue such remedies. Where the liquidator has no assets available to him or her with which to fund recovery efforts, it would be possible for him or her to raise funds by the sale and assignment of one or more of the debtor's accounts receivable or other choices in action. There would be no bar to such a sale being to an existing creditor of the debtor, who would then be free to pursue, and retain, whatever remedies are available pursuant to the rights assigned to him or her.

35 Claims

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

A liquidator is obliged to give at least 28 days' notice of any deadline for creditors to prove any debts or claims. In practice, the initial deadlines published by the liquidator are longer than the statutory period and may be extended one or more times for the benefit of all the creditors or a specific creditor or group of creditors. A claim is typically proven by a creditor through an affidavit (which is known as a proof). The affidavit typically includes:

- the creditor's name and address;
- a statement of account showing the particulars of the debt;
- specific vouchers, if any; and
- a statement verifying whether the creditor is or is not a secured creditor.

Under the Companies Winding Up Rules, the liquidator is obliged to examine any proof of debt lodged with him or her and the grounds of the debt and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If the liquidator rejects a proof, he or she must state in writing to the creditor the grounds of rejection.

If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the court may, on the application of the creditor, reverse or vary the decision. An application to reverse or vary the decision of the liquidator in a winding up by the court rejecting a proof sent to him or her by a creditor, will not be entertained, unless notice of the application is given before the expiry of 28 days from the date of the service of the notice of rejection.

No provisions exist that prevent the sale or transfer of any claim against an insolvent's estate.

With regard to the question related to contingent or unliquidated amounts, yes, such claims can be recognised. Such claims, however, would have to be assessed by the court.

Furthermore, a claim for a discounted amount can be enforced for its full value and interest can be claimed after insolvency proceedings have commenced.

36 Set-off and netting

To what extent may creditors 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?

Contractual rights of set-off prior to liquidation are binding and will be given effect by the liquidator.

37 Modifying creditors' rights

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

Subject to the statutory provisions providing for the priority of certain claims over others, a creditor may apply to the court to have the liquidator's decision as to the priority of his or her claim varied. If, for instance, a creditor believes that he or she has an enforceable security interest in some asset of the debtor's, but the liquidator disagrees and proposes to treat that creditor as unsecured, the court may hear and resolve that dispute. However, other than determining which class of claims any particular claim belongs to, the court is not empowered to change the priority of claims.

38 Priority claims

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

According to the Companies Act and the International Business Companies Act, the following claims are paid in priority to all other debts, including those subject of security charges:

- costs and expenses of the winding up;
- statutory rates, taxes, assessments or impositions, fees payable under the insolvency acts, duties and penalties under the Stamp Act, licence fees payable under regulatory laws;
- employees' wages, salaries and gratuities; and
- amounts due in respect of personal injuries to employees accruing before winding up.

All other debts rank equally among themselves and are to be paid in full satisfaction (or in fair distribution of the remaining assets).

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Employee claims such as wages of employees earned prior to the commencement of winding-up proceedings are referred to as preferential payments.

Under the Employment Act, 2002 a redundancy payment would also be referred to as a preferential payment in a liquidation. The amount recoverable is dictated by the Act. Factors considered are years of service, and position held by the individual being made redundant. Under the 2017 amendments to the Employment Act, before making an employee redundant, an employer is obligated to:

- inform the recognised trade union or the employee's representative of the situation giving rise to the redundancy and provide a written statement detailing the reasons why dismissal is contemplated;
- discuss the redundancy with the trade union or employee's representative; and
- consult with the Minister of Labour regarding the redundancy.

In addition, under the Industrial Relations Act, 1971, there is a Code of Industrial Practice that gives guidance when making an employee redundant. Although the code is not legally binding, it is a manner by which the employers may do everything in their power to ensure redundancy is done in a fair, professional and cordial manner.

According to the Code, employers should:

- give as much warning as practicable to the employees concerned as well as to the Ministry of Labour;
- consider introducing a scheme for voluntary redundancy, retirement and transfer to other establishments within the undertaking;
- establish which employees are to be made redundant and the order of discharge;
- offer to help employees in finding other work, in cooperation with the Ministry of Labour; and
- decide how and when to make the facts public.

40 Pension claims

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

Health insurance premiums or unpaid pension fund contributions of employees are preferential debts. After payment for costs of the liquidation, such debts are to be paid in full. If, however, the assets of the company are insufficient, they will be paid out equally out of the amount available. The Bahamas has no social security regime, so all pension schemes are private. Bahamian companies do not generally administer their own pension plans, so other than the issue of unpaid contributions due from the employer, actuarial deficiencies in pension assets rarely arise, save when the pension plan administrator is itself the debtor.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

If the company is responsible for environmental issues and that liability is proven, then the Ministry of the Environment and Housing may recover the value of the liability from the debtor by proving in the liquidation. However, the Ministry will be treated as one of the unsecured creditors of the company and the claim will enjoy no special priority.

42 Liabilities that survive insolvency or reorganisation proceedings

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

If insolvency proceedings against a debtor company are brought to a conclusion by the dissolution of the company, any remaining debts or liabilities are extinguished along with the company. If the company survives the liquidation proceedings for any reason, its liabilities survive. Because reorganisation of a company in this sense is a private, out-of-court process, it cannot affect the liabilities of a company save by means of a binding agreement between the company and its creditors.

43 Distributions

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

The timing and amount of distributions to creditors are matters left largely to the discretion of the liquidator, subject to the supervision of the court. Generally, no distributions are made unless all creditor claims have been received and dealt with, but on occasion a liquidator may seek the leave of the court to make an interim distribution while making provision for unresolved claims. Generally, the court prefers that the liquidator not maintain long-term custody of large sums of assets not necessary for the payment of preferential debts or expenses.

The liquidator is also obliged to give notice of his or her intention to declare and distribute a dividend. The liquidator must give 21 days' notice stating how the dividend is proposed to be distributed.

The notice must contain particulars with respect to the company, and its assets and affairs, as will enable the creditors to comprehend the calculation of the amount of the dividend and the manner of its distribution.

Security**44 Secured lending and credit (immovables)**

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

The principal types of security taken on immovable property include legal and equitable mortgages, and fixed and floating charges.

45 Secured lending and credit (movables)

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

The most common forms of security taken on movable property include liens, chattel mortgages, debentures and hypothecations.

Clawback and related-party transactions**46 Transactions that may be annulled**

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Any transaction or disposition of the assets of the company that is made while the company is insolvent within the meaning of the statute; within six months preceding the commencement of insolvency proceedings; and with the intent of giving one creditor of the company a preference over the others, is deemed invalid.

Also, any disposition of property made at an undervalue with the intent to defraud the creditors of an insolvent company is voidable at the instance of the official liquidator of the company. The burden of proving the intention to defraud creditors falls on the liquidator and he or she must take action to void the transaction within two years of its date.

Further to this, under the Fraudulent Dispositions Act, every disposition of property made with an intent to defraud and at an undervalue will be voidable at the instance of the creditor. An application to set aside any such disposition must be brought within two years.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

No such restriction exists in our jurisdiction, although creditor claims submitted by related parties will be subject to additional scrutiny by the liquidator and the court to ensure that the claims do not arise from any breach of fiduciary duties owed to the debtor by a director, for example.

Groups of companies**48 Groups of companies**

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

Each company in a group of companies is regarded as a separate legal entity possessed of separate rights and liabilities. As such, a parent or affiliated corporation would not be responsible for the liabilities of subsidiaries or affiliates, save in circumstances where the parent had specifically guaranteed the debts of the subsidiary.

49 Combining parent and subsidiary proceedings

In 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?

Under the Rules of the Supreme Court of the Bahamas, actions can be consolidated. This is allowed when there are common questions of law or fact where relief claim arises under the same matter or circumstances. However, there is no rule providing for the pooling of the assets of a parent and subsidiary in liquidation, although obviously the shares of the subsidiary may be assets available for recovery and distribution in the liquidation of the parent. Therefore, it is conceivable that the liquidation proceedings in respect of a parent and subsidiary would be consolidated, but the assets would not be pooled.

International cases**50 Recognition of foreign judgments**

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?

The Bahamas is not a signatory to any treaty on international insolvency or the reciprocal enforcement of judgments. However, legislation does provide for the reciprocal enforcement of judgments from the UK and nine other countries, all members of the British Commonwealth. Judgments from these countries can simply be registered with the Supreme Court and then enforced as though they were Bahamian judgments. To enforce unpaid judgments from other countries, it is necessary to commence fresh proceedings in the Bahamas based on the debt represented by the unpaid judgment. For this purpose, it is necessary that the judgment debtor be within the jurisdiction. Only a limited number of defences are available to the judgment debtor, and summary judgment can usually be obtained in such cases.

The Companies (Winding Up) Amendment Act 2011, the Foreign Proceedings (International Cooperation) Liquidation Rules 2012 and the Foreign Proceedings (International Cooperation) (Relevant Foreign Countries) Liquidation Rules 2016 together concern the recognition of foreign insolvency proceedings and court-appointed officers of a 'relevant foreign country' (RFC) may be recognised as such by the Bahamian court and armed with sufficient authority to recover assets of the company that may be within the jurisdiction. The list of RFCs runs to 142 countries with the notable exception of the United States. The Bahamas will not recognise a liquidator appointed by a foreign court over a Bahamian company, nor give effect to any orders out of the proceedings pursuant to which the liquidator was appointed.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The Bahamas is not presently a signatory to the UNCITRAL Model Law on Cross-Border Insolvency. It is currently being considered.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

No distinction is made between foreign and domestic creditors in Bahamian insolvency proceedings.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Under the current insolvency regime, no statute addresses specifically whether or not assets can be transferred from a domestic administration to a foreign one. If the debtor company that owns the assets is Bahamian, the answer is almost certainly no, in that Bahamian rules do not allow for the recognition of foreign proceedings in which a Bahamian company is being liquidated, or of any appointees of those proceedings. If a foreign company is the subject of insolvency proceedings in the Bahamas, and related insolvency proceedings are commenced abroad, either in respect of the debtor company, its parent or the corporate group of which it is a member, it is conceivable that the Bahamian court would order that the Bahamian proceedings be stayed and the assets of the foreign company be transferred into the possession and control of the foreign administration, particularly where that would appear generally more efficient and more likely to produce a favourable result for creditors. There is legislation that provides for international cooperation in insolvency matters.

54 COMI

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?

No such test exists in this jurisdiction.

55 Cross-border cooperation

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?

Under the Companies Act, upon application of a foreign representative (that is, a liquidator, trustee or other official appointed in respect of a debtor for the purposes of foreign proceedings), the court may make orders ancillary to foreign proceedings for the purposes of:

- recognising the right of a foreign representative to act on behalf of a debtor jointly with a qualified insolvency practitioner;
- enjoining the commencement or staying the continuation of legal proceedings against a debtor;
- staying the enforcement of any judgment against a debtor;
- requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative;
- ordering the turnover to a foreign representative of any property belonging to a debtor; and
- granting such other relief as it considers appropriate.

Such relief will only be made available if certain statutory criteria are met.

The court, when making any ancillary relief in relation to the foreign representative must take into consideration the just treatment of all holders of claims against or interests in the debtor's estate regardless of domicile, and comity. There are also other criteria that the court must take into consideration. Accordingly, the court will address matters concerning foreign creditors in a just and equitable manner according to the circumstances of the matter.

In the Bahamas, grounds on which the courts have refused to recognise foreign proceedings are:

- the court had no power at common law or under any applicable statute to impose a stay on security enforcement;
- recognition of the foreign proceedings would have created an inequitable result that would have skewed the usual priorities in the distribution process; or
- the order sought to be recognised was contrary to public policy according to preferential treatment to an unsecured creditor.

56 Cross-border insolvency protocols and joint court hearings

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?

We are not aware of any arrangements entered into between courts in the Bahamas and those in other jurisdictions to coordinate proceedings or agree protocols. However, the Bahamian court has ample jurisdiction to make such arrangements when and if they should appear necessary.

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The Bankruptcy and Composition Law (Law No. 11 of 1987) (the Bankruptcy Law) and Commercial Companies Law (Law No. 21 of 2001), as amended, (the Companies Law) comprise the legislation that applies to bankruptcies, reorganisations and insolvency matters in Bahrain. There are separate insolvency rules for financial institutions (commercial banks, investment banks, insurance firms, etc) licensed by the Central Bank of Bahrain (CBB) under the Central Bank of Bahrain and Financial Institutions Law 2006 (the CBB Law). However, the Bankruptcy Law and Companies Law will still apply to such financial institutions to the extent that they do not conflict with provisions of the CBB Law. There are other laws that contain provisions that may indirectly relate to insolvency proceedings including the Civil Code (Law No. 19 of 2001) (the Civil Code) and the Civil and Commercial Procedures Act (Law No. 12 of 1971).

2 Excluded entities and excluded assets

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

None. Assets owned by the state, however, are excluded from insolvency proceedings and may not be subjected to any interim measures.

3 Public enterprises

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

See question 32 regarding procedures for insolvent companies. There are no special procedures followed in Bahrain in situations of insolvency of government-owned enterprises. Notwithstanding any insolvent public enterprises that may have governmental ministries, authorities or agencies as its shareholders, public enterprises and any creditors of such public enterprises would be treated like any other company in an insolvency situation.

4 Protection for large financial institutions

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

No.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The High Civil Court is the court designated to deal with insolvency matters. Appeals can be made to the Court of Appeal. There are no restrictions applicable.

A final judgment on a matter in dispute can be appealed to the higher court. The right of appeal is automatic, unless the appeal is filed at the Cassation Court, in which case, a written approval is required to be obtained from the Consulting Chamber of the Cassation Court before the appeal is accepted to be heard.

Yes, there is a requirement to post security to proceed with an appeal but only when the appeal is filed at the Cassation Court. Currently, the fixed amount of security deposit is 50 Bahraini dinars (approximately US\$135). The deposit is paid along with the court fee of 100 Bahraini dinars and postal charges of 2 Bahraini dinars for summoning the parties.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Non-financial institutions

The shareholders of a company may, in accordance with the provisions of the company's constitutional documentation, resolve to voluntarily liquidate the company. After completing the necessary filing procedures with the company registrar, the debtor company will be in a state of liquidation, and the powers of the directors will terminate as a result. Upon the conclusion of liquidation proceedings, the debtor company will be removed from the official companies register.

A debtor may also commence its own formal bankruptcy proceedings by submitting a petition to the court, where it has failed to make payment of its debts as a result of a deterioration of its financial affairs.

The High Civil Court will issue a bankruptcy order declaring the debtor to be in a state of bankruptcy. A moratorium will thereafter come into effect (see question 21).

Financial institutions

An insolvent financial institution that is under administration may, within two years of the date of being placed in administration, submit a petition to the court for its liquidation. A financial institution is deemed to be insolvent if its financial position becomes unstable and it stops paying its due debts other than administrative fines and taxes. The petition must be made available to shareholders and creditors as well as being published in the local newspapers and the official gazette at least 15 days before it is submitted to the court. The court will issue an order declaring the financial institution to be in a state of liquidation, and a liquidator will thereafter be appointed by the CBB.

In addition, a financial institution may resolve to voluntarily liquidate itself without going through the administration procedure by utilising the Bankruptcy Law and complying with the procedure set

out above for a non-financial institution, although the CBB would be expected to be involved in the process.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Save for instances of fraud, gross negligence or an act of wrongdoing that would not have otherwise been committed by an ordinary businessperson, a debtor may apply for a scheme of arrangement where his or her business becomes disorganised in such a manner as to lead to a suspension of its payments to creditors. The petition may be filed within 30 days of the date on which the debtor fails to pay its debts. The debtor or the debtor company must prove that it has carried on business continuously during the year prior to the application. In addition, the debtor company must have obtained approval of its shareholders to be able to file the application. Upon filing the application, the debtor must provide the court with its recommendations for reorganisation (and adequate guarantees for its implementation). Following the acceptance of the application, the court will appoint a supervisor and order the commencement of the scheme of arrangement as between the debtor and its creditors. A moratorium will come into effect in relation to any enforcement proceedings against the debtor. The scheme of arrangement is applicable to all creditors whose debts are deemed to be unsecured even if they do not participate in the proceedings or vote for the scheme.

8 Successful reorganisations

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

Under a voluntary petition for reorganisation (or scheme of arrangement) a meeting between the debtor and the creditors would have to be convened within 30 days of the date on which the reorganisation was ordered by the court to commence. Participation is limited to ordinary unsecured creditors. Creditors with secured rights over the debtor's assets would be entitled to participate if such creditors are willing to either waive their security or write off a third of the debts owed to them by the debtor. The debtor will present its recommendations on a settlement or reorganisation plan for discussion with participating creditors at the meeting. The reorganisation plan must be approved by the majority of creditors representing one-third of the certified and uncontested debts owed by the debtor. Creditors that did not participate by voting on the reorganisation plan will be excluded for the purposes of calculating the said majority. There are no limitations on the reorganisation plan releasing non-debtor parties. Once approved, the plan will be binding on all creditors.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Non-financial institutions

A creditor may file an involuntary application for the bankruptcy of a debtor, where the debtor experiences financial distress such that the debtor is incapable of paying its debts as they fall due. If the court accepts the creditor's application, it will issue an order declaring that the debtor is in a state of bankruptcy. Concerned parties may contest the bankruptcy, by filing a petition within 10 days of the bankruptcy order being published in the local newspaper. Once the bankruptcy order is issued, an automatic moratorium or stay of proceedings will be imposed over the debtor. The court will appoint a bankruptcy trustee, and the powers of the debtor's incumbent board of directors will terminate accordingly.

Financial institutions

Creditors of an insolvent financial institution that has been placed under administration may, within two years of the institution being placed in administration, submit a petition to the court for its liquidation.

See question 6 for requirements and effects.

Alternatively, creditors of an insolvent financial institution, which is not under administration, may apply to the court by utilising the Bankruptcy Law and complying with the procedure set out above for a non-financial institution, although (as is the case in voluntary liquidations) the CBB would be expected to be involved in the process.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

There is no clear scope under the Bankruptcy Law for creditors to commence reorganisation proceedings against a debtor.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

No.

12 Unsuccessful reorganisations

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 reorganisation could be defeated where the plan fails to achieve the requisite approval of the creditors present at the meeting (see question 8). More importantly, the High Civil Court must certify any reorganisation plan, and it reserves the authority to reject any plan on the basis of public policy or if the plan is not in the interests of the creditors as a whole. Bankruptcy proceedings may commence in the event that the reorganisation fails to obtain approval.

A failure by the debtor to perform the approved reorganisation plan will result in the termination of the plan, paving the way for bankruptcy.

13 Corporate procedures

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

The Bankruptcy Law includes discrete provisions that apply to corporations, but the entire Bankruptcy Law will apply to corporations as long as they do not conflict with the relevant provisions relating to corporations.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Liquidations and bankruptcy proceedings are formally concluded with the liquidator or bankruptcy trustee presenting his final report on the debtor to the court. The court would certify the report and order for distributions to be made among the creditors. Similarly, a scheme of arrangement would be formally concluded once the reorganisation plan, backed by the majority of the creditors, is sanctioned by the High Civil Court.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

The principal test determining whether a debtor is insolvent is one that requires the debtor to have experienced financial distress such that the debtor is incapable of paying its debts as they fall due.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Non-financial institutions

A debtor may be subject to mandatory insolvency proceedings where:

- the predetermined life of the company has expired;
- the company fulfils the purposes and objects for which it was incorporated;
- there has occurred a destruction of the company's assets to such an extent that it would no longer be feasible for the company to carry on;
- the company merges with another company;
- the company fails to carry on any business continuously for a period of one year; and
- the insolvency is in the interests of public policy.

There are no liabilities for failing to commence mandatory insolvency proceedings, as it is normally the court or state regulators that initiate such proceedings where any of the foregoing events take place.

Financial institutions

The court may order the mandatory liquidation of a financial institution if it is deemed insolvent or if the court finds the liquidation to be just and equitable (eg, the actions undertaken by the institution are harmful to the national economy) or after an administration period has come to an end and the licensee's affairs cannot be restored.

Directors and officers

17 Directors' liability - failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Non-financial institutions

If a debtor carries on its business while insolvent, that debtor may face penal sanctions involving either fines or prison sentences if the debtor carried on such business with the intention to defraud creditors as to its solvent state.

If the company's assets or remedies are insufficient to repay 20 per cent of its outstanding debts, the High Civil Court may order the shareholders and directors, either jointly or severally, to pay all or part of the company's debts, unless the shareholders and directors can prove that they have acted in accordance with the standards of a 'reasonable man'.

Moreover, the Companies Law states that the board will be jointly liable before the company, the shareholders, and any third parties for all acts of fraud, misuse of power, mismanagement or violation of the law and the company's articles. In this respect, directors may be liable for approving a voidable transaction (see question 46) that has caused losses to the company's creditors.

Financial institutions

In addition to the above, a director of an insolvent financial institution that carries on its licensed activities knowing (or where he or she should have known) that the institution is insolvent will be liable to a term of imprisonment and a fine not exceeding 20,000 Bahraini dinars.

18 Directors' liabilities - other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Corporate officers and directors will be held personally liable for any damages inflicted upon the company, its shareholders or founders (see question 17).

Under the CBB Law, the CBB may require a director or employee of an insolvent financial institution to pay compensation if that director or employee permitted the financial institution to carry on business while being aware that it was insolvent.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

The Minister concerned with Commerce Affairs may dissolve a company's board of directors, by a special resolution, if a company experiences adverse financial or management conditions or suffers substantial losses affecting the rights of the shareholders or creditors. The special resolution must include the appointment of an interim committee from experienced and specialised persons to manage the company for a period not exceeding three months after which a new board of directors must be elected.

Furthermore, upon a company's bankruptcy, the powers of the directors or officers of the company will be suspended and assumed by the bankruptcy trustee (see question 20).

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Any powers held by directors or officers of the insolvent debtor company will be suspended and assumed by the bankruptcy trustee upon an adjudication of the debtor's bankruptcy.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

Non-financial institutions

A moratorium or a stay of proceedings would automatically come into force with respect to claims or enforcement actions against the debtor following the commencement of bankruptcy or a scheme of arrangement.

Under bankruptcy proceedings, the issuance of a bankruptcy order has the effect of suspending all payments and imposing a moratorium against the debtor. The moratorium does not extend to secured creditors, who are entitled to pursue their enforcement claims or initiate legal proceedings against the bankruptcy trustee. The bankruptcy trustee may, under the direction of the bankruptcy court, seek to relieve the secured creditors promptly by either immediately repaying the secured debts (in the unlikely event that sufficient funds are available) or procure the secured asset to be sold and repay the secured creditors with the sale proceeds. There are no similar means of relief for unsecured creditors.

Financial institutions

As far as financial institutions are concerned, a moratorium takes effect on the commencement of administration proceedings. This means that no measures can be taken against the financial institution without the approval of the administrator.

If the financial institution is subject to bankruptcy proceedings without going into administration first, the paragraph relating to non-financial institutions above applies.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

A debtor may, in the context of a reorganisation or scheme of arrangement, continue to carry on its business under the supervision of a court-appointed supervisor. The debtor may continue to take such actions it deems necessary, provided that such actions are regarded to be in the ordinary course of business. There are therefore no restrictions on the use of assets insofar as such use is deemed part of the debtor's ordinary course of business. However, the bankruptcy courts will take such

necessary measures they deem suitable to preserve the assets of the debtor. The debtor will therefore not be able to sell any assets of its business without the express permission of the relevant bankruptcy court.

Moreover, no special treatment is afforded to creditors for the supply of their goods to the debtor after filing. One of the main responsibilities of the court-appointed supervisor is to supervise the manner in which the debtor conducts its business.

23 Post-filing credit

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

The ability of a debtor to obtain funding or loans in the course of a reorganisation depends on whether such an act is part of the debtor's ordinary course of business. The debtor would otherwise have to obtain the approval of the High Civil Court. Any new loan (whether secured or unsecured) will have no priority and will be excluded from the reorganisation scheme, unless the loans have been obtained within 15 days of the date on which the order for the commencement of reorganisation is published and notice has been provided to the supervisor of the reorganisation proceedings.

Financial institutions

In the context of an insolvency of a financial institution, the administrator has powers to obtain unsecured or secured loans.

24 Sale of assets

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?

Voluntary liquidation of non-financial institutions

A company in liquidation may only conduct its business to the extent deemed necessary for the purposes of the liquidation proceedings. A liquidator has the power to sell the company's assets in the manner he or she deems appropriate, unless the liquidator's deed of appointment stipulates otherwise. The liquidator may not proceed with the sale of the debtor's entire assets or entire business without obtaining the approval of the shareholders at a shareholders' meeting. The purchaser will acquire the assets free and clear of claims, unless the assets are encumbered with third-party interests. Moreover, except for instances of fraud or wilful wrongdoing, there is nothing that would limit the liquidator from entering into credit-bidding arrangements with the creditors. If a credit bidder is an assignee of the original secured creditor, there is nothing preventing the liquidator from entering into credit bid arrangements provided any such transaction is not concluded on the basis of 'personal' considerations. Factors that would determine whether any credit bid transaction was tainted with personal considerations include whether or not the transaction was:

- completed at arm's length;
- a fair market price; and
- in the interest of all creditors.

Reorganisation of financial and non-financial institutions

A debtor may not conduct any action that is deemed outside the scope of its ordinary course of business unless it obtains the approval of the bankruptcy judge. As such, a sale of the debtor's entire business may only take place after the approval of the High Civil Court. The purchaser will acquire the assets free and clear of claims, unless the assets are encumbered with third-party interests. It is more questionable, however, whether the debtor can enter into credit-bidding arrangements, as the debtor is prohibited from entering into transactions that would damage or compromise the position of its creditors.

Involuntary liquidation of non-financial institutions

The debtor is restricted from managing or disposing its assets in the course of liquidation proceedings. The court-appointed bankruptcy trustee may, subject to the approval of the bankruptcy judge, proceed with the sale of the debtor's assets where such a sale would be beneficial to the bankruptcy proceedings. For credit bids, no court order will be

required unless the terms of the court-appointed bankruptcy trustee do not include the power to accept credit bids and conclude such transactions. Any such transaction must not be completed on the basis of personal considerations. Factors taken into consideration by a court when assessing any credit bids are similar to those noted above for voluntary liquidation of non-financial institutions.

Administration and liquidation of financial institutions

To the extent that the financial institution has been placed under administration, the administrator has broad powers to conclude agreements or take necessary actions that would be in the interests of the financial institution and its creditors. If the financial institution is in liquidation, the liquidator must obtain the consent of the court in respect of the sale of any assets exceeding the value of 100,000 Bahraini dinars. No court order will be required unless the terms of appointment of the administrator requires the administrator to obtain a court order prior to accepting any credit bids. As noted above, factors relevant in the context of bankruptcy proceedings equally apply in the context of an administration.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Voluntary liquidation of non-financial institutions

Unless his or her deed of appointment indicates otherwise, there is nothing that would prohibit the liquidator from employing 'stalking horse' bids in the sale procedure.

Reorganisation of financial and non-financial institutions

There is nothing within the Bankruptcy Law to suggest that 'stalking horse' bids could not be employed.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

A debtor would not be entitled to unilaterally reject or disclaim an unfavourable contract entered into at 'arm's length'. If the unfavourable contract is impossible or excessively onerous for the debtor to perform, then the courts in Bahrain will have the authority, having regard to the interests of both the parties to the agreement, to reduce the obligations of the debtor accordingly. If a contract is breached by the debtor after the adjudication of bankruptcy, the creditor would be unable to raise a claim by virtue of the stay in proceedings imposed by the moratorium (see question 21). The creditor must therefore lodge a claim with the bankruptcy trustee (see question 35).

By contrast, the administrator or liquidator of a financial institution may, subject to the approval of the court, unwind a contract if that is deemed to be in the interests of the financial institution, to protect the interests of its customers or to avoid the occurrence of irrevocable damages.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The IP licence agreement will continue to be enforceable and will be treated like any other legally binding agreement entered into prior to the initiation of the insolvency proceedings. There is nothing in the Bankruptcy Law that limits the ability of the licensor to terminate the agreement. Although the insolvency administrator would be required to safeguard the interests of the debtor, he or she may not continue to use the IP for the benefit of the estate after termination of the licence agreement.

28 Personal data

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

The insolvent company will, even during its reorganisation, remain liable for any transfer of confidential or personal information or customer data in its possession, without a valid written consent from the owner of such personal information or customer data. Therefore, unless the insolvent company has obtained such written consent from the owner or obtained a court order allowing it to transfer such personal information or data, the insolvent company should refrain from doing so.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

The courts in Bahrain would generally respect the parties' intention to proceed with arbitration in the event of insolvency, where the parties have agreed to this in writing. The approval of the High Civil Court must be obtained if the parties wish to commence arbitration proceedings after the issuance of the bankruptcy order. The Bankruptcy Law does not limit the types of insolvency disputes that may be arbitrated.

Creditor remedies**30 Creditors' enforcement**

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?

It is unlikely that there will be concurrent processes in which the debtor's assets would be seized outside of court proceedings, as the High Civil Court retains ultimate authority in preserving the assets of the debtor and acting in the interests of the creditors as a whole. The bankruptcy trustee would have the authority to claw back seized assets where there is sufficient proof to suggest that the debtor has a legal right to the assets.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Unsecured creditors may be entitled to interim measures such as obtaining an attachment order from the court over the debtor's assets. The court must be satisfied that there are serious grounds that justify the issuance of the attachment order. Such serious grounds include the risk of the debtor disposing of its assets or acting in a way that would hinder the creditor's right to recourse.

Obtaining an attachment order is not ordinarily a difficult or time-consuming process as such interim measures are filed and heard by the courts on an urgent basis, although each application depends on its facts. There are no special procedures that apply to foreign creditors.

In the context of insolvency, the courts have the authority to preserve the assets of the debtor and a duty to act in the interests of the creditors as a whole. It is therefore possible that an application by an unsecured creditor for an attachment order would be rejected by the courts in the interests of the remainder of the creditors.

Creditor involvement and proving claims**32 Creditor participation**

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Notice of the bankruptcy proceedings will be given in the local newspapers. The notice will include an invitation for creditors to submit their claims. Local creditors have a period of 10 days, with foreign creditors having a period of 30 days, to submit their claims. To the extent that a creditors' union is formed (see question 33), the creditors may hold a meeting to replace the court-appointed bankruptcy trustee. A meeting may also be held for the creditors to discuss the accounts and statements prepared by the bankruptcy trustee in relation to the debtor.

The bankruptcy trustee is required to compile an inventory of the debtor's assets, a copy of which shall be deposited with the High Civil Court and bankruptcy trustee. Such records may be viewed by creditors with the permission of the bankruptcy trustee.

The bankruptcy trustee is required to provide the court with a report of the reasons and circumstances that led to the debtor's insolvency within 30 days of the date of the trustee's appointment. The bankruptcy trustee may be requested by the court to provide reports on the state of bankruptcy on a periodical basis (including monthly reports on any assets that have been collected for the proceedings).

It is the bankruptcy trustee, rather than the creditors, that has the authority to pursue the estate's remedies against third parties. Release of liabilities owed by third parties who are part of the debtor group will only be permitted if the bankruptcy trustee obtains a court order.

33 Creditor representation

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?

Under a scheme of arrangement, a creditors' committee can be formed. During bankruptcy, a union of the creditors is formed immediately by law where the debtor has failed to reorganise its debts, the creditors have rejected the debtor's reorganisation plan or the debtor has failed to implement the reorganisation plan. The union includes all creditors (whether secured or unsecured). The union has the power to replace the court-appointed bankruptcy trustee with one that is appointed by a 75 per cent majority. The union has powers to authorise or limit the debtor's ability to carry on new business. It also has the responsibility to supervise the actions of the elected bankruptcy trustee. There are no restrictions on the creditor to retain the services of advisers, but it is unlikely that the expenses can be claimed from the bankruptcy proceeds (unless such advisers were appointed by the High Civil Court).

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

Only a relevant insolvency official is entitled to pursue the estate's remedies or any other rights owed to the debtor. The fruits of any rights or remedies form part of the debtor's pool of assets, and will be distributed as among the creditors.

35 Claims

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

Non-financial institutions

As indicated above, all creditors are required to submit their claims within 10 days from the date of publication of the bankruptcy order in local newspapers (as opposed to 30 days for foreign creditors (see question 32)). Claims may be contested by the bankruptcy trustee or the creditors, if the claim has not been submitted within the prescribed time frame, or if the claim lacks the necessary documentary evidence. The bankruptcy judge issues a ruling on any creditor claims that have been contested, and the affected parties have the right to appeal.

There are no particular restrictions on a party's right to transfer a claim. A creditor may, in accordance with the provisions of the Civil Code, assign its right to a claim to a third party. The Civil Code permits a creditor to claim for contingent liabilities where the claim is reliant on a future event that is deemed to be certain.

Once creditors submit their claims, the bankruptcy trustee will be involved in verifying the amounts using the documentary evidence provided (loan documents, agreements, certificates, etc).

There is nothing in the Bankruptcy Law that would prohibit a claim acquired by another at a discount to be enforced for its full face value, provided a creditor can verify that the insolvent debtor owes such a debt at full face value.

The Bankruptcy Law suspends the accrual of interest over a creditor's claims upon the court's adjudication of bankruptcy.

Financial institutions

Creditors of an insolvent financial institution will be invited by the liquidator to submit their claims within 60 days from the date of receiving notification thereof (see question 32). Creditors will have a right to appeal a decision by the liquidator to reject their claims.

36 Set-off and netting

To what extent may creditors 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?

Set-off rights can be exercised during liquidation or bankruptcy proceedings where the relevant rights and obligations are 'interrelated'. There must be a high level of connection between the rights and obligations that are to be set off.

The extent to which a set-off is exercisable in the course of a scheme of arrangement depends on whether it could be deemed to be in the ordinary course of business. The approval of the bankruptcy judge would be required to the extent that it is not within the scope of the ordinary course of business.

37 Modifying creditors' rights

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

Yes, if the court considers that security is defective or if security is granted during the 'suspect period' (see question 46).

38 Priority claims

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

Non-financial institutions

Apart from employee-related claims (see questions 39 and 40), sums due to the state (whether taxes, duties or otherwise) and the costs associated with the sale of the debtor's assets have a privileged status

and therefore retain priority over the debtor's secured and unsecured creditors.

Financial institutions

The CBB Law provides priority to the fees and expenses of the administrator and liquidator, followed by taxes due to the government, deposits and loans taken with the approval of the CBB to keep the financial institution from insolvency, deposits not exceeding 20,000 Bahraini dinars and deposits exceeding the foregoing amount.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

An employer is entitled to dismiss its employees in the event of a restructuring or as a result of severe financial difficulties. The employer would nevertheless be liable to pay the employee his or her wages up to the date of dismissal, any accrued annual leave, any benefits promised under the employment contract and, in some particular cases, a compensation sum for the employee's time in service (known as a leaving indemnity). The employer must abide by its obligation of serving the employee a minimum of one month's notice (or such other period of notice stipulated in the employment contract).

The employer does not incur additional liabilities and the employees' claims do not increase on account of dismissing or terminating a large number of employees.

40 Pension claims

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

In Bahrain, employee pensions tend to be administered by the state under the auspices of the Social Insurance Organisation. It is possible for employers to operate private pension schemes for their employees in Bahrain, although this remains a rarity. That said, an employee's entitlement under a private pension scheme will enjoy a privileged status over the claim of any creditors.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Legislative Decree No. 21 of 1996 in respect of the Environmental Law requires a person to repair, rectify or reinstate any damages or losses caused by that person to the environment in Bahrain. The law does not take into account any insolvency scenarios and does not expressly state that such environmental liability may be shared with other nonoffending parties. More importantly, the environmental liability is owed to the government (and in particular, to the Supreme Council for the Environment). Accordingly, the courts in Bahrain may treat this government-owned environmental liability as a priority claim over all other secured and unsecured claims (see question 38).

42 Liabilities that survive insolvency or reorganisation proceedings

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

Criminal liability, claims against directors under the Companies Law, claims relevant to the assets and disposals not covered by the prohibition imposed upon the bankrupt, and claims relating to the business of the bankrupt that the debtor is permitted to perform under law would survive insolvency or reorganisation.

43 Distributions

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

Distributions are made by permission of the High Civil Court once the list of creditors (and their respective claims) has been finalised, and the pool of the debtor's assets has been ascertained (whether through sale or otherwise). Privileged creditors are the first to be paid as a matter of priority. Secured creditors will have their debts repaid from the sale proceeds of the secured asset, and any profits obtained from the sale shall be distributed among the unsecured ordinary creditors. The unsecured creditors will rank equally in claiming any of the debtor's remaining assets.

Security

44 Secured lending and credit (immovables)

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

The principal types of security for immovable property are mortgages and pledges. A mortgage is a right acquired by the creditor over the debtor's immovable asset. The mortgage provides the creditor with priority over any of the debtor's unsecured creditors in relation to the sale proceeds of the immovable asset. A mortgage over land may be registered with the Survey and Land Registration Bureau and a mortgage over a business may be registered with the Ministry of Industry, Commerce and Tourism. That said, Bahrain's legal system does not operate in the same way as common law jurisdictions where a security would only be valid and perfected via registration.

A pledge is a right acquired by the creditor to retain or keep possession of an asset of the debtor until such time that the debtor fully repays its debt.

An assignment over a lease or an interest in a parcel of land can also be granted as security.

45 Secured lending and credit (movables)

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

Pledges (as explained above) and rights of retention (or liens) are the principal types of security over movable property. In addition, a business mortgage can be granted, which will include various movables belonging to a business including machinery, vehicles, etc. Rights of retention particularly apply where the creditor supplies goods to the debtor. The creditor would have the right to refrain from supplying the goods if the debtor has failed to comply with its contractual obligations.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Non-financial institutions

Under the Civil Code, a creditor may claim to have a transaction entered into by the debtor set aside where the transaction has the effect of increasing the debtor's financial obligations and the parties to the transaction were aware of the debtor's state of insolvency. Moreover, a transaction entered into by the debtor may be declared void if it provides an 'unjustifiable preference' to a third party or if it was entered into under fraudulent circumstances.

A bankruptcy trustee may also seek the avoidance of a transaction entered into by the debtor during the course of bankruptcy if the effect of the transaction is based on personal consideration.

Any benefits transferred under a void transaction will be redeemed and will be shared by the creditors.

The following disposals may be annulled or set aside if effected by the debtor after the date of suspension of payment and before the adjudication of bankruptcy:

- all donations other than small presents that are customary;

Update and trends

The Bahrain Official Gazette published a new Reorganisation and Bankruptcy Law (Law No. (22) of 2018) (the New Law) on 7 June 2018. The New Law will be enforced on 7 December 2018 and shall repeal and replace the existing Bankruptcy Law. However, the provisions of the Bankruptcy Law shall still apply to existing and pending claims and applications filed in accordance with its provisions prior to the enforcement of the New Law.

- any kind of premature discharge of debts, the creation of a consideration for the discharge of an unmatured negotiable instrument will be deemed as a discharge;
- payment of maturing debts other than by the manner agreed; and
- any mortgage or other agreed security imposed upon the debtor's assets to secure a previous debt.

Further, disposals other than those mentioned above performed within the time limit stated therein may be adjudged as invalid against the body of creditors where the disposal is detrimental to them and the disposing party was aware at the time of the disposal of the bankrupt's suspension of payment.

Under the Bankruptcy Law, the court can set a date that will be considered as the date of suspension of payment, but this date cannot be backdated to more than two years from the date the debtor is adjudged bankrupt. The period from the suspension of payment until the adjudication of bankruptcy is referred to as the 'suspect period' and the court may consider disposals or transfers within the suspect period to be void if they are detrimental to creditors.

Financial institutions

An insolvent financial institution is deemed to have entered into a void transaction within the suspect period if:

- the transaction was at an undervalue;
- the transaction was entered into with the purpose of defrauding any of the financial institution's creditors; or
- the transaction gave a preference to any person.

A suspect period is applicable in the context of an insolvent financial institution that has entered into a void transaction (see above). More particularly, the suspect period is two years from the date of the financial institution being placed under administration or from the date on which the liquidation order was issued where the void transaction is with a related party (directors, officers, etc). A suspect period of six months applies from the date of the financial institution being placed under administration or from the date the liquidation order was issued where the void transaction is entered into with anyone other than a related party.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

No. All creditors are allowed to submit their claims against an insolvent debtor under Bahrain's insolvency laws, even when there is some degree of proximity between the creditor and insolvent debtor (ie, in the case of insiders). Nevertheless, creditors that have entered into non-arm's length transactions with the insolvent debtor are susceptible to being challenged by the bankruptcy trustee or administrator on grounds of preferential treatment (see question 46).

Groups of companies

48 Groups of companies

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

See questions 17 and 18 for instances where shareholders (parent companies) may be held liable for the obligations of the insolvent company. Parent or affiliated corporations may also be held liable where they have provided guarantees or have acted in the capacity of sureties with

regard to the insolvent company (see also question 32). Unless shareholders (or parent companies) have provided guarantees to support its subsidiaries, a court would not order a distribution of group company assets pro rata without regard for the assets of individual corporate entities involved.

49 Combining parent and subsidiary proceedings

In 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?

The parent and subsidiary companies are not part of the insolvency proceedings, unless the parent and subsidiary were jointly liable with the debtor in repaying a particular debt, and have become insolvent as a result of their combined failure to repay the same. To the extent that the debtor and its affiliated companies enter insolvency, the bankruptcy trustee may be able to pool the assets of the various entities.

International cases

50 Recognition of foreign judgments

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?

A judgment or award issued by a foreign court will be recognised in Bahrain if the foreign court shares a reciprocity arrangement with Bahrain. In addition, the judgment must comply with the conditions of the Civil and Commercial Procedures Act, which provide that:

- the Bahrain court did not have jurisdiction in the matter in respect of which the order or judgment was made and it was made by a foreign court of competent jurisdiction under the jurisdictional rules or laws applied by such courts;
- all parties were served due notice to attend and had been properly represented;
- the order or judgment was final in accordance with the laws of the court making it (regardless of whether such order or judgment is subject to appeal to a higher court); and
- the order or judgment of the foreign court does not conflict with any previous decision of the Bahrain courts and does not conflict with public policy or morality in Bahrain.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Bahrain has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

The Bankruptcy and Companies laws do not differentiate between local and foreign creditors. There are no special procedures followed in the case of foreign creditors in company liquidations and reorganisations.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Under formal bankruptcy proceedings, the bankruptcy judge would have to approve the wholesale transfer of assets to insolvency proceedings held in another country.

54 COMI

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?

As far as we are aware, the courts in Bahrain have not adopted nor applied any COMI tests for debtor companies. Accordingly, COMI has no practical application in Bahrain (see also question 51 concerning the UNCITRAL Model Law on Cross-Border Insolvency).

55 Cross-border cooperation

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?

There are rules in place for cooperation with the courts of the Gulf Cooperation Council (GCC). However, with respect to non-GCC countries, we are not aware of systems that would allow cooperation between domestic and foreign courts. Generally, the courts will refuse to cooperate with foreign proceedings or foreign courts, particularly when such proceedings do not comply with the conditions described in the response to question 50.



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56 Cross-border insolvency protocols and joint court hearings

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?

None that we are aware of.

Belgium

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The main legislation applicable to insolvencies and reorganisation is Book XX 'Insolvency of undertakings' of the Belgian Code of Economic Law (the Insolvency Act). The Insolvency Act, on 1 May 2018, replaced the Act of 8 August 1997 on Bankruptcies and the Act of 31 January 2009 on the Continuity of Undertakings.

Additionally, the Act of 25 April 2014 on the status and supervision of credit institutions and the Act of 13 March 2016 on the supervision of insurance undertakings contain specific provisions relating to the reorganisation and winding up of credit institutions and insurance undertakings respectively.

Furthermore, the Act of 11 July 2013 on security interests (the Security Interests Act) entered into force on 1 January 2018.

Finally, the Belgian Companies Code contains provisions applicable to the voluntary winding up of companies. A new Belgian Companies Code is also currently being discussed in the Belgian Parliament.

2 Excluded entities and excluded assets

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

The Insolvency Act applies to all undertakings. Undertakings include self-employed individuals and the 'liberal professions' (such as lawyers or doctors), all legal entities and entities without legal personality. However, non-profit entities without legal personality that do not distribute profits to persons exercising a decisive influence on their management, legal persons of public law and public bodies do not fall under the scope of the Insolvency Act. The provisions of the Insolvency Act only apply to financial institutions on a residual basis (ie, if the specific regimes in place do not provide specific rules). The provisions in relation to pre-insolvency measures and the reorganisation procedure do not apply to financial institutions.

The Belgian Judicial Code outlines a certain number of assets that are excluded from insolvency proceedings involving an individual. Entities do not benefit, in principle, from such protection and none of their assets are thus exempt from claims of creditors. Additionally, public entities may benefit from sovereign immunity from enforcement in respect of certain of their assets.

3 Public enterprises

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

The fact that an enterprise is government-owned does not in itself mean that such an enterprise would not be subject to the Insolvency Act. A number of government (majority) owned enterprises are not, however, subject to the bankruptcy proceedings.

Creditors of insolvent government-owned enterprises may also attach (which can lead to a forced sale of) the assets of such enterprises to obtain payment of their claims. However, such attachment is limited (ie, assets that such entities use entirely or partially within the framework of their public services are excluded from attachment procedures or other insolvency proceedings (sovereign immunity from enforcement)).

4 Protection for large financial institutions

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

In 2014, Belgium has enacted new banking legislation in line with the European regulatory framework (Capital Requirements Directive IV 2013/36/EU CRD IV, single supervisory mechanism, Bank Recovery and Resolution Directive (2014/59/EU) and prohibition (subject to exceptions) of proprietary trading).

The Belgian banking legislation consists of four acts:

- the Act of 25 April 2014 on the status and supervision of credit institutions;
- the Act of 25 April 2014 on various provisions;
- the Act of 25 April 2014 establishing mechanisms for a macroprudential policy and outlining the specific tasks assigned to the National Bank of Belgium (NBB) as part of its mission to contribute to the stability of the financial system; and
- the Act of 8 May 2014 on appeals against macroprudential recommendations of the NBB.

Key elements of this legislation, taken together, include the following:

- Significant credit institutions (see article 6 of Regulation EC 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions) are subject to the direct supervision of the European Central Bank, which applies both the European and Belgian rules. New credit institutions will require the approval of the European Central Bank, irrespective of their size.
- Credit institutions (that can make an appeal on the Belgian deposit guarantee scheme) are prohibited from proprietary trading under their trading book. There are a number of exceptions, such as market making or hedging activities as further determined by the regulator (NBB).
- Additional requirements are imposed on managers and board members. In particular the role of the board as a key player in the control, orientation, risk management and compliance of a credit institution has been enhanced.
- The equity structure of a credit institution consists of 'core equity tier 1', 'tier 1' and 'tier 2'. At the moment, a transitional capital conservation buffer (CCoB) and countercyclical buffer (CCyB) are applicable until 31 December 2018 and included in Annex IV of the Act of 25 April 2014 on the status and supervision of credit institutions. The final CCoB and CCyB will take effect in 2019.
- Credit institutions are required to put in place recovery plans covering different hypotheses and allowing credit institutions to recover, without impact on the financial system, their viability or financial positions.

- A resolution mechanism needs to be put in place in order to ensure continuity of the critical functions of credit institutions, avoid systemic risk, protect state resources and protect deposits in case of a risk of default.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The relevant court for bankruptcy and judicial reorganisation proceedings is the commercial court of the place of the ‘centre of main interests’ (COMI) of the debtor. For more details on COMI please refer to the chapter on the European Union. If the debtor is a company or a legal person, the COMI is assumed to be the place of the registered office unless the registered office has been transferred in the three months preceding the request to open the insolvency procedure. If the debtor is a self-employed individual, the COMI is assumed to be the place of principal activity of the debtor or, for the individual exercising a liberal profession requiring a registration, the place of registration, unless the place of activity has been transferred in the three months preceding the request to open the insolvency procedure.

The commercial court has jurisdiction over the opening of insolvency proceedings and over any disputes arising from the insolvency.

An appeal against a court order has to be lodged within 15 days of the publication of the judgment in the Belgian State Gazette or from the notification of the judgment when the appeal is lodged by the bankrupt debtor.

Subject to a number of exceptions, any other court order made during an insolvency proceeding can also be appealed within a month of the notification of the judgment.

Lodging an appeal does not suspend the appealed decision during the appeal procedure.

There is no requirement to post security in order to proceed with an appeal.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

A voluntary winding up takes place when the general assembly of a company’s shareholders decides to dissolve the company in accordance with its articles of association. Generally, such a decision requires the same quorum and majority as is required for any change to the articles of association of the company. The only exception to this rule applies when the company has lost more than three-quarters of its share capital, in which case the decision to dissolve the company can be taken by one-quarter of the members present or represented at the shareholders’ meeting.

Following the decision to dissolve the company, one or more liquidators must be appointed to manage the liquidation of the company. The appointment of the liquidators must be confirmed by the court and from that moment the company will be deemed to continue to exist for liquidation purposes only.

As from the date of the decision to dissolve the company, all unsecured creditors are entitled to equal treatment, meaning that they will receive payment of their debts on a pro rata basis. A voluntary liquidation in accordance with the company’s articles of association presumes, however, that there are sufficient assets to cover all claims.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

The Insolvency Act provides for two types of voluntary reorganisations: an amicable settlement without any court involvement (or just for the appointment of a mediator) and judicial reorganisation proceedings under the supervision of the courts.

Amicable settlement

Any debtor can enter into an amicable settlement with some or all of its creditors to address a difficult financial situation or to reorganise its business, and ask for the appointment of a mediator if necessary. The parties to this amicable settlement are free to determine its content but the amicable settlement does not affect the rights of third parties. Under the Insolvency Act, the debtor or another party can file a copy of the amicable settlement with the court registry. The purpose of such filing is to protect the terms of the settlement and the transactions concluded under it against certain effects of the ‘suspect period’ (see question 43). In other words, the Insolvency Act provides a safe harbour against the risk of the amicable settlement and the related transactions being set aside in a subsequent bankruptcy proceeding.

Judicial reorganisation

The aim of a judicial reorganisation is to maintain, under the court’s supervision, the continuity of all or part of the debtor’s business or of its activities. Judicial reorganisation proceedings can only be started if the continuity of the debtor’s business is threatened in the short or long term. A company meeting the conditions for bankruptcy can also apply for a judicial reorganisation procedure (see question 1). A request for judicial reorganisation is subject to substantial information and documentation requirements to limit abuse. The judicial reorganisation involves a moratorium granted in favour of the debtor for a period of up to six months. During this moratorium period, no enforcement can take place in principle against the debtor’s assets and no bankruptcy proceedings can be opened in respect of the debtor. The three new court-supervised reorganisation processes are as follows.

Judicial reorganisation by way of amicable settlement

The negotiations of this settlement take place under the court’s supervision (through a delegated judge). Once agreed, the amicable settlement will be presented to the court and the moratorium will end. Once sanctioned by the court, the amicable settlement is protected against certain effects of the suspect period in the same way as the out-of-court amicable settlement. The same principles with regard to out-of-court amicable settlements apply, except that an amicable agreement under court supervision is not confidential and will be published and that enforcement measures are suspended during the negotiations.

Judicial reorganisation by way of collective agreement

A judicial reorganisation by way of a collective agreement starts with a verification of all claims to be included in the reorganisation plan. As such, the debtor will prepare a reorganisation plan involving a description of the restructuring and a description of the creditors’ rights following the implementation of that restructuring. Also, secured creditors may see their payments deferred and enforcement rights suspended as a consequence of the reorganisation plan for a period of up to 24 months starting on the date of the filing of the plan on the condition that they continue to be paid their interest during this period. The reorganisation plan must provide for at least a partial repayment of the creditors, meaning that at least 20 per cent of each debt must be repaid to each creditor. The reorganisation plan is then submitted to a vote and must be approved by more than half of the creditors representing more than half of the principal amount of the claims involved. If the plan is approved, the court will sanction the reorganisation plan and the moratorium will end. The debtor will then be required to implement and comply with the reorganisation plan and if he or she fails to do so, the creditors may require the court to revoke its approval of the reorganisation plan.

Judicial reorganisation by way of a transfer of business under court supervision

The court can order the transfer of all or part of the business of the debtor either with or without the debtor’s consent at the request of any interested party if the debtor is bankrupt or if an attempted reorganisation of the debtor has failed. A specific regime for the transfer of specific ongoing contracts is in place when the reorganisation takes the form of a transfer of business.

8 Successful reorganisations

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

To be effective, the plan in the framework of a judicial reorganisation by way of collective agreement must contain two key sections:

- a section describing the status of the company (such as the financial structure of the company, its different areas of business and their profitability, the quality and motivation of management), the difficulties it faces and how the debtor intends to resolve them; and
- a section containing the necessary measures to pay off its debts. Such measures may include deferral or reduction of principal or interest, conversion of debt to equity, the rescheduling of payments or a restricted right to set off claims. Secured creditors may see their payments deferred and enforcement rights suspended for up to 24 months, on the condition that they continue to be paid their interest.

The reorganisation plan is then submitted to a vote and must be approved by more than half of the creditors representing more than half of the principal amount of the claims involved. If the plan is approved, the court will sanction the reorganisation plan and the moratorium will end. The debtor will then be required to implement and comply with the reorganisation plan and if it fails to do so, the creditors may require the court to revoke its approval of the reorganisation plan.

A reorganisation plan may also release non-debtor parties, such as sureties and guarantors from their obligations or liabilities to the company's creditors.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Creditors can request the court to terminate any ongoing judicial reorganisation proceedings when it is manifest that the debtor can no longer preserve the continuity of its business. In that case, the court may decide to declare the debtor bankrupt or to force the debtor into judicial liquidation proceedings. If the debtor is not in a judicial reorganisation procedure, creditors can place a debtor in bankruptcy by serving a writ of summons before the commercial court. Petitioners are required to demonstrate that the conditions for bankruptcy are met, that is, that the debtor has ceased in a persistent manner to pay its debts, and is no longer able to obtain credit.

When serious, precise and congruent evidence shows that conditions for bankruptcy are met, a creditor may also make an ex parte application for an order that the debtor is no longer entitled to manage its assets (temporary divestiture) for a period of 21 days, after which a formal request for bankruptcy, judicial dissolution or judicial reorganisation must be submitted to the court.

Belgian corporate law also provides the possibility for third parties to request the dissolution, and hence the liquidation, of a company in certain cases:

- if the net assets are lower than the minimum share capital;
- if the company has not filed its annual accounts in accordance with the Belgian Companies Code;
- if the company is removed from the Crossroads Bank for Enterprises;
- if, despite two convocations thirty days apart, the company has not appeared before the Chamber of distressed companies (which is a special chamber within the Commercial Court, specifically dedicated to supervise distressed companies), especially in case of a fictitious seat of a company; and
- if there is a lack of fundamental managing qualifications or professional certification required by law.

Note that a new Belgian Companies Code is currently in discussion and in this respect, rules may change.

In the case of bankruptcy, the estate of the company or the individual will be liquidated. However, the Belgian Judicial Code enumerates

a certain number of assets that are excluded from insolvency proceedings involving an individual. Once the available assets of the company have been fully realised (whether or not they are sufficient to meet its outstanding debts), it will cease to exist by operation of law. If the debtor is a natural person, he or she may be discharged by the court for the unpaid debts remaining after the bankruptcy and the Insolvency Act explicitly provides for an exclusion of any assets or income acquired by the debtor after the bankruptcy decision to encourage a second chance for the debtor.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

A request for a judicial reorganisation procedure can, in principle, only be filed by the debtor. There are, however, two important exceptions to this principle:

- The public prosecutor, a creditor or any interested buyer can ask the court to transfer all or part of the debtor's business, if:
 - the debtor is bankrupt and has failed to file a request for a judicial reorganisation;
 - the court refuses to grant a judicial reorganisation procedure, decides to close it before it is completed or revokes the reorganisation plan;
 - its creditors do not approve the reorganisation plan; or
 - the court refuses to ratify such a reorganisation plan.
- If the debtor's obvious and serious defaults are threatening the continuity of its business, every interested party can ask for the appointment of a court representative, who will be required to file, on behalf of the debtor, a request for a judicial reorganisation procedure.

In case of the debtor's obvious and serious defaults during the reorganisation proceedings, the judge may replace it with a temporary administrator during the moratorium period.

Further, the auditor of a company will be required to inform the board or management body of that company of any material circumstances that might jeopardise the company's continuity. If the company does not take any measures to remedy the situation, the auditor may inform the court thereof.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

There are no specific procedures for expedited reorganisations.

12 Unsuccessful reorganisations

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 judicial reorganisation will fail if, during the moratorium, it becomes clear that the debtor can manifestly no longer preserve the continuity of its business. The court may then order the termination of the moratorium period at the request of the debtor, the public prosecutor, or any other interested party. The court will also be entitled to declare the company bankrupt or to put it into liquidation proceedings.

A reorganisation plan may be refused by creditors and if there are more than half of the creditors representing more than half of the principal amount of the claims involved, the plan cannot be pursued by the debtor. The judge may also refuse to file the plan if it does not respect the formalities provided for by the Insolvency Act or if it is against the public order. Once again, the plan cannot be pursued in this case, even if enough creditors voted in favour of it.

If a creditor or the public prosecutor can prove that the debtor is not carrying out the recovery plan, that the debtor will not pursue the execution of the plan and that damages will result from the non-execution or that a creditor or group of creditors are being unfairly prejudiced by the plan, the reorganisation may be ended by the judge.

13 Corporate procedures

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

Belgian company law provides for voluntary dissolution and liquidation. Involuntary dissolution and liquidation may be ordered by the commercial court in the following cases:

- at the request of any interested party or the public prosecutor if the company has failed to file its annual accounts (see question 9);
- at the request of any interested party if the net assets of the company drop below the minimum share capital (see question 9);
- at the request of any interested party if the company has been removed from the Crossroads Bank for Enterprises (see question 9);
- at the request of any interested party if, despite two convocations thirty days apart, the company has not appeared before the chamber of distressed companies (see question 9); or
- at the request of any interested party if there is a lack of fundamental managing qualifications or professional certification required by law (see question 9).

In all these cases, liquidators are obliged to pay out to the creditors in accordance with the principle of equal treatment, subject, however, to the rights of secured creditors or creditors benefiting from a specific statutory lien. This process is similar to bankruptcy proceedings, with the exception that the court is not, in principle at least, involved in the liquidation proceedings, which are held on an informal basis.

In addition, a corporation that has been dissolved and is in the process of being liquidated can still be declared bankrupt if the conditions for bankruptcy are met.

Note that a new Belgian Companies Code is currently in discussion and in this respect, rules may change.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Voluntary or involuntary liquidation other than bankruptcy

Where a company has been liquidated either voluntarily or involuntarily, the liquidation will end with a distribution to the shareholders of all the assets that remain (if any) after debts have been paid or provided for. The liquidators will call a general meeting of shareholders to which the liquidators submit the final accounts and at which the shareholders appoint commissioners to review the accounts. At a second general meeting, the shareholders review the way the liquidators have performed their duties based on a report presented by the commissioners. The formal termination of the liquidation will be published and filed in the company's official record at the commercial court. A simplified procedure exists in case the company has no debts outstanding.

Conclusion of bankruptcy liquidation

A bankruptcy may be terminated by the court (ex officio or at the initiative of the bankruptcy trustee) when the assets will not cover the expenses of handling the bankrupt estate. Extracts of the judgment ordering the termination will be published in the Belgian State Gazette. As a consequence of that decision, the bankrupt company will immediately be dissolved.

Termination of the bankruptcy after a full liquidation of the assets is only ordered by the court at the request of the bankruptcy trustee. The bankruptcy trustee will make the request following a final creditors' meeting where the final accounts of the liquidation are presented and discussed, and after the final distribution of the liquidation proceeds. The debtor will be notified of the trustee's application and will have the opportunity to oppose the closure. The termination order will only come into force one month after its publication, during which time the court may withdraw the order at the request of the creditors.

Some assets are excluded from the bankruptcy assets by the Insolvency Act. Such assets include the goods, amounts and payments that the debtor receives after the bankruptcy declaration and which are related to the debtor's activities occurring after the bankruptcy. This is to promote a second chance for the debtor. Applying the same reasoning, a bankrupt individual (as opposed to a company) is discharged

from any remaining debt if it asks for this discharge. The guarantors also benefit from this discharge.

The termination order relating to the bankruptcy of a company causes the immediate dissolution of the company. Extracts of the order will be published in the Belgian State Gazette.

Conclusion of a judicial reorganisation

A judicial reorganisation is concluded by:

- the court concluding that the debtor can manifestly no longer assure the continuity of its business (ie, that the debtor is unable to enter into an amicable settlement or a collective agreement with its creditors);
- an agreed amicable settlement presented to the court;
- the full performance of the reorganisation plan;
- the revocation of the reorganisation plan by the court;
- the completion of the sale of the business; and
- a declaration of bankruptcy or liquidation.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

Belgian law has no uniform criteria to determine whether a debtor is insolvent. Each regime (bankruptcy and judicial reorganisation) has different criteria. The debtor is in a state of bankruptcy from the moment it has consistently ceased to pay its debts when they fall due and no longer has the trust of its creditors. A debtor can apply for a judicial reorganisation when the continuity of that debtor's business seems to be threatened in the long or short term.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

The debtor is under a legal obligation to file for bankruptcy within one month of such time it has consistently ceased to pay its debts. However, if the debtor considers that there is a possibility for the continuity of the undertaking, it can also file for a judicial reorganisation, even if the debtor is in a situation of cessation of payments. In this case, the debtor is protected from bankruptcy during the term of the judicial reorganisation procedure.

Directors and officers

17 Directors' liability - failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

If proceedings are not commenced within such time limit, the debtor may be subject to both criminal and civil liabilities. In practice, criminal sanctions will not be ordered for the sole fact of not having filed for bankruptcy in due time. Civil sanctions are, however, significant, as directors may be held personally liable for the increase of the liabilities resulting from the delay in filing for bankruptcy.

Liability claims for wilful misconduct are made by the bankruptcy trustee or by the creditor if the bankruptcy trustee does not make a claim within one month of a creditor so requesting.

18 Directors' liabilities - other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

In general, directors and officers are not liable for the company's debts. There are, however, in addition to the corporate rules on directors' liability (in particular for breaches of the company's articles of association or the Belgian company law), certain specific provisions applicable in relation to bankruptcy. Accordingly, directors or former directors of

a bankrupt company may be held liable at the request of the bankruptcy trustee or the creditors if, owing to their obvious and serious mismanagement, the company is unable to pay its debts in full. In such case, the directors will be liable to the extent that the creditors are not fully satisfied out of the proceeds of the bankrupt estate. In addition, specific legislation allows the tax and social security administration, as well as the bankruptcy trustee, to hold directors liable for certain amounts due in respect of compliance with tax and social security legislation.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

No, there is no shift of duties provided for by law.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

During reorganisation proceedings, the company remains in charge of all its assets and directors and officers will have to manage them in order to implement the amicable settlement or the reorganisation plan, or to complete the transfer of business.

During bankruptcy proceedings, the assets of the company are managed by the bankruptcy trustee.

During liquidation proceedings, directors and officers have no power, as the appointed liquidator will be in charge of the liquidation of the company. However, if no liquidator has been appointed, directors and officers are presumed liquidators.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

Liquidation

The immediate effect of the declaration of bankruptcy is that any legal or enforcement proceedings are suspended. Secured creditors can only commence or continue enforcement proceedings subject to limits set by the bankruptcy legislation.

Reorganisation

In the case of a request for a judicial reorganisation, no enforcement of any security can be effected nor can the debtor be declared bankrupt or liquidated prior to the court's ruling on such a request. The judicial reorganisation involves a moratorium granted to the debtor for up to six months (see question 7).

During this moratorium period, no enforcement can take place in principle against the debtor's assets and no bankruptcy proceedings can be opened in respect of the debtor. Creditors will, however, be able to effect set-off, enforce security over financial collateral and enforce receivables pledges. This moratorium does not affect ongoing contracts but the debtor can decide, even if not contractually permitted to do so, not to perform the obligations under the relevant contract (other than employment contracts) during the moratorium if it is necessary for the purposes of the reorganisation plan or for the transfer of the business (see questions 42 and 43).

However, under the Insolvency Act, the suspension of enforcement does not apply to the sale of any movable or immovable assets seized by a creditor and for which the date of sale is scheduled less than two months after the filing of the request for judicial reorganisation (the court can still suspend it). It also does not preclude creditors from benefitting from any new security interest (such as the conversion of any mortgage mandate). Finally, a pledge on receivables is not affected by the suspension and the collection of those receivables during the suspension period remains possible.

The moratorium period will end and the creditors will, in principle, regain their full rights and may proceed to the enforcement of

their rights (including the security) (taking into account the limitations imposed by an agreed settlement or approved reorganisation plan) against the debtor, if:

- the reorganisation is unsuccessful (see question 11);
- an agreed amicable settlement is presented to the court (see question 7);
- a reorganisation plan approved by more than half of the creditors (representing more than half of the principal amount of the claims involved) is ratified by the court; however, depending on the content of the reorganisation plan, certain secured creditors can see their payments deferred and enforcement rights suspended for up to 24 months (see question 7); and
- the reorganisation procedure is terminated following the completion of the sale of the business.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

In case of a judicial reorganisation, the court will in principle allow the debtor to continue operating its business during the moratorium period. The debtor (or its managing bodies) may nevertheless be precluded by the court from performing any act of management if serious mismanagement is threatening the continuity of its business. In that case, an administrator will be appointed to continue the judicial reorganisation procedure and the debtor (or its managing bodies) will cease to be involved during the reorganisation.

In principle, all ongoing contracts (ie, contracts existing before the commencement of the proceedings but that provide for further performance by the parties) will continue in effect notwithstanding the judicial reorganisation, but may be terminated during the judicial reorganisation by the counterparty to the extent that the debtor defaults. Note that a contractual default by the debtor occurring before the opening of the reorganisation procedure cannot be considered a valid reason for the counterparty to terminate the contract to the extent that the default is remedied within 15 days of the default being notified to the creditor. The debtor may, within 14 days of the opening of the judicial reorganisation proceedings, decide to cease to perform its obligations under a contract (other than employment contracts) during the moratorium if necessary for the purposes of the reorganisation plan or for the transfer of the business.

In order to support the debtor in securing further business and credit, the judicial reorganisation legislation provides that debts arising during the judicial reorganisation period (including claims arising from new agreements as well as claims in relation to agreements for periodically renewable performance or services) will be treated preferentially over all other creditors in the event of a subsequent bankruptcy or liquidation. In addition, new claims arising out of performance of agreements after the opening of judicial reorganisation proceedings are not subject to the moratorium. If the debtor fails to pay amounts due in respect of such performance after the opening of judicial reorganisation proceedings, the creditor will have the ability to enforce.

23 Post-filing credit

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

Liquidation

Secured or unsecured loans or credit granted after the commencement of bankruptcy or liquidation proceedings will receive preferential treatment over other claims to the extent that they can be considered as administrative expenses. The Belgian Supreme Court has defined administrative expenses as debts contracted by the bankruptcy trustee for the purposes of the administration of the bankrupt estate.

Reorganisation

Claims arising from transactions entered into after the commencement of judicial reorganisation proceedings will be considered as

administrative expenses in a subsequent bankruptcy or liquidation and will be treated as a preferential claim.

24 Sale of assets

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?

Bankruptcy

The liquidation of the assets of the bankrupt estate by the bankruptcy trustee will start as of the first verification of the claims. The debtor can be heard on how the realisation of the assets could yield the highest proceeds. The assets are sold by the bankruptcy trustee under the supervision of the court. Creditors can start urgency proceedings if they claim to be prejudiced by an intended sale. In this case, the court can appoint an ad hoc bankruptcy trustee to prevent the sale.

In either case, the purchaser will acquire the assets free and clear from the insolvent estate.

Judicial reorganisation

During judicial reorganisation proceedings, the court can order the transfer of all or part of the debtor’s business, either with or without the debtor’s consent, at the request of any interested party if the debtor is bankrupt or if an attempted reorganisation of the debtor has failed. In such circumstances, the court will appoint a representative who will manage the sale and transfer. If comparable offers are also being made, priority must be given to the preservation of employment. Once an offer has been selected, the court will hear the various stakeholders, including creditors, and will either approve, impose conditions if appropriate, or reject the sale. Following the completion of the sale of the business, the creditors will be entitled to exercise their rights in respect of the sale proceeds and the judicial reorganisation will be terminated. The purchaser will acquire the assets free and clear out of the reorganisation unless the reorganisation plan provides differently.

The sale of certain assets of the company can also form part of the reorganisation plan. In this case, the debtor must decide which assets it wants to sell and at what price. The reorganisation plan is then submitted to a vote and must be approved by more than half of the creditors representing more than half of the principal amount of the claims involved. The purchaser will acquire the assets free and clear unless the reorganisation plan provides differently.

25 Negotiating sale of assets

Does your system allow for ‘stalking horse’ bids in sale procedures and does your system permit credit bidding in sales?

Stalking horse bids are not strictly prohibited under Belgian law, but are difficult to achieve in the context of insolvency proceedings. They would require the consent of all parties involved.

In case of an insolvency proceeding, this is difficult to achieve as set-off after insolvency is prohibited in principle and only allowed in very limited circumstances (ie, where both debts are closely connected).

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

There are no specific provisions allowing the debtor to reject or disclaim an unfavourable contract. The Insolvency Act, concerning reorganisations, provides for the possibility of the debtor suspending performance of its contractual obligations if such suspension is essential for the reorganisation of the business and the counterparty is notified of the same within 14 days of the commencement of the judicial reorganisation proceedings. That does not apply to employment contracts.

Concerning bankruptcies, the bankruptcy trustee must decide immediately if it continues the contracts concluded before the bankruptcy declaration that were not terminated by the declaration itself. However, such a decision cannot prejudice the rights of third parties. Counterparties of the bankrupt entity or individuals may also ask the bankruptcy trustee to take a decision within a 15-day period and they can consider the contract as terminated if no answer is given after this time by the bankruptcy trustee.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor’s right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Various pieces of IP legislation contain provisions addressing the consequences of insolvency on IP rights, with various outcomes depending on the type of IP right. In certain cases, the owner of the relevant rights can terminate the debtor’s right to use the IP upon insolvency. However, the bankruptcy trustee may also be able to continue using the relevant IP rights in certain circumstances determined by law.

28 Personal data

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

There is no general prohibition or restriction on the transfer of personal data in cases of insolvency. That being said, such transfer is likely to fall within the scope of the Law of 8 December 1992 regarding the protection of personal data (the Data Protection Act) implementing Directive 95/46/EC and that has been superseded by the General Data Protection Regulation (the GDPR) as of 25 May 2018.

Under the Data Protection Act and the General Data Protection Regulation (the GDPR), such transfer of data amounts to a communication of the data to a third party, which will become the new data controller after the transfer.

As with any other processing of personal data, it is necessary to assess whether such transfer is justified by any of the legal grounds set out by the Data Protection Act and the GDPR.

If the transfer of personal data is justified by the legitimate interest of the insolvent transferor, the interests and fundamental rights of the data subjects must be taken into account. It will, therefore, have to be assessed whether or not such legitimate interest is overridden by the fundamental rights and freedoms of the data subjects.

In the context of customer and employee data, it is arguable that the transfer is also in the interests of the data subjects (as they have an interest in the continuity of the business), but this may have to be assessed with additional information on the kind of data, the purposes of the processing, etc.

In any event, data subjects should be informed of the transfer of their data to the third party or any change of data controller.

The Insolvency Act has created an electronic register relating to insolvencies and containing inter alia all data that identifies the debtors, the creditors, the insolvency actors, the delegate judges and bankruptcy judges.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

It is generally accepted that litigation directly arising in the context of insolvency proceedings cannot be referred to arbitration. Nevertheless, leading authors have cast doubt on the validation of this general prohibition, suggesting that arbitration proceedings involving the bankruptcy trustee should be allowed, except where the courts have been granted exclusive jurisdiction over the relevant matter by law.

Creditor remedies

30 Creditors' enforcement

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 Financial Collateral Act of 15 December 2004 (the Financial Collateral Act) and the Security Interests Act both allow seizure of pledged assets outside of court proceedings. The pledgor and pledgee can agree on the terms of enforcement, including the possibility to appropriate the pledged assets.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Prior to the commencement of insolvency proceedings, unsecured creditors can enforce their rights against a defaulting debtor by obtaining a court order attaching the debtor's assets and requiring them to be sold. A distinction should be made between a pre-judgment conservatory attachment (which, for movable properties, can be obtained within days in cases of real urgency; for immovable properties, it can take up to approximately one month) and a post-judgment enforcement attachment (which requires either an enforceable judgment or an enforceable notarised deed that details the exact amount due to the creditor). At the time of the commencement of a judicial reorganisation or bankruptcy, attachment and other enforcement measures against the defaulting debtor will be suspended (see questions 7 and 21). The Insolvency Act also allows for creditors to use their right to benefit from any new security interest (such as conversion of a mortgage mandate or the taking of any legal mortgage by the tax authorities), even when the reorganisation proceedings have already begun.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Bankruptcy procedure

Creditors are notified of the bankruptcy order by publication thereof in the Belgian State Gazette and by its publication in two newspapers.

Creditors' meetings are held on several occasions during the bankruptcy process. The first creditors' meeting is held when the official verification report of outstanding claims is delivered and the bankruptcy trustee reports on all the admitted and contested claims. The contested claims are discussed and referred to a later court session for decision on the subject matter. Further creditors' meetings may be called at any time, as the need arises. As of the third anniversary of the declaration of bankruptcy, a creditors' meeting may be held at the request of any creditor, subject to the approval of the court (unless requested by creditors representing at least one-third of the liabilities of the bankruptcy estate, in which case court approval is not required). At that meeting, the bankruptcy trustee needs to explain the status of the liquidation. Finally, at the end of the liquidation procedure, a creditors' meeting is held at which the final accounts are settled. Creditors' meetings are called by court order and the order is published in the bankruptcy register at least one month before the date of the meeting although the publication in the bankruptcy register can be replaced by a notice given by the bankruptcy trustee to all registered creditors.

In addition to the calling of meetings, creditors also exercise other powers in relation to the administration of the bankruptcy. Firstly, creditors may challenge the official verification report of the outstanding claims within one month of its presentation to the court. Secondly, creditors that disagree with a planned forced sale of assets during the liquidation phase may request the ad hoc appointment of a trustee for the sale. Creditors may also appeal against the court's decision regarding the final discharge of the debtor, as no further action by creditors

will be possible after the bankruptcy once such clearance has been given by the court. Finally, creditors are entitled to file damage claims against directors of the debtor if their obvious and serious mismanagement has contributed to the bankruptcy (the law contains an irrefutable presumption that organised tax fraud within the meaning of the money laundering legislation consists of such obvious and serious mismanagement).

Reorganisation procedure

Creditors are notified of the opening of a reorganisation procedure by the publication of an extract of the judgment in the Belgian State Gazette.

When the reorganisation procedure aims at obtaining an approval of a reorganisation plan, the court sets a date, an hour and a place for the hearing during which the vote and the approval of the plan will occur.

Within eight days following the judgment opening the procedure, the debtor must send information to the creditors, including the list of creditors and the amount of their debts. Any creditor may contest in court the amount or the qualification of the debt made in the list he or she received. Creditors can also file their claims in the reorganisation register.

Creditors also have powers in relation to the handling of the reorganisation. First, they may ask for the appointment of a temporary administrator (for the moratorium period) in case of serious and obvious defaults of the debtor. Second, they may ask for the early termination of the reorganisation procedure when the debtor is obviously incapable of continuing its activities, or when the information that was provided at the opening of the procedure was incomplete or false. Finally, they may ask for the revocation of the reorganisation plan when it is not properly executed by the debtor.

33 Creditor representation

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?

There is no formal process under Belgian law for the formation of creditors' committees.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

In bankruptcy proceedings, the bankruptcy trustee will have exclusive responsibility to pursue claims of the debtor.

In a judicial reorganisation, the debtor will continue to have the right to pursue any of its claims.

35 Claims

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

Bankruptcy

All creditors must file their claims in the bankruptcy register by the date provided for in the bankruptcy declaration (at the latest). This date is determined by the court and shall be no later than 30 days after the date of the bankruptcy order. This obligation does not apply to natural persons nor to foreign legal persons, except if they are represented by a third party giving professional judicial assistance. Creditors receive notification of the filing requirement through a message in the bankruptcy register and, to the extent their identity is known, through a letter from the bankruptcy trustee. Filing a claim requires the completion of a standard form (which contains mandatory information about the creditor, the amount of its claim and any security) and the submission of certain supporting evidence. Special provisions have also been adopted in relation to the claims filed by the employees compelling the

bankruptcy trustee to assist the debtors' employees in establishing their claim.

Creditors that do not file their claim in time lose their right to participate in any distribution and lose any priority to which they may have been entitled. They can, however, still request the 'recognition' of their claims up until the day of the last creditors' meeting when all the accounts are finally settled at their own expense. If their claim is accepted at a later stage, the creditor will only be allowed to receive a portion of the assets left for distribution at that time.

The bankruptcy order will also set the date for the final verification of claims. This date must be at least five days, and no more than 30 days, after the last filing date for claims. Claims that are disputed by the bankruptcy trustee during the verification process will be decided upon by the court.

There are no provisions specifically dealing with the transfer of claims. Any transfers would thus need to comply with the general statutory and contractual provisions on the transfer of claims. Given the filing process, it is advisable that any transfer be disclosed to the bankruptcy trustee and be filed with the court.

The creditor of a claim for contingent amounts can file such a claim in an insolvency proceeding and can request that the contingent nature of the claim is taken into account. In the case of the debtor's bankruptcy, the creditor can preserve his or her rights by having the claim recorded and requesting any measures that he or she deems necessary (sealing assets, having an inventory made, etc). If the conditions on which the relevant claim depends would only become effective after the declaratory judgment, the bankruptcy trustee can decide to reserve the share of this creditor until such conditions are met.

It should be noted that, as from the bankruptcy decision, interests on unpaid amounts no longer accrue unless the creditor has a claim secured by a mortgage or a pledge.

Judicial reorganisations

According to the Insolvency Act, creditors must file their claims in all types of reorganisations (even for amicable settlements with only two creditors).

36 Set-off and netting

To what extent may creditors 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?

Pursuant to the Financial Collateral Act, creditors can exercise the right of set-off after the opening of bankruptcy or judicial reorganisation proceedings only to the extent that:

- the set-off right was agreed between the parties prior to the opening of insolvency proceedings (if the set-off right was agreed after the opening of insolvency proceedings, it will only be enforceable if the relevant creditor was lawfully unaware of the opening of insolvency proceedings affecting his or her debtor at the time the set-off right was agreed);
- the set-off relates to mutual debts existing at the time of the opening of the insolvency proceedings; and
- such creditor is a merchant (ie, someone who regularly enters into commercial contracts).

Set-off and netting agreements will not be declared ineffective unless they constitute a gratuitous transaction (ie, a transaction for no consideration) or transaction at an undervalue, or if they have been entered into with fraudulent intent.

If the conditions set out above are not met, creditors are precluded from exercising any right of set-off following the occurrence of an insolvency event except where the claims to be set off against each other are closely connected, in which case set-off will be allowed. It is generally accepted that claims arising out of the same contract can be considered as closely connected.

The above relates to all forms of conventional set-off, that is, set-off agreed between the parties. Other forms of set-off also exist, in particular statutory set-off and judicial set-off. As set out above, statutory set-off is not enforceable after the occurrence of an insolvency event except where claims are closely connected. The right of statutory set-off of the Belgian tax authorities is enforceable after the opening of insolvency

proceedings. Judicial set-off is not enforceable after the occurrence of the insolvency event.

37 Modifying creditors' rights

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

A court cannot change the rank of a creditor's claim in a bankruptcy, as such ranking is determined by law. In a judicial reorganisation, a court may approve a restructuring plan that modifies the ranking of a class of claims.

38 Priority claims

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

Government priority claims

The most important government statutory liens are those asserted by the social security and tax authorities (including direct and indirect taxes, national, regional and local taxes). Certain other specific statutory liens also take precedence, including the following non-government priority claims:

- enforcement costs incurred in the interest of creditors generally;
- costs incurred in saving or maintaining a specific asset;
- the unpaid purchase price for the sale of movable or immovable assets;
- unpaid rent on a building; and
- unpaid premiums for the insurance of assets.

The bankruptcy legislation distinguishes between general statutory liens, which apply in general to the bankrupt estate, and specific statutory liens, which apply to specific assets within the bankrupt estate. As a general rule, specific statutory liens will take priority over general statutory liens. Priority among specific statutory liens will be determined by law, which establishes a ranking of these specific statutory liens. Secured claims will, in general, take priority over any general statutory liens. Priority between creditors with a specific statutory lien and secured creditors has generated a substantial amount of case law, where often the date on which the security interest has become enforceable against third parties will determine priority.

It should be noted that administrative expenses will take priority over unsecured creditors and creditors with a general statutory lien. They will also take priority over secured creditors and creditors with a specific statutory lien, but only to the extent that they have benefited from the administrative expenses. The Insolvency Act allows for tax authorities to take a legal mortgage even after the request for reorganisation, which benefits them.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

A restructuring involving a substantial reduction of the workforce may, depending on the number of proposed dismissals and the time frame during which these dismissals are to be made, constitute a collective dismissal. Where this is the case, specific obligations are imposed on the employer in addition to the usual statutory requirements relating to the termination of individual contracts, including a requirement to provide significant prior information to, and to continue to consult with, the employee representatives or the employees themselves, and to notify the labour authorities before any final decision is taken. Furthermore, a collective dismissal also triggers specific employment-related measures such as the payment of a specific collective dismissal or closure indemnity to the dismissed employees (on top of their standard severance package) and the setting up of an outplacement service, etc.

In a restructuring involving bankruptcy proceedings, claims of employees against the employer will essentially relate to the payment of unpaid severance entitlements following the termination of their

employment contracts and their pension entitlements. In the case of a reorganisation, the reorganisation plan cannot reduce the payments related to employment contracts for services provided prior to the reorganisation.

Claims for unpaid severance entitlements have priority in proceedings against an insolvent employer. However, this priority comes after other prioritised claims and relates only to the proceeds of the employer's movable assets.

With respect to pension liabilities in cases where occupational pension plans have been set up by the employer for the benefit of the employees, the main protection against employer insolvency is the external financing requirement for occupational pension schemes (see question 40). As a consequence, employer insolvency must not be detrimental to an employee's occupational complementary pension entitlements.

Where an employer has not funded an occupational pension plan sufficiently, an employee's pension entitlements under that plan may be reduced and the Belgian Business Closure Fund may intervene. Employees can file a claim against the insolvent employer in respect of the loss suffered as a consequence of such underfunding.

40 Pension claims

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

In Belgium, pension arrangements are externalised (eg, with an insurance company) or held by a different entity than the employer (eg, a pension fund). A bankruptcy of the employer will not have any influence on the rights that are already accumulated under the relevant pension arrangement. Acquired reserves are absolutely protected. There is, however, no priority attached to a claim of pension benefit.

Employees benefit from a priority right with respect to unpaid wages; however, it is not yet clear in case law whether such priority rights should also be attached to a claim of the employee concerning the unpaid contribution by the employer.

Similarly, there is no complete consensus on whether the Belgian Business Closure Fund should intervene to cover the unpaid employer's contributions in the event of closure of the business. In any event, the Belgian Business Closure Fund's intervention would be capped.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Environmental liability of an insolvent party will be treated like all other unsecured liabilities. It should be noted that particular liabilities and obligations may be imposed through specific legislation. For instance, under the decree of the Flemish Council of 27 October 2006 concerning soil decontamination and soil protection, the curator in insolvency proceedings has the obligation to issue a soil examination for terrain owned by the company and that is prone to particular risks.

42 Liabilities that survive insolvency or reorganisation proceedings

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

In case of bankruptcy, the liabilities of a debtor will in principle survive insolvency.

However, an individual can request discharge from the court, and only in exceptional circumstances, such discharge will not be granted. In case such discharge to an individual is granted, the liabilities that have been secured by a mortgage or a pledge will, however, survive.

Technically, creditors will regain their rights against a corporate debtor following the completion of insolvency proceedings. However, if the debtor is a company the decision of the court to close the insolvency proceedings entails the automatic dissolution and liquidation of the company. This means that, in practice, liabilities do not survive

insolvency. The Insolvency Act specifically excludes assets or income acquired by the debtor after the bankruptcy declaration from the bankruptcy estate.

A purchaser of the debtor's assets in an insolvency will not be liable for the insolvent debtor's liabilities. There are a number of important exceptions to this principle:

- in accepting the transfer of parts of a business in a going concern, the court may impose certain conditions, including the transfer of certain liabilities to the purchaser of the relevant assets; and
- in certain cases, liabilities specifically linked with the transferred assets may transfer as well as a direct consequence of their close connection with the relevant asset.

43 Distributions

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

Distributions are made on a *pari passu* basis with the exception of administration expenses and creditors benefiting from a security interest or a statutory lien.

The costs, debts and expenses incurred in the management of the estate will be paid out first. Creditors enjoying a security interest or a specific statutory lien (as opposed to a general statutory lien) are then entitled to be paid out of the proceeds of the sale of the secured assets. If the proceeds of the sale of the secured assets are insufficient to pay the secured creditors, or holders of a specific statutory lien, then those creditors are admitted as unsecured creditors for the remainder of their claims.

Distributions can be made as soon as the bankruptcy trustee has verified all claims filed. Hence, the trustee will not have to wait until the closing of the bankruptcy. The bankruptcy trustee may start selling assets even earlier, that is, as soon as he or she considers that maintenance costs are too high.

Distributions in reorganisations are generally made in accordance with the reorganisation plan or the amicable settlement agreement.

Security

44 Secured lending and credit (immovables)

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

The most important form of security over immovable property is the mortgage, which provides the mortgagee with the right to have the property sold if the debtor defaults and to use the proceeds of sale to repay the outstanding secured debt.

The creation and perfection of a mortgage requires notarised documents to be filed with the land registry and attracts stamp duty of 1 per cent of the secured amount in addition to a mortgage fee of 0.30 per cent of the secured amount and various other fees. More sophisticated creditors accept an irrevocable mortgage mandate to secure part of the amount as opposed to an effective mortgage, in particular where the amounts are substantial. Under such mandate, the owner of the property appoints a third party related to the creditor as its attorney with the power to create an effective mortgage upon the creditor's first demand. The advantage of an irrevocable mortgage mandate is that it does not attract stamp duties other than nominal fees. The disadvantage, however, is that the irrevocable mortgage mandate does not create effective security until it is effectively converted into a real mortgage, even though, under the Insolvency Act, a creditor can benefit from the conversion of a mortgage mandate even if there has been a request for judicial reorganisation.

45 Secured lending and credit (movables)

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

There are several types of security available.

Pledge

The principal and most traditional type of security over movable assets is the pledge, which provides the pledgee with the right to have the assets sold if the debtor defaults and to use the proceeds of the sale to repay the outstanding secured debt. This is, in principle, subject to the

authorisation of the courts. However, the parties can agree either at the time of the pledgor's default or at the conclusion of the pledge on the appropriation of the pledged assets by the pledgee. Following the entry into force of the Security Interests Act on 1 January 2018, the framework for pledges under Belgian law has changed significantly.

Before the reform, in order for a pledge to secure commercial debts, it was necessary to have a pledge agreement as well as the physical transfer of possession of the pledged asset to the secured creditor or to a third party acceptable to both pledger and pledgee. Given the obvious inconvenience caused by the necessity to transfer possession, Belgian law had therefore introduced the *pand handelszaak* or *gage sur fonds de commerce*, a form of security similar to the floating charge under English law. This floating charge covered all business assets of the pledgor with the exception of immovable property and 50 per cent of the value of the stock. The creation of a floating charge required a written agreement that must be filed with the land registry and that attracts a stamp duty of 0.5 per cent of the value of the assets covered by the floating charge. A floating charge could only be created to the benefit of an EU credit institution.

Within the new framework, a registered pledge without the physical transfer of possession of the pledged asset has become the rule. Registration of the pledge arrangement in a centralised pledge register (at minimal costs) is required to make the pledge enforceable with regard to third parties. The moment of registration determines the ranking of the pledge arrangement. Each registration is valid for a renewable period of 10 years and may have to be updated, for example, if the pledge is transferred to a different pledgee pursuant to a transfer of the secured obligations. The separate regime for the *pand handelszaak* or *gage sur fonds de commerce* has therefore been abolished as the new framework allows for an easy and less costly creation of a business pledge. A pledge by way of physical transfer of possession is still possible in the new framework.

Another noteworthy change is the introduction of a 'security agent' concept similar to the concept already included in the Financial Collateral Law (which is not affected by the new Security Interests Act). There is an ongoing reform of the Belgian Civil Code that is likely to modify the provisions on security.

In addition, the Financial Collateral Act contains simplified rules for the creation, perfection and enforcement of a pledge over financial collateral. These rules apply to cash on account (ie, not physical cash) as well as to financial instruments. The definition of financial instruments covers shares and bonds, but also derivative contracts, dematerialised and book entry securities, as well as any right to financial instruments.

The pledge must be agreed in writing and the financial collateral, over which a pledge is created, must be delivered to the beneficiary of the pledge or to the person acting on its behalf. This requirement is met when the financial collateral has effectively been transferred, held, registered in a register or otherwise designated as such, so that the beneficiary of the security acquires possession or control of these assets.

There is no notification requirement or court authorisation procedure for the enforcement of a pledge over financial collateral. If the pledgor defaults, the pledgee has the right to sell the financial instruments or to apply the cash to satisfy the claims it has against the pledgor. The pledgee also has the right to appropriate the financial collateral but only if the parties have expressly agreed thereto and have provided a contractual mechanism for the valuation of the financial instruments. The occurrence of a bankruptcy does not affect the enforceability of a pledge on financial collateral. However, following a recent amendment to the Financial Collateral Act, certain pledges on financial collateral cannot be enforced anymore during a judicial reorganisation procedure. This is the case for pledges on bank account and credit claims and netting arrangements involving a debtor that is not a public or financial entity, or if the debtor is a public or financial entity, the enforcement can only be requested by creditors that are public or financial entities, except in both cases in the event of default of the debtor. In practice, this means that if the judicial reorganisation proceedings are commenced by a debtor other than a public or financial entity, creditors are not entitled to enforce their security interests or carry out netting arrangements on the sole ground that such proceedings have been opened.

Statutory lien of the unpaid seller

In the event of insolvency, an unpaid seller has a statutory lien on the asset sold to the insolvent buyer, provided, however, that the buyer is

the owner of the asset at the time of occurrence of the insolvency event and that the asset is clearly identifiable at that time.

Fiduciary transfer of title

For many years it was unclear whether Belgian law accepted the fiduciary transfer of title. In the Sart-Tilman case, the Belgian Supreme Court upheld the decision of the Court of Appeal of Liège, ruling that the security assignment of a claim was ineffective in the event of the insolvency of the assignor. It appears to be widely accepted among scholars that this decision only affects arrangements where the transfer was solely effected for the purpose of creating security and does not affect more complex and well-established arrangements where the use of title as security is only one of the aspects, or one of the consequences (eg, leasing or factoring) of the transaction. The exact scope and effects of the Sart-Tilman case are still a source of dissension and legal uncertainty under Belgian law. In 2010, the Belgian Supreme Court held that an ineffective security assignment should be reclassified as a pledge. Special 'protective' legislation exists in respect of 'repo' transactions and transfers of book entry securities and cash. This protective legislation has now been updated and amended in the Financial Collateral Act. The law recognises the validity and the enforceability of a transfer of title to financial collateral by way of security. The fiduciary transfer of title is thus valid under Belgian law and is enforceable, including in the context of insolvency proceedings affecting the debtor that has transferred financial collateral to its creditor by way of security in accordance with the Financial Collateral Act. Recent case law has clarified that the beneficiary of security by way of transfer of title will be in the same legal position as a pledgee in a situation of *concursum creditorum*. The Security Interests Act also provides for such fiduciary transfer of title, except when the transferor is a consumer under the Belgian Code of Economic Law.

Retention of title

Retention of title arrangements covering movable property are effective in the event of insolvency affecting the buyer, provided that they meet certain requirements, such as a written agreement executed prior to the delivery of the goods and the availability of the asset in the buyer's estate at the time of executing the retention right, and provided that any maintenance costs have been settled with the bankruptcy trustee.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

All arrangements, transfers and payments made by the bankrupt debtor after the declaration of bankruptcy are void.

Moreover, any transaction or payment effected with fraudulent intent may be set aside irrespective of when it was entered into. If a transaction is set aside, the proceeds from it must be returned to the bankrupt's estate. The bankrupt's estate can also be required to return any money or assets it received under the transaction to the relevant creditor. However, in most cases the creditor's claim for restitution or repayment will form an unsecured claim in the bankruptcy.

Additionally, it is possible to annul some transactions made in a certain delay preceding the declaration of bankruptcy during what is called the 'suspect period', if such period is determined by the judge at the time of the bankruptcy, for a maximum of six months.

Transactions may be attacked by the bankruptcy trustee, and sometimes by the creditors themselves.

See also question 43.

There are no provisions specifically dealing with the annulment of transactions in reorganisations.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There is no specific rule in this respect. In the case of a non-arm's length transaction, it could, however, be argued that the transaction has been

concluded outside the corporate interest of the potential bankrupt company and as a result is unenforceable.

Groups of companies

48 Groups of companies

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

Insolvency proceedings are organised per legal entity. ‘Piercing the corporate veil’ is very exceptional in Belgium. It would only occur in the event that there is a commingling of assets and liabilities of different entities (eg, no separate accounting and cross-payments of liabilities without a legal framework) or in fraudulent transactions in which several entities took part.

If a parent company is also a director (as a legal entity) of one of its subsidiaries, it could become liable as a director of that subsidiary in the event of, for example, mismanagement or breaches of law committed as a director of the subsidiary and, as a result, become liable for its debts.

49 Combining parent and subsidiary proceedings

In 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?

Belgian law does not formally recognise the concept of a corporate group in insolvency law and as a result, insolvency proceedings are not opened in respect of a corporate group as a whole (ie, insolvency proceedings will be opened only to the extent the conditions for the opening of insolvency proceedings are satisfied in respect of the relevant entity of the corporate group). The assets and liabilities of insolvent companies within a corporate group cannot be combined for distribution purposes, except to the extent that the individual estates of companies cannot be separately identified. For practical purposes, however, it is not uncommon for courts to hear the proceedings of entities belonging to the same corporate group simultaneously. The Regulation (EU) 2015/848 of the European Parliament and Council of 20 May 2015 on insolvency proceedings (EU Insolvency Regulation) does, however, foresee new rules on the coordination of insolvency proceedings that relate to several members of the same group of companies. From 26 June 2017, any European court having jurisdiction over the insolvency proceedings of a member of the same group of companies may be requested by an insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group, to allow group coordination proceedings (article 61 of the EU Insolvency Regulation). For further information, please see the chapter on the European Union.

International cases

50 Recognition of foreign judgments

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?

Since 31 May 2002, the provisions applicable to cross-border insolvency proceedings have differed depending on whether or not they are covered by Council Regulation (EC) No. 1346/2000 on insolvency proceedings. This Regulation has been replaced by the EU Insolvency Regulation.

Within the scope of the EU Insolvency Regulation

The EU Insolvency Regulation sets out harmonised rules on conflict of laws and jurisdiction applying to intra-EU collective insolvency proceedings. The regulation specifies in Annex A the relevant insolvency proceedings to which it applies in each member state (other than Denmark), which for Belgium are bankruptcy, all types of judicial reorganisation, liquidation, temporary divestiture and matters relating to private individuals’ collective debt rescheduling (EU insolvency proceedings). With respect to Belgium, other types of Belgian insolvency procedures bringing about mandatory *pari passu* ranking of unsecured creditors (such as voluntary or judicial winding up or attachment proceedings under the Belgian Judicial Code) thus fall outside its scope. For

further detail on the EU Insolvency Regulation please refer to the chapter on the European Union.

Outside the scope of the EU Insolvency Regulation

National conflict rules – Private International Law Code

Except as set out further below, situations not covered by the EU Insolvency Regulation are governed by the Belgian Private International Law Code. The provisions of the Code containing the conflict of laws rules relating to insolvency proceedings follow, to a large extent, the rules set out in the EU Insolvency Regulation. This means that:

- insolvency proceedings falling under the Code are those existing under Belgian law (bankruptcy, judicial reorganisation and collective debt rescheduling) but also foreign proceedings based on a debtor’s collective insolvency; and
- insolvency proceedings can be principal proceedings (ie, universal proceedings having effect on all the debtor’s assets) or territorial (secondary) proceedings (ie, having effects limited to the debtor’s assets located within the territory of the state where the proceedings are opened).

As to the criterion of jurisdiction allowing Belgian courts to open insolvency proceedings, the Code provides that main proceedings may be opened in Belgium when:

- the principal establishment of the debtor is in Belgium – one should note in this respect that the notion of principal establishment is similar (although not exactly identical) to the concept of COMI in the EU Insolvency Regulation; or
- the registered office of the company is in Belgium (which is an additional connecting factor by comparison with the EU Insolvency Regulation).

The Code also upholds the jurisdiction of the Belgian courts to open territorial proceedings when the debtor has an establishment in Belgium (and principal establishment or COMI outside the territory of the European Union).

Moreover, the Code provides for an automatic recognition of certain foreign decisions on insolvency. Execution requires an *exequatur*, a condition also required by the EU Insolvency Regulation.

Insolvency treaties

Belgium has entered into bilateral insolvency treaties with Austria, France and the Netherlands. The scope of application of such insolvency treaties has become very limited following the EU Insolvency Regulation and the legislative changes relating to the reorganisation and winding up of credit institutions and insurance undertakings by the Law of 6 December 2004. It remains limited by the current EU Insolvency Regulation. The bilateral treaties only apply with respect to matters that are not covered by the EU Insolvency Regulation and with respect to entities that are not covered by either the EU Insolvency Regulation or the EU directives on the reorganisation and winding up of credit institutions and insurance undertakings.

EEX

While the EEX Treaty (which for the EU member states has been effectively replaced by the Brussels Regulation No. 1215/2012 of 12 December 2012) in principle does not apply to insolvency proceedings, it may nevertheless cover situations that are connected to insolvency proceedings (eg, out-of-court settlements and claims for compensation by the bankruptcy trustee against the purchaser of assets sold by the debtor in the suspect period). In such event, there may be a divergence between the applicable jurisdiction and enforcement rules for aspects covered by the EU Insolvency Regulation and others covered by the EEX Treaty. This may lead to possible parallel proceedings in several jurisdictions that are not subject to coordination and mutual information rules, similar to those applying between principal and secondary proceedings in the context of the EU Insolvency Regulation.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

There are currently no plans to adopt the UNCITRAL Model Law on Cross-Border Insolvency into Belgian law.

52 Foreign creditors**How are foreign creditors dealt with in liquidations and reorganisations?**

Foreign creditors are treated in the same way as Belgian creditors in a Belgian insolvency, although note that:

- when taking legal proceedings in Belgium, foreign creditors can be required, to the extent no particular treaty exemption applies, to put up a bond or collateral to cover the amounts that could become due as a consequence of the proceedings (*cautio judicatum solvi*); and
- other than to the extent enforcement is recognised under EC Council Regulation No. 1215/2012, a creditor can only proceed to enforcement of a foreign judgment (including attachments) if a Belgian court has made an *exequatur* order (ie, a formal recognition of the judgment and confirmation that it is enforceable in Belgium).

Exceptionally, a foreign creditor's claims may be barred or reduced in insolvency proceedings if the court finds that it has recovered assets abroad in breach of the equal treatment of creditors' provisions.

53 Cross-border transfers of assets under administration**May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?**

In general, the EU Insolvency Regulation, and the relevant provisions of Belgian domestic law, do not allow the transfer of assets from an administration in one country to an administration in another country. One exception to this is that if secondary insolvency proceedings result in a surplus, the remaining assets will be transferred to the liquidator of the main proceedings (article 49 of the EU Insolvency Regulation).

54 COMI**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?**

COMI has been inserted in the Insolvency Act as the criterion to determine the competent court in relation to an insolvency. Presumptions are created in this regard: in the case of a legal person, the COMI is assumed to be its registered office (unless this office has been transferred in the three months preceding the request for insolvency procedure) but if the debtor is self-employed, the COMI is assumed to be the place of principal activity of the debtor or, for the person exercising a liberal profession requiring registration, the place of registration (unless this place has been transferred in the three months preceding the request for insolvency procedure).

As indicated above, Belgian law currently does not use the concept of a group of companies for insolvency purposes. Therefore, the determination of the COMI of group companies is not relevant.

55 Cross-border cooperation**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 Belgian Private International Law Code states that a decision in foreign insolvency proceedings, not falling within the scope of the EU Insolvency Regulation, may be recognised and executed in Belgium. The competent courts for the recognition of foreign insolvency proceedings are the commercial courts, with an exception for proceedings for insolvent individuals, for which the courts of first instance are competent. The courts will only recognise foreign decisions if certain conditions are met, such as the compatibility with Belgian public order, the respect of the rights of defence and the recognition needs to relate to a final decision.

The Private International Law Code also imposes a general obligation of cooperation on the bankruptcy trustee of the main or territorial proceedings opened in Belgium with the administrator of the foreign proceedings, subject to a condition of reciprocity and only insofar as the costs of such cooperation are not excessive, taking into account the debtor's assets.

Although not prohibited under Belgian law, the instances in which Belgian courts have entered into communications with foreign courts in cross-border insolvencies and restructurings have been very limited. Such communication was attempted in the framework of the bankruptcy of Lernout & Hauspie Speech Products NV (L&H). At the end of 2000, L&H obtained bankruptcy protection under Chapter 11 of the US Bankruptcy Code. At the same time, L&H filed a request for judicial composition in Belgium. In this framework, Stonington Partners Inc made a claim resulting from securities fraud. Under US law, this claim would have been subordinated to other claims and would thus effectively not have been allocated any share in the bankruptcy estate. Under Belgian law, the claim (if proven) would have ranked *pari passu* with all other unsecured claims. The relevant US court decided to apply US law. The Court of Appeal overruled this decision and made a 'strong recommendation' to the bankruptcy judge to enter into direct communication with the Belgian bankruptcy trustees and the Belgian court. The lower court, however, refused to follow this recommendation and no actual communication between the Belgian and US courts was made.

We are not aware of any courts that have refused to recognise foreign proceedings or to cooperate with foreign courts.



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56 Cross-border insolvency protocols and joint court hearings

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?

There are no official cross-border insolvency protocols (or other similar arrangements) between Belgian courts and courts in other countries. The occasions in which Belgian courts have communicated with courts in other countries in cross-border insolvency proceedings have been very limited. The best-known attempt to establish such communication was made in the framework of the L&H insolvency (see question 55).

Bermuda

John Wasty

Appleby

General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The Companies Act 1981 (Companies Act) and the Companies (Winding-Up) Rules 1982 (Rules) are the main pieces of legislation regulating the reorganisations and insolvencies of corporate entities in Bermuda. The reorganisation and insolvency regimes provided by the Companies Act are derived largely from the English Companies Act 1948.

2 Excluded entities and excluded assets

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

The Companies Act is applicable to the insolvencies or reorganisation of all corporate entities in Bermuda, save to the extent that its provisions are amended by other legislation that applies to specific types of corporate entities, including: the Insurance Act 1978 for licensed insurance companies; the Segregated Accounts Companies Act 2000 for licensed segregated accounts companies; and once in force, the Banking (Special Resolution Regime) Act 2016 (Banking (Special Resolution Regime) Act) for licensed banks.

Assets that do not properly form part of an entity's estate upon the commencement of that entity's insolvency are excluded or exempted from claims of creditors; such assets being those that: have been validly charged as security for a debt; are held in trust by the insolvent entity; or have been validly assigned.

3 Public enterprises

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

The Companies Act is applicable to the reorganisations and insolvencies of government-owned enterprises in Bermuda, with no special or extra remedies accruing to their creditors. A court-supervised insolvency of a government-owned entity has yet to be pursued in Bermuda.

4 Protection for large financial institutions

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

There is no legislation in Bermuda providing for the insulation or protection of financial institutions in difficulty through beneficial financial or economic policies from the Bermuda government or otherwise. While the Banking (Special Resolution Regime) Act provides special rules for the insolvency of licensed banks, it does not provide for bailouts.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

A petition for the reorganisation or winding up of a company, and any ancillary applications thereto (for example, an application for the appointment of provisional liquidators), is made to the Supreme Court of Bermuda, Commercial Court. There is a right of appeal to the Court of Appeal of Bermuda, with leave for appeals from interlocutory orders and without leave for final orders. The appellant is usually required to provide security for the costs of an appeal in accordance with the directions of the Registrar of the Court of Appeal.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

The Companies Act provides for the voluntary liquidation of a company by way of a 'members voluntary winding up' or a 'creditors voluntary winding up' pursuant to a resolution for the company's winding up being passed at a general meeting of its shareholders.

From the commencement of the voluntary winding up, the company ceases to carry on business except to the extent required for its beneficial winding up.

To pursue a members' winding up, the majority of the directors of the company must file a statutory declaration to the effect that in their opinion the company will be able to pay its debts in full within a stated period, not exceeding 12 months from the commencement of the winding up.

To pursue a creditors' winding up, the company must convene a meeting of the company's creditors for the day, or the day following the day, of the commencement of the winding up for purposes of appointing a liquidator.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

The only court-supervised reorganisation procedure in Bermuda is the 'scheme of arrangement' procedure provided for in sections 99 and 100 of the Companies Act. A scheme of arrangement may be initiated by the company, any member or creditor of the company or, where applicable, a liquidator who has been appointed in relation to the company. A proposed scheme must represent a compromise or arrangement between the company and its creditors or members, or any classes thereof.

8 Successful reorganisations

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

For a scheme to be presented to the Bermuda courts for sanction, a majority in number representing 75 per cent in value of the creditors or members present and voting either in person or by proxy at each creditors' or members' class meeting, as the case may be, must approve the scheme.

Classes of creditors are determined by the requirement for a class to be confined to those persons whose rights (as affected by the proposed scheme) are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

'Cram up' or 'cram down' (as those terms are generally understood in reorganisation proceedings) of a scheme of arrangement on to any dissenting class of creditors or members is not permitted in a Bermuda scheme of arrangement. To the extent that any single class of affected creditors or members fails to approve the scheme of arrangement by the requisite majority, the scheme will fail in its totality.

Depending on the law governing the underlying obligation, a scheme of arrangement may include third-party releases from liability.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Typically, a creditor seeking to place a debtor into insolvent winding up in Bermuda will present a petition to the court seeking such relief on the grounds that: the company is unable to pay its debts; or it is just and equitable for the company to be wound up.

The proceedings of an involuntary winding up differ from those of a voluntary winding up in that: the provisional liquidator or liquidator in an involuntary winding up must obtain the sanction of the court or the committee of inspection before taking certain actions; upon the final distribution of the assets to the creditors or members, the liquidator must obtain an order from the court for its release and for the dissolution of the company.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

There are no involuntary reorganisation procedures in Bermuda; reorganisations may only proceed with the support of the company or its liquidator, as the case may be.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

The Companies Act does not provide a statutory mechanism for an expedited reorganisation, including a reorganisation by way of a 'pre-packaged' arrangement.

A reorganisation may be largely informally pre-negotiated with a liquidator prior to his or her appointment on the informal understanding that the liquidator will, once appointed, agree to the pre-negotiated deal. An informal arrangement of this nature will have a similar effect to a 'pre-package' deal but the structure, content and nature of each such arrangement will be bespoke to its specific circumstances. The liquidator will not, and as a matter of law cannot, be bound to enter into the pre-negotiated arrangement if and to the extent that, upon his or her appointment, the liquidator does not consider the pre-negotiated arrangement to be in the best interests of the company's creditors.

12 Unsuccessful reorganisations

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 scheme of arrangement is defeated if: the scheme is not approved by the requisite majority of each class of affected creditors or members, as applicable; or the scheme is not sanctioned by the courts.

The effect of a scheme of arrangement not being approved is that the company's and its creditors' or members' rights and obligations remain unchanged (ie, the failure of a scheme of arrangement has no residual effect).

If the debtor fails to perform the plan (once sanctioned by the court), the creditors or members, as applicable, may seek the assistance of the courts in enforcing the plan.

13 Corporate procedures

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

There are no corporate procedures for the dissolution of a corporation outside of the voluntary winding-up procedures provided for in the Companies Act (ie, members' voluntary winding up and creditors' voluntary winding up).

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

After the liquidator has realised the debtor's assets and paid off the respective debts and expenses or made any necessary distributions, the liquidator, in the case of involuntary liquidations, must apply to the court for an order releasing him or her and dissolving the company.

In voluntary liquidations, the company is deemed to be dissolved following a final resolution of members pursuant to which the liquidator's final accounts are accepted. The liquidator will notify the Registrar of Companies of the company's dissolution, who will strike the company from the Register of Companies.

A scheme of arrangement is formally concluded by the delivery of the court's order sanctioning the scheme of arrangement to the Registrar of Companies.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

The Companies Act does not define or use the terms 'solvency' or 'insolvency', but rather refers to a company being 'unable to pay its debts'. A company will be deemed to be unable to pay its debts if: the court is satisfied that the company is unable to pay its debts taking into account the contingent and prospective liabilities of the company; the company fails to discharge an undisputed statutory demand exceeding 500 Bermuda dollars within 21 days; or execution of a judgment or order against the company is returned unsatisfied.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

A company is not under any statutory duty to commence winding up in circumstances where it is insolvent or likely to become insolvent. In insolvent circumstances, however, the directors of a company must act in the best interests of the company's unsecured creditors. Directors who consider a winding up of the company to be in the best interests of the company's unsecured creditors, but who are outvoted on the issue, usually resign from office.

Directors and officers
17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Bermuda law does not incorporate the concept of 'wrongful trading' in circumstances where the company continues to trade while insolvent. See question 18 for further details on other sources of directors' liability.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Following the commencement of winding-up proceedings, a director may be held personally liable for the company's obligations (in such amounts as the court considers just or appropriate) if it is shown that the director: was knowingly a party to the carrying on of the company with the intent to defraud creditors; misapplied, retained or became liable or accountable for any money or property of the company; or is guilty of any misfeasance or breach of trust in relation to the company. In certain circumstances, a director may also be personally liable for certain categories of the company's obligations such as unpaid taxes or pension contributions.

A director may be held civilly or criminally liable pursuant to the liquidation of the company, including:

- failing to provide the liquidator with full and frank disclosure;
- fraudulently removing or concealing the assets of the company;
- falsifying the accounts or affairs of the company;
- fraudulently inducing a person to provide credit to the company; or
- dealing with the assets of company with the intent to defraud the creditors.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

In circumstances where a company is insolvent (ie, unable to pay its debts) or is likely to become insolvent, the directors' duties shift from being owed to the company's general body of shareholders to being owed to the company's general body of unsecured creditors with continuing economic interests in the company. There is no bright line test as to when and to what extent the directors' duties shift to the company's unsecured creditors; the less the likelihood of the company escaping an insolvent winding up, the greater the degree to which the directors' duties are owed to the company's unsecured creditors.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

In the ordinary course in insolvent winding-up proceedings, the directors and officers of the company cease to have any powers upon the appointment of a liquidator or the making of a winding-up order.

During reorganisation proceedings, however, the extent of the directors' and officers' continuing powers may vary depending on the circumstances of the reorganisation. In circumstances where a reorganisation is pursued by a liquidator of a company that has already been wound up, the directors and officers of the company have no continuing powers. In circumstances where a provisional liquidator is appointed with limited powers to oversee the company's reorganisation ('light-touch' powers), the directors and officers may continue to exercise all powers subject only to those limitations, if any, required by the court.

Matters arising in a liquidation or reorganisation
21 Stays of proceedings and moratoria

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?

Upon the appointment of a provisional liquidator or the making of a winding-up order in relation to a company, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court.

Secured creditors are largely unaffected by the automatic stay of proceedings in that they may either enforce their security pursuant to 'self-help' remedies included in the security provisions or may otherwise obtain leave from the court to commence or continue enforcement proceedings against the company.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

Typically, a provisional liquidator or liquidator may continue to carry on business with the consent of the court or the committee of inspection. Subject to the court's or committee of inspection's sanction, expenses incurred by the liquidator in carrying on the business will be paid out of the assets of the company as expenses of the liquidation in priority to other unsecured creditors.

A provisional liquidator may be appointed with limited ('light-touch') powers to oversee the reorganisation of the company. In such circumstances, the directors and officers remain in control of the company and the company continues to carry on business as usual.

23 Post-filing credit

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

Generally, the debtor is not permitted to incur additional liabilities after insolvency proceedings have commenced. However, subject to the court's approval, a creditor may enter into a 'funding agreement' whereby a creditor may advance funds for specified purposes, typically to fund certain costs of the winding-up proceedings. The creditor of the funding agreement will receive priority repayment on the amount advanced to the liquidator ahead of unsecured creditors.

24 Sale of assets

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?

A liquidator may, subject to the court's or committee of inspection's sanction, sell any unsecured asset or the entire business of the debtor. Unless the asset is subject to continuing security or as otherwise specifically agreed, the purchaser will acquire the asset 'free and clear' of claims without any liabilities attaching thereto.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

In the ordinary course, stalking horse and credit bids (where the creditor is the original creditor or an assignee) are permissible in Bermuda. In assessing the fairness of a credit bid, the court will take into account relevant circumstances relating to the bid, and may seek to rely on an independent valuation by an expert assessor.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

With the leave of the court, a liquidator may disclaim any property belonging to the company, whether real or personal, including any right of action or right under a contract that in the liquidator's opinion is onerous for the company to hold or is otherwise unprofitable or unsaleable.

Before granting the liquidator leave to disclaim onerous property (including a contract), the court may require notice to be given to interested persons and may impose any conditions on the disclaimer as the court thinks just.

From the date of the disclaimer, the company will be released from its obligations in or in respect of the released property. The disclaimer does not, except so far as necessary, affect the rights or liabilities of any other parties. A person who is injured as a result of the disclaimer will be deemed a creditor in the company's winding up in respect of the amount of the injury.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

As a general rule, an IP licensor may not be able to terminate a company's right to use duly licensed IP as a result of the company entering into insolvency or reorganisation proceedings unless expressly entitled to do so in the relevant licencing agreements.

28 Personal data

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

The Personal Information Protection Act 2016 (PIPA) is anticipated to come into force in late 2018. PIPA outlines the requirements for the use and transfer of personal information by companies. In particular, PIPA requires, among other things, that personal information should be used: in a lawful and fair manner; for limited specific purposes; and adequately and not excessively in relation to its purpose. In terms of the transfer of data, PIPA expressly regulates the transfer of data to overseas third parties, but generally permits the transfers of personal information to third parties who adhere to a comparable level of protection as that required by PIPA.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

There are no known data on the frequency of arbitration in liquidation or reorganisation proceedings in Bermuda. Generally, disputes arising out of insolvency proceedings are not arbitrable as they fall under the exclusive jurisdiction of the courts (eg, disputes relating to the conduct of the liquidator or the validity of a winding-up petition). To the extent that the existence of a liability owed by the company to a creditor is disputed by the liquidator, and such dispute would normally be resolved by arbitration, the parties may commence or continue arbitration proceedings with the leave of the court.

Creditor remedies

30 Creditors' enforcement

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?

As detailed in question 2, secured assets do not properly form part of an entity's estate upon the commencement of that entity's insolvency and are excluded or exempted from claims of creditors. Secured assets may be seized outside of court proceedings pursuant to the 'self-help' provisions contained in the relevant security documents.

There are no other processes by which some or all of the assets of a business may be seized outside of court proceedings.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

In the ordinary course, outside of insolvency proceedings, an unsecured creditor may enforce a judgment by means of a writ of execution, writ of possession or garnishee order.

Pre-judgment attachment is not available to unsecured creditors. In certain circumstances, however, an unsecured creditor may be able to obtain injunctive relief prohibiting the company from disposing of assets pending judgment.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

In winding-up proceedings, notices are ordinarily given to creditors pursuant to:

- the presentation of the winding-up petition;
- the appointment of provisional liquidators or liquidators;
- the filing of proofs of debt;
- the convening of all creditor meetings; and
- the liquidator's application for his or her release and the dissolution of the company.

In winding-up proceedings, creditor meetings are convened:

- in the first instance, to approve the appointment of permanent liquidators and a committee of inspection, if any;
- annually to consider the liquidator's annual reports;
- as required to consider any extraordinary business; and
- finally, to approve the liquidator's final distribution account.

In winding-up proceedings, creditors are generally entitled to know the total assets and liabilities of the company and to receive copies of any reports submitted by the liquidator to the court. Creditors do not have a general right to access the books and records of the company, but may only do so through an application to the court. At the end of the liquidation, the liquidator must send a copy of the statement of receipts and payments of the liquidation to all creditors and contributories, together with a final report and notice of their intention to apply for release from the court.

In a scheme of arrangement, creditors receive an explanatory memorandum that details the nature and effect of the proposed scheme. The explanatory memorandum will include such financial information as is necessary to enable the creditors to make an informed decision regarding the scheme. Generally, creditors will receive notice of the proposed scheme of arrangement together with notice of the creditors' meeting.

33 Creditor representation

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 committee of inspection may be formed consisting of creditors or contributories (members) of the company. Subject to the sanction of the court, members of the committee of inspection are appointed by resolution of the creditors or the contributories, typically at the first meeting of creditors or contributories. The committee of inspection may sanction, in lieu of a court sanction, the liquidator:

- bringing or defending actions;
- carrying on the business of the company;
- appointing an attorney;
- paying any classes of creditors in full;
- making any compromise or arrangement with the company's creditors; and
- otherwise compromising calls and liabilities. They may also fix the remuneration to be paid to the liquidator.

Members of a committee of inspection are not paid except for reimbursement of their reasonable expenses, including the reasonable costs of advisers.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

Subject to the sanction of the court or committee of inspection, in circumstances where a liquidator has no assets to pursue a claim, a claim may be pursued: by a specific creditor pursuant to the claim being assigned to that creditor for value; or by the liquidator pursuant to a funding agreement.

35 Claims

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

A liquidator will notify creditors of the requirement to submit proofs of their debts by way of: advertising in the appointed newspaper in Bermuda; and by writing to all creditors appearing in the company's books and records. The liquidator will specify the time period in which all proofs of debts must be submitted, which must not be less than 14 days from the date of the notice. If a liquidator rejects a proof of debt, he or she must state his or her grounds in writing to the creditor. If the claim is rejected, a creditor can appeal the liquidator's decision by applying to the court within 21 days of receiving the notice of rejection.

Provided contingent or unliquidated claims arise from enforceable obligations, creditors of such contingent or unliquidated debts may submit proofs of debt on the basis of a just estimate.

Subject to public policy prohibitions against the trading in discounted debts of an insolvent company, a claim in liquidation can be assigned by a creditor and can be the subject of a proof of debt for the full amount (post-liquidation interest is payable after payment in full of all unsecured creditors' debts).

36 Set-off and netting

To what extent may creditors 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?

Automatic set-off arises pursuant to section 235 of the Companies Act and section 37 of the Bankruptcy Act 1989 (Bankruptcy Act), the latter providing that where there are mutual credits, mutual debts or

other mutual dealings between the insolvent company and a creditor, account shall be taken of what is due from the one party to the other in respect of mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party. It is not possible to contract out of section 37 of the Bankruptcy Act.

37 Modifying creditors' rights

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

No, the court does not have the jurisdiction to change the rank (priority) of a creditor's claim. The court may, however, order that post-liquidation debts will be paid in priority to all other unsecured claims.

38 Priority claims

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

In winding-up proceedings, all taxes owing to the Bermuda government and rates owing to a municipality will be paid in priority to the claims of unsecured creditors in the company. In the ordinary course, a secured creditor may enforce his or her security in priority to all other claims, subject only to the priority of other secured creditors.

In reorganisation proceedings, there are no statutorily mandated preferential payments or priority of claims.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Pursuant to section 33 of the Employment Act 2000 (Employment Act), upon the liquidation of an employer's business, all employment contracts will be automatically terminated one month from the date of the winding up, unless the business is continuing to operate.

Upon termination of an employment contract pursuant to the Employment Act, employees working in Bermuda may be entitled to recovery of accrued entitlements (payments for vacation and wages accrued) and severance pay equivalent to a maximum of 26 weeks of their annual salary and benefits.

Termination of employment may also give rise to claims for compensation or redundancy payments under the Employment Act or Workmen's Compensation Act 1965 (Workmen's Compensation Act) as an unsecured, preferential claim in liquidation. Save for any contractual provision otherwise, those claims are limited to a maximum of 2,500 Bermuda dollars per employee (irrespective of how many employees' contracts are terminated).

40 Pension claims

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

In winding-up proceedings, the following employee and pension related claims will be paid in priority to the claims of unsecured creditors in the company:

- wages and salaries;
- accrued holiday remuneration;
- unpaid contributions under the Contributory Pension Act 1970 (Contributory Pension Act) or other insurance contracts payable in the 12 months prior to the winding up of the company; and
- amounts due in respect of any compensation or liability for compensation under the Workmen's Compensation Act.

Apart from the priority of unpaid contributions under the Contributory Pension Act, there is no priority that attaches to claims for deficiencies in such plans.

In reorganisation proceedings, there are no statutorily mandated preferential payments or priority of claims relating to pension claims.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

There are no environment-specific provisions in Bermuda's insolvency or reorganisation processes that provide for the controlling and remediation of environmental damage.

42 Liabilities that survive insolvency or reorganisation proceedings

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

Generally, no liabilities of the company will survive the winding up of that company.

In reorganisation proceedings, only those liabilities that are compromised or otherwise discharged pursuant to the terms of the scheme of arrangement will be compromised or otherwise discharged. All other liabilities will survive the reorganisation proceedings.

43 Distributions

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

In winding-up proceedings, distributions are made to creditors by the liquidator: on an ad hoc basis with the sanction of the court or committee of inspection; or in accordance with the final distribution accounts.

In reorganisation proceedings, distributions are made to creditors in accordance with the terms of the scheme of arrangement.

Security

44 Secured lending and credit (immovables)

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

The principal types of security taken over immovable property are mortgages (legal and equitable) and fixed charges.

45 Secured lending and credit (movables)

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

The principal types of security taken over movable property are mortgages, fixed charges, floating charges, pledges and liens and retention of title clauses in contract.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Any conveyance, payment, execution or other act relating to property made or done by or against a company within six months before the commencement of its winding up may, in certain circumstances, be deemed a fraudulent preference of its creditors and accordingly held invalid. To constitute a fraudulent preference, the relevant act must have been done with the dominant intention to prefer the particular creditor who benefited from the act.

A floating charge granted by a company within 12 months before the commencement of its winding up is void unless the debtor can prove that it was solvent upon the grant of the charge, except to the extent that the charge was granted in exchange for cash consideration (together with any interest that has accrued on the consideration so provided).

A liquidator, with the sanction of the court, may disclaim any property belonging to the company (whether real or personal) which in his or her opinion is onerous for the company to hold or is otherwise unprofitable or unsaleable.

In any winding up by the court, any disposition of property of the company including things in action, and alteration of its members, made after the commencement of the winding up shall be void unless the court orders otherwise.

Irrespective of whether a company has commenced liquidation proceedings, a transaction may be vulnerable to being set aside by an eligible creditor as a fraudulent conveyance. To be set aside as a fraudulent conveyance, the transaction must constitute an undervalued disposition of property with the dominant purpose to place the property beyond the reach of creditors. Normally, eligible creditors have six years within which to initiate proceedings to set aside a transaction as a fraudulent conveyance, although this period may be extended to eight years in certain circumstances.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There are no restrictions on claims by related parties or non-arm's length creditors in Bermuda.

Groups of companies

48 Groups of companies

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

Normally, the court will uphold the legal concept of separate legal identity that accrues to a company. A court cannot order a distribution of group company assets pro rata without regard to the assets and liabilities of the individual corporate entities involved.

49 Combining parent and subsidiary proceedings

In 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?

Proceedings for the insolvencies and reorganisations of a group of companies may occur concurrently for practical efficiency but remain legally separate proceedings. In the absence of a scheme of arrangement or other consensual arrangement between the group of companies and their creditors, the assets of the companies are not pooled for distribution.

International cases

50 Recognition of foreign judgments

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?

Under the Reciprocal Judgements Act 1958 (Reciprocal Judgements Act), a judgment of a superior court in the United Kingdom or other designated common law jurisdiction may be registered as a judgment in the Bermuda courts to the extent the foreign judgment is: final and conclusive as between the parties; and is for a fixed sum of money (not being in respect of taxes or in respect of fines or penalties).

Under Bermuda's common law, the Bermuda courts may, subject to certain requirements, recognise judgments from foreign jurisdictions not otherwise qualifying for registration under the Reciprocal Judgments Act for a liquidated sum by way of summary judgment.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Bermuda has not adopted the UNCITRAL Model Law on Cross-Border Insolvency and is not currently considering its adoption. Foreign liquidators may apply for recognition in Bermuda pursuant to Bermuda's common law and the principles of comity.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

There is no distinction between foreign and local creditors in liquidations or reorganisations.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Yes, with the sanction of the Bermuda courts.

54 COMI

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?

As Bermuda has not adopted the UNCITRAL Model Law on Cross-Border Insolvency (see question 51), the concept of COMI does not have direct application in Bermuda. Any company to whom the Companies Act applies, being ordinarily a company that is incorporated in Bermuda, may avail itself of the insolvency and restructuring processes provided for in the Companies Act irrespective of whether it has any business operations or assets in Bermuda.

55 Cross-border cooperation

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?

There are no statutory mechanisms for the recognition of foreign insolvency proceedings or for cross-border cooperation in insolvency or restructurings. There is, however, substantial jurisprudence of the Bermuda court exercising its common law powers to recognise foreign insolvency and restructuring proceedings and to cooperate with courts of foreign jurisdictions, particularly in circumstances where:

- the subject company is incorporated in Bermuda;
- the subject company has assets located in Bermuda;
- the liquidators seek assistance that would be available to them both under the law of the foreign jurisdiction and under Bermuda law; and
- such recognition and cooperation are not contrary to Bermuda public policy.

56 Cross-border insolvency protocols and joint court hearings

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?

There is no statutory or formal protocol for the communication and cooperation of the Bermuda courts in cross-border insolvency proceedings. The Supreme Court has issued two practice directives relating to cross-border insolvencies: Guidelines Applicable to Court to Court Communications in Cross-Border Cases, dated 1 October 2007; and Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency matters, dated 9 March 2017. The latter is based on the draft guidelines adopted by the Judicial Insolvency Network in October 2016.

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

In Brazil, the main applicable law to corporate insolvencies and reorganisations is Federal Law No. 11,101/2005, known as the Brazilian Bankruptcy and Restructuring Law (BRL), which was enacted on 9 February 2005 and came into force on 9 June 2005, bringing significant changes to the legal treatment of Brazilian companies that are insolvent or in financial difficulties.

2 Excluded entities and excluded assets

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

BRL is not applicable to state-owned companies, mixed-capital companies, financial institutions, consortia, credit unions, supplementary pension companies, health care plan companies, insurance companies and electricity concessionaire.

Financial institutions, consortia and credit unions are regulated by Law No. 6.024/74 and Decree No. 2.321/87. The Central Bank of Brazil may decree the special temporary regime, intervention and extrajudicial liquidation of such company. BRL's appliance is supplementary in those cases.

Supplementary pension companies are regulated by Complementary Law No. 109/2001 and are subject to the decree of extrajudicial liquidation by the General Office of National Supplementary pension.

Supplementary pension companies and insurance companies are regulated by Complementary Law No. 109/2001 and are subject to the decree of extrajudicial liquidation by General Office of Private Insurance.

Healthcare plan companies are regulated by Law No. 9.656/98 and the National Agency of Supplementary Health may decree its intervention and extrajudicial liquidation.

In a judicial reorganisation, the debtor company may freely manage its business, but cannot sell or encumber its permanent assets without judicial authorisation or authorisation of the creditors at the General Creditors Meeting.

Creditors that are not subject to the proceeding may enforce their credit and seizure of the debtor's assets; however, only the judicial reorganisation court may decide on the destination of the debtor company's assets, even if it was seized by another court. In forced liquidation proceedings, all assets must be collected and sold by the judicial administrator, except those that are no longer the property of the debtor because of fiduciary transfer of assets.

3 Public enterprises

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

State-owned and mixed-capital companies are expressly excluded from BRL. However, there is not a specific law in Brazil on insolvency procedures for government-owned enterprises. In case of default of a government-owned enterprise, which does not have capacity to pay its debtors, the state (federal government, states and municipalities) is subsidiarily liable. Many scholars and practitioners argue that they should be subject to BRL, as the Brazilian Federal Constitution provides that state-owned and mixed-capital companies shall receive the same legal treatment accorded to private companies, including commercial, labour and tax rights and obligations. However, there are no court precedents on the possibility of applying the BRL to government-owned enterprises.

4 Protection for large financial institutions

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

Brazil has no specific legislation to deal with financial difficulties of institutions considered 'too big to fail'.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

According to BRL, the competent court to ratify out-of-court reorganisation plans, rule judicial reorganisation proceedings or declare the forced liquidation of a company is the estate court of wherever the main of the company is located. Some judicial districts have courts that are specialised in insolvency proceedings (bankruptcy courts), but if not, the proceedings must be conducted by regular civil state courts.

The right to appeal is established in BRL and in the Brazilian Code of Civil Proceeding, if all the requirements are met; there is no need of permission to appeal. Brazilian Law does not require posting security to proceed with an appeal; the appellant must only pay judicial fees (which may vary from state to state). The appeals must be filed with the state courts of appeals. Parties may also file appeals against the decision of the state court of appeals to the superior courts in the case of violation of federal laws (to the Superior Court of Justice) of the Constitution (to the Supreme Federal Court).

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

According to BRL, debtors that are facing an economical and financial crisis and do not meet the requirements to request judicial reorganisation may request their own forced liquidation. The debtor company

must present the reasons for not being able to carry on its business and submit the following documents:

- accounting statements for the last three financial years and those drawn up especially to support the forced liquidation request, prepared in strict accordance with applicable corporation law and consisting necessarily of:
 - balance sheet;
 - accrued income statement;
 - profit and loss statement as from the last financial year; and
 - cash flow statement;
- list of creditors, stating their address and the amount, classification and rating of the respective claims;
- list of assets and rights, titles proving the ownership of the assets and respective estimated appraisal;
- evidence of his or her status as businessperson, articles of association or bylaws in effect, or if there are none a list of all partners, their addresses and their personal assets;
- the mandatory books and accounting documents required by law; and
- list of managers and directors during the last five years, with their respective addresses, offices and equity holdings.

The judicial administrator will use the proceeds to first pay the following amounts before any legal preference as set forth by the Bankruptcy Law: (i) fees of the judicial administrator; (ii) sums provided to the bankruptcy estate by the creditors; (iii) expenses related to management and sale of the assets and legal fees of the liquidation proceeding; (iv) court costs with respect to actions and enforcement proceedings filed against the bankruptcy estate; (v) obligations resulting from valid legal acts performed and contracts agreed to during the judicial reorganisation proceeding, such as loans (debtor-in-possession (DIP) finance) and supply agreements, or after the decree of the liquidation, and taxes related to triggering events after the decree of the liquidation. Subsequently, the claims will be paid in the following preference order:

- labour claims of up to 150 minimum wages for each creditor, and claims deriving from accidents at work;
- secured credits up to the value of the collateral;
- tax debts;
- credits with special privileges;
- credits with general privileges;
- unsecured credits;
- contractual penalties, tax penalties and fines deriving from violations of legal provisions; and
- subordinated credits (as considered by law or agreement, and shareholders' and certain managers' credits).

In addition, if the debtor is in possession of assets (including money) that belong to third parties at the time of the liquidation decree by the court (by a leasing or fiduciary collateral sale agreement or advance of foreign exchange currency agreement, for example), rightful owners may request restitution of their assets before the payment of any creditor. In situations where assets no longer exist, the owner will be entitled to receive an equivalent amount in cash. The same will occur when a bank has disbursed funds to the debtor pursuant to an advance of foreign exchange agreement. In such cases, any restitution in cash will have priority and will only be subject to the previous payment of labour claims that have matured three months before the declaration of liquidation, up to a limit of five times the prevailing minimum wage per employee.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

A judicial reorganisation proceeding begins with the filing of a petition with the court, and may only be voluntary (ie, creditors cannot request a debtor's judicial reorganisation). To file the request the debtor cannot: (i) be bankrupt; (ii) have had another judicial reorganisation request granted within the past five years and eight years in case of small companies; and (iii) have been convicted of a bankruptcy crime.

The request must be filed with the following documents:

- a statement of the causes of the debtor's equity condition and the reasons for the economic and financial crisis;

- accounting statements for the last three financial years and those drawn up especially to support the petition, prepared in compliance with applicable corporation law and consisting necessarily of:
 - the balance sheet;
 - accrued income statement;
 - income statement as from the last financial year; and
 - management report on cash flow and projection thereof;
- a full itemised list of creditors, stating the address, type, rating and updated amount of the respective claim, and specifying its origin and schedule of payments as well as showing the accounting records on each pending transaction;
- a full list of employees, stating the respective functions, salaries, indemnities and other amounts to which they are entitled, with the corresponding accrual months, and specifying amounts pending payment;
- certificate of debtor's good standing at the Public Registry of Companies, coupled with updated articles of incorporation and minutes of appointment of current senior managers;
- a list of private assets of the debtor's controlling partners and directors/managers;
- updated statements of the debtor's bank accounts and of any financial investments of any kind, including those in investment funds or on stock exchanges, issued by the respective financial institutions;
- certificates of the protest offices in the judicial district of the debtor's domicile or headquarters and branches; and
- a list, signed by the debtor, of all ongoing lawsuits against the debtor, including labour-related suits, with an estimate of the respective disputed amounts.

If all requirements for the judicial reorganisation are met (eg, delivering the lists of creditors and of all lawsuits filed against the debtor, etc), the court will grant the request, appoint a judicial administrator (that may be a specialist company, a lawyer, a business management, an accountant or an economist) and order the publication of the list of creditors. This decision triggers a stay period of 180 days, during which enforcement actions (except tax enforcement actions and actions involving disputed, contingent or unliquidated claims) filed against the debtor will remain suspended. Brazilian courts have been admitting the extension of the stay period in cases where the debtor has not delayed the proceeding and needs more time to negotiate the restructuring with the creditors.

The debtor remains in possession of the assets and management of its activities. After the filing, the debtor cannot sell its fixed assets without prior authorisation of the court or of the duly approved plan at the creditors' meeting foreseeing the sale of the assets.

The role of the judicial administrator is limited to the supervision of the proceeding, verification of claims and organisation of the creditors' meeting.

After the publication of the list of creditors in the Official Gazette, creditors may file a credit claim to the judicial administrator challenging the list (its own claim or other creditors' claims) within 15 days. After 45 days, the judicial administrator must submit a new list. After the publication of the new list, creditors may file a credit claim with the court within 10 days. The court will then render a final decision on the credit claim.

The debtor must submit its reorganisation plan with the court within 60 days of the date of publication of the granting decision in the Official Gazette, under the penalty of a bankruptcy decree.

8 Successful reorganisations

How are creditors classified for purposes of a reorganisation 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 four classes of creditor in judicial reorganisation proceedings for purposes of voting at the creditors' meeting: (i) class I – labour creditors; (ii) class II – secured creditors; (iii) class III – unsecured creditors; and (iv) class IV – businesses creditors.

As a rule, the four classes of creditors must approve the plan by the majority of the votes of creditors attending the meeting: labour and microenterprises or small businesses must approve the plan on a

headcount basis, while secured and unsecured creditors must approve it both on a headcount and amount-of-claims basis.

The shareholders, affiliated companies, controllers, companies under control of the debtor, companies holding more than 10 per cent of the debtor's shares or companies in which the debtor holds more than 10 per cent cannot vote at the creditors' meeting.

If the plan is approved by (i) two out of the four classes of creditors; (ii) at least 50 per cent of the creditors attending the meeting, by amount of claims; and (iii) a third of the creditors in the dissenting class, the court may approve the plan by the 'cram down' mechanism. In case of rejection of the plan, the court must decree the debtor's liquidation. If approved, the court will analyse the legality of the plan and, afterwards, ratify it, causing the novation of all the credits subject to the judicial reorganisation.

The reorganisation plan may provide different classes of creditors, provided that it must treat equally creditors in the same conditions.

BRL provides that creditors may execute co-obligors, such as guarantors. For such reason, the Superior Court of Justice has recognised that clauses involving the release of co-obligors are illegal.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Any creditor may request the forced liquidation of a debtor in certain circumstances, including the following:

- failure by the debtor to comply with payment obligations in excess of 40 times the prevailing Brazilian minimum wage (which is 954 reais per month in 2018), provided that a protest with a public registry has been lodged with respect to the corresponding indebtedness. To reach the above threshold, two or more creditors can sum their credits;
- existence of debt collection proceedings against the debtor where no assets have been attached or if the debtor failed to post a bond correspondent to the value of the debt;
- the debtor has been engaged in actions such as unjustified sales of assets or fraudulent schemes against the interests of creditors; and
- failure by the debtor to comply with obligations under a judicial reorganisation plan.

The debtor company will be notified about the request. As a response to the request filed by a creditor, the debtor may: (i) pay the debt, causing the termination of the process; (ii) file a defence and post a bond with the Bankruptcy Court to avoid the liquidation decree (in case of rejection of the defence, the bond will be released to the creditor); (iii) only file a defence; or (iv) request its judicial reorganisation. If the defence is not accepted and the other possibilities are not accomplished by the debtor company, its forced liquidation will be decreed and the same effects mentioned in question 6 will take place.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

In Brazil, only the debtor company may request the commencement of its judicial reorganisation proceeding, there is no possibility of creditors doing so.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Extrajudicial reorganisation allows the debtor to restructure its debts with specific groups of creditors, for example, only financial institutions or secured creditors. In the extrajudicial reorganisation proceeding, the debtor negotiates the plan with its creditors (pre-package restructuring) and may request the ratification of the plan by the court. Extrajudicial reorganisation is only applicable to secured, unsecured, micro and small businesses. Labour and tax claims, credits with

fiduciary collateral or those arising from advance on exchange contracts cannot be affected by the extrajudicial reorganisation process.

The shareholders, affiliated companies, controllers, companies under control of the debtor, companies holding more than 10 per cent of the debtor's shares or companies in which the debtor holds more than 10 per cent also cannot vote at the creditors' meeting.

Bankruptcy Law does not provide a stay period for extrajudicial reorganisation cases. Yet, there are Brazilian court precedents that have applied the stay period to such cases (judicial reorganisation of Triunfo, Colombo and Enseada).

The debtor must obtain the approval of creditors representing more than three-fifths of each type of creditor included in the extrajudicial reorganisation to obtain the ratification of the plan by the court and bind dissenting creditors.

12 Unsuccessful reorganisations

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?

The debtor (creditors cannot submit a plan) must submit its reorganisation plan with the court within 60 days of the date of publication of the granting decision in the Official Gazette, under the penalty of a bankruptcy decree. After the publication of a notice informing the creditors about the plan, creditors may file objections against the plan within 30 days. If there is no objection, which is not usual, the plan will be automatically approved. However, in the case of an objection by any creditor, the court must convene a creditors' meeting to discuss and vote the plan. The debtor may modify or amend the plan even during the creditors' meeting.

In case of rejection on the plan, the court will decree the forced liquidation of the debtor.

After the ratification of the approved plan by court, the debtor must remain under judicial reorganisation for a period of two years under the supervision of the judicial administrator and the court. In the case of failure by the debtor to comply with the provisions of the plan during this period, the court may decree the debtor's liquidation. After such period, the judicial reorganisation proceeding is terminated, and in case of default by the debtor, creditors may request the debtor's liquidation or file an enforcement proceeding against the debtor seeking the payment pursuant to the conditions of the approved reorganisation plan.

13 Corporate procedures

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

Yes, the Brazilian corporate legislation provides for a winding-up proceeding. Technically, the winding up of a Brazilian company is the termination of the corporate entity itself. Therefore, normally the winding up encompasses three steps: dissolution triggering event; liquidation of all company's assets and liabilities; and termination of the legal entity and cancellation of Board of Trade entries and other enrolments with authorities.

According to Brazilian law, a company may be dissolved for several different reasons, such as:

- expiry of company's term, unless the company remains for a undefined term;
- quotaholders' or shareholders' resolution, according to specific quorums;
- lack of business operational authorisation;
- judicial annulment of incorporation;
- exhaustion of corporate purpose, or the same is held impossible; or
- upon dissolution conditions if provided for in the articles of association.

Finally, the law also provides for the termination without dissolution or even liquidation, in case of transformation, merger, consolidation or split. In such cases, the law provides for specific succession for the assets and liabilities of the terminated company, and on the protection of creditors' rights.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

After the ratification of the approved plan by court, the debtor must remain under judicial reorganisation for a period of two years under the supervision of the judicial administrator and the court. If the debtor successfully complies with the obligations set forth in the plan during the period of two years, the court will terminate the judicial reorganisation process.

Regarding forced liquidation proceedings, after being judicially decreed, the debtor company will be liquidated so that its assets can be attached and sold by the judicial administrator, and the amount obtained will pay the creditors. Only after the extinguishment of all obligations may the shareholders request the rehabilitation of the company, to be allowed to explore its activity once again.

All the debtor company's obligations will be considered extinguished if it is able to pay all of its debts, if it is able to pay up to 50 per cent of its unsecured debts, after five years of the end of the proceeding, or after 10 years of the end of the proceeding if there was any conviction for a bankruptcy crime.

The forced liquidation proceeding is a case of total judicial dissolution of the company. If, after the selling of all assets and the payment of creditors, there is any amount left – which is very difficult to determine – this amount will be given to the shareholders in proportion to their participation in the company's equity.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

Brazilian law does not define the concepts of 'insolvent' or insolvency'. However, generally, a company is considered insolvent if its debts exceed its assets.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

According to BRL, debtors that are facing an economical and financial crisis and do not meet the requirements to request its judicial reorganisation must request the declaration of their own forced liquidation. However, BRL does not provide for any penalty or liabilities for the debtor company that does not file for its own forced liquidation. There are also no specific consequences if a company carries on business while insolvent.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Please refer to question 16. There is no consequence for directors and officers if a company carries on business while insolvent; however, the liability on the insolvency state may be assessed in accordance with Brazilian corporate legislation.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

In forced liquidation proceedings, shareholders, controlling shareholders, directors and executive officers may be considered liable for debts or acts if the court considers that some requirements were fulfilled.

Regarding this topic, BRL provides that the Bankruptcy Court may investigate and determine shareholders, controlling shareholders,

directors and executive officers' liabilities if it verifies that they performed any act or omission that contravenes Brazilian law – such as corporate laws, tax laws, labour laws, among others – regardless of the collection of the assets and impossibility to pay all the creditors of the company.

As an example, the Brazilian Corporate Law sets forth, in its section 116, the definition and the rules of the conduct that shall be observed by the controlling shareholder, and section 117 provides the liability rule applicable to the controlling shareholder. Also, section 153 and following provides the duties of the company's directors and executive officers, and in case of violation of such duties or illegal acts in conducting social businesses, the managers shall be deemed liable for their acts.

So, in principle, if the company's shareholders or managers have contravened one of the sections mentioned above, there is a possibility that the court holds them responsible for certain obligations or acts, even if they are pre-bankruptcy actions.

BRL also predicts that in those cases, a responsibility lawsuit will begin in the Bankruptcy Court, and in this lawsuit, the defendant's assets can be blocked in a compatible amount to the damage caused, until final judgment. The term for the filing of such lawsuit is two years after the decision that ends the forced liquidation proceeding becomes unappealable.

Apart from that, based on section 50 of Brazilian Civil Code, the Court may disregard the company's corporate veil, if it considers that there was an abuse of its legal personality (in case of equity confusion and misuse of purpose). In this case, the shareholders would be considered liable for all the company's debts.

Finally, the public prosecutor may understand that the shareholders, officers or directors committed a bankruptcy crime and file a criminal action, considering that section 179 BRL determines that the shareholders, executive officers, directors and counsellors will be equivalent to the debtor company for the criminal effects of the BRL. Also, BRL sets out several criminal offences related to bankruptcy, which penalties can vary from one to six years of imprisonment, plus fine.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

The directors' duties do not shift to creditors when a judicial reorganisation proceeding is filed. In the course of judicial reorganisation proceedings, in principle there will be no change in management. Therefore, the managers of the debtor will retain their positions, although working under the supervision of the creditors' committee (if any) and a judicial administrator appointed by the court.

In certain circumstances, however, managers shall be removed from their positions, including when:

- there are indicia of bankruptcy crimes;
- they have acted with wilful misconduct or engaged in fraudulent schemes against creditors;
- they have been making personal expenditures that are not compatible with their income; or
- their removal is specified in the reorganisation plan.

When regulating the removal of managers, BRL initially states that they shall be replaced as provided for in the corporate documents of the debtor or in the reorganisation plan. But immediately following this provision, it provides another solution to the same scenario by specifying that the general meeting of creditors shall appoint a judicial manager.

In forced liquidation proceedings, the debtor (either an individual businessperson or a company) is removed from its activities and the existing assets are attached and sold by a judicial administrator (which may continue activities if it is understood by the bankruptcy court to be beneficial for the creditors). Any proceeds derived from the sale of assets are distributed among different creditors according to a preference order established by law. Therefore, the directors are removed and substituted by the judicial administrator.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Please refer to question 19 above. In judicial reorganisation proceeding, the directors retain their positions and may exercise all powers; however, permanent assets can only be sold with judicial authorisation and credits subject to the proceeding cannot be paid.

In forced liquidation proceedings, the directors are removed from their post and substituted by the judicial administrator; therefore, they have no powers.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

In judicial reorganisation proceedings, a suspension of 180 days shall apply to all legal proceedings in course against the debtor, in relation to debts that are subjected to the proceeding. Upon the expiry of such term, all creditors regain the right to initiate or proceed with their lawsuits against the debtor. In practice, this term tends to be extended by the Bankruptcy Court. In forced liquidation proceedings, there is also the provision of suspension of all legal proceedings in course against the debtor indefinitely, once all creditors must be paid within the proceeding, in accordance to a legal preference order.

There are two exceptions to the suspension rule: lawsuits where there are no pre-defined amounts being claimed, and labour claims, which shall continue their course in the Labour Court until the applicable labour credits are defined. In these two cases, the competent court may send an order to the court in charge of the restructuring proceedings establishing an estimated amount to be reserved in the names of the relevant creditors. Once such amounts are finally determined, they shall be included as credits in the restructuring proceedings.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

The debtor company can carry on its business activities during reorganisation. The sale of permanent assets may only occur if provided in the approved and ratified reorganisation plan or if authorised by the Bankruptcy Court after the debtor company has proven the need of such sale and the creditors' committee (if there is any) has also agreed.

BRL provides that creditors may elect a committee of creditors, which is formed by one representative of each class with two deputy members, elected by the respective classes. The committee of creditors' role is to: (i) supervise and examine the activities of judicial administrator; (ii) inform the judge in case of violation of rights or losses of the creditors; (iii) render opinions on issues requested by other creditors; (iv) request the court to convene the creditors' meeting in cases established by law; (v) supervise the debtor's activities and submit monthly reports with the court; (vi) supervise if the debtor is complying with the obligations of the plan; and (vii) request the sale of the debtors' assets in cases when the managers are removed from the company.

The creditors, if not in a creditors' committee, have no active role in supervising the debtor's business activities.

It is the role of the judicial administrator to supervise the debtors' activities and compliance with the obligations set forth in the plan during the proceeding and during the supervision period.

The creditors who supply goods or services to the debtor company after the filing for reorganisation will not be subject to the proceedings and the credits originated after the filing may be enforced, and in case of forced liquidation, will have priority of payment. BRL does not grant any special treatment to such creditors, but usually there are provisions

in the plan providing that such creditors will have better payment conditions to stimulate creditors to maintain the relationship with the company and preserve its activities.

23 Post-filing credit

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

The company under reorganisation may continue its ordinary activities unless otherwise ordered by the court, which includes obtaining unsecured financing, so the debtor company does not need to obtain any approval towards the court to receive loans. Secured financing needs to be authorised by the court or by the creditors at the creditors' meeting if the security is a permanent asset.

The loans granted after the filing will have priority in a liquidation scenario (refer to question 6).

24 Sale of assets

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?

The reorganisation plan may provide for a judicial sale of branches or individual going concerns belonging to the debtor. This also occurs in forced liquidation proceedings. The judicial sale may take the form of an auction, be effected through proposals submitted in sealed envelopes, or be a combination of the former two options.

Once the judicial sale is effected, the relevant branch or going concern will, in principle, be free and clear of any liens and encumbrances, and the purchaser will not succeed the debtor with respect to any indebtedness. As a consequence, creditors will not be able to claim any amount from the purchasers of branches or going concerns, and the corresponding assets will not be attached to satisfy their credits. Therefore, creditors will simply retain their original claims against the debtor.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

BRL does not provide a 'stalking horse' or credit bidding, but these mechanisms have been recently used in sale proceedings, especially if provided in a judicial reorganisation plan and approved by the creditors. Credit bidding may also occur if the credit bidder is an assignee of the original secured creditor and if the amount of the credit is reduced in the amount of the purchase price.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 debtor company under reorganisation continues its business activities and directors and officers are not removed from their positions, as a rule. Also, BRL has no provision on termination of contracts in case of judicial reorganisation. Therefore, the debtor can reject or disclaim an unfavourable contract, but it must follow the contractual rules regarding the reasons of the rejection and the proceeding for it. In case of default by the creditors, the other party may terminate the contract in accordance with the contract's provisions.

In a liquidation scenario, the judicial administrator may opt to continue the fulfilment of the contract for a certain period to avoid debt increase or if it is necessary to preserve and maintain the bankruptcy estate's assets. The contracting party may notify the judicial administrator to respond if the debtor continues complying with the contract.

In case of termination, the contracting party will be entitled to an indemnity.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

In the case of judicial reorganisation proceedings, the IP licensor or the debtor company may only terminate the debtor's right to use it if the contractual provisions allow it to do so, and the contractual provisions and remedies must be observed. Also, the provisions of termination caused solely by the filing of the judicial reorganisation tend to be considered null by Brazilian courts. In a forced liquidation proceeding, the judicial administrator may opt to maintain the agreement if it reduces or avoids the increase of the debts or if it helps to maintain and preserve the debtor company's assets, but it will not be able to terminate the agreement and continue to use the IP for the benefit of the estate.

28 Personal data

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

There is no restriction in BRL on the use of personal information or customer data collected in an insolvency proceeding or the transfer of that information, as an asset, to a purchaser.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Arbitration is not used specifically in insolvency proceedings, but is often used in commercial disputes and claims between parties. The arbitration claims involving the debtor company generally are not suspended in case of judicial reorganisation, because in arbitration commonly there are no pre-defined amounts being claimed.

Creditor remedies

30 Creditors' enforcement

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?

In case of fiduciary lien, the creditor has the right of repossession of the property in the event of default, through administrative proceedings and after an auction, if no acceptable bids are presented. Post-filing creditors and creditors that are not subject to the judicial reorganisation, may seize outside of court proceedings. Creditors with fiduciary lien over essential assets to the debtors' activities cannot execute the guarantee during the stay period. However, pursuant to Brazilian courts' precedents, the court presiding over the judicial reorganisation is the one competent to authorise and decide on seizures over the debtors' assets. Usually, courts reject seizures of assets essential to the debtors' activities or to the compliance of the plan.

In forced liquidation cases, creditors cannot seize the debtor's assets outside the proceeding.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

In a judicial reorganisation proceeding, unsecured creditors are a specific class of creditors, and are paid according to the provisions of the approved and ratified reorganisation plan. In a forced liquidation

proceeding, unsecured creditors are the sixth in the ranking of creditors for payment purposes, which is applied after the payment of priority creditors.

If there is no insolvency proceeding, unsecured creditors may collect or enforce their credits with different proceedings according to each type of debt instrument. Certain instruments allow the creditor to file an enforcement proceeding, which is less time consuming and provides for the possibility of pre-judgment attachment of assets. Regular collection lawsuits are more time consuming and do not allow pre-judgment attachment of assets. There is the possibility, however, of obtaining temporary restraining orders, if requirements are met.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

The creditors are first notified through a public notice about the decision that authorises the processing of the judicial reorganisation or the decision that decrees the forced liquidation, containing the list of creditors presented by the debtor company. After that, they are again notified about the list of creditors presented by the judicial administrator. Then, the creditors will be notified about the presentation of the reorganisation plan, as applicable, and also about any general meeting of creditors that is scheduled. Any and all decisions of the proceedings are also published in the official gazette.

General meetings of creditors may be called upon request of the Bankruptcy Court, the Judicial Administrator, creditors' committee or creditors holding at least 25 per cent of the claims in a determined class of creditors. General meetings of creditors are also called to discuss and vote on the reorganisation plan proposal and in other specific events provided in BRL.

The judicial administrator has several duties and obligations, both in judicial reorganisations and forced liquidation proceedings, provided in section 22 of BRL, including presenting monthly reports on the debtor company's activities, as well as providing any information requested by the Bankruptcy Court or the creditors.

In liquidation and judicial reorganisation, the creditors have access to information concerning the assets and their appraisal, name of the creditors, respective claims and classification. In liquidation cases, the judicial administrator has to submit periodically reports to the court on the management, payments of creditors and expenses of the estate. In judicial reorganisation cases, the judicial administrator shall submit monthly reports on the financial situation based on information provided by the debtor.

33 Creditor representation

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?

BRL contemplates an optional creditors' committee, and must be constituted of one creditor of the labour class, one creditor of the secure class, one creditor of unsecured class and one creditor of the micro businesses class. However, the creditors' committee is rarely constituted in Brazil, as creditors can vote, negotiate and take part in the proceedings even if they are not in the creditors' committee. Additionally, members of the creditors' committee can be held liable for the outcome of the proceedings (even if they do not have an intention to harm third parties, creditors or the debtor company). The expenses of the committee may be paid by the debtor company.

The creditors' committee has the following duties, among others:

- monitor the activities carried out by the debtor and the judicial administrator and present monthly reports about them;
- inform the court in case it detects any violation or harm of the creditors' rights;
- monitor the fulfilment of the restructuring plan; and

- when managers are removed and until the restructuring plan is approved, request court authorisations for sales of assets, borrowings and the creation of security interests to ensure the continuation of business activities.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

In a forced liquidation proceeding, creditors may not pursue the estate's remedies, as the judicial administrator represents the bankrupt estate to pursue remedies against third parties. The fruits of the remedies belong to the bankrupt estate and will be used to pay the creditors according to the legal order of payment. In a judicial reorganisation proceeding, there is no bankruptcy estate and the debtor company continues to operate its activities.

35 Claims

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

In both judicial reorganisation and forced liquidation proceedings, the creditors may submit a credit claim to the judicial administrator against the first list of creditors presented by the debtor company.

After the publication of the list of creditors in the Official Gazette, creditors may file a credit claim to the judicial administrator challenging the list (its own claim or other creditors' claims) within 15 days. After 45 days, the judicial administrator must submit a new list. After the publication of the new list, creditors may file a credit claim with the court within 10 days.

In a liquidation proceeding, the creditor may ask the court to reserve claims for contingent or unliquidated amounts to be recognised in the future.

BRL does not contain any provisions.

36 Set-off and netting

To what extent may creditors 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 credits that are submitted to the reorganisation proceeding cannot, in principle, exercise rights of set-off, considering that, in principle, creditors of the same class or sub-class must be treated equally. However, the plan may authorise set-off or netting. On the other hand, in a reorganisation proceeding, credits that are not submitted to the proceeding may be, as a rule, offset.

In a forced liquidation proceeding, the offset is possible. The debts that can be offset are the ones owed by the debtor company until the date of the judicial decree of the forced liquidation, and the Brazilian Civil Code must be followed for carrying out such offset. However, the offset is not possible with debts existing after the decree of the forced liquidation (with exception of cases of merger, incorporation, split or death), and with credits that were transferred when the insolvency situation was already known or related to fraud or intention to harm. Generally, under a forced liquidation proceeding, the offset of debts does not require court approval.

37 Modifying creditors' rights

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

Yes. Upon filing of a credit claim by a creditor or the debtor to discuss the nature of the claim, the court may change the rank in a liquidation case and the class in a judicial reorganisation case. The court may

consider that: (i) the creditor has or does not have a valid guarantee; (ii) the appraisal value of the guarantee does not correspond to the value of the claim, and, consequently, the difference between the valuation of the asset granted as guarantee and the claim must be classified as unsecured credit.

38 Priority claims

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

In judicial reorganisation proceedings, there is no other privileged or priority claims, considering that all credits subject to the proceeding will be paid according to the provisions of the approved and judicially reorganisation plan.

In forced liquidation proceedings, the following amounts, must be paid prior to pre-filing claims: (i) fees of the judicial administrator; (ii) sums provided to the bankruptcy estate by the creditors; (iii) expenses related to management and sale of the assets and legal fees of the liquidation proceeding; (iv) court costs with respect to actions and enforcement proceedings filed against the bankruptcy estate; (v) obligations resulting from valid legal acts performed and contracts agreed to during the judicial reorganisation proceeding, such as loans (DIP finance) and supply agreements, or after the decree of the liquidation, and taxes related to triggering events after the decree of the liquidation. With regard to post-filing claims, only labour claims up to 150 minimum wages have priority over secured creditors.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

There is no specific provision in BRL regarding termination of employment agreements. In the judicial restructuring proceeding, considering that the debtor company continues to practise its business activities, the employment agreements remain in force and may be terminated by the regular legal hypotheses (dismissal with just cause, dismissal without cause, employee's resignation and indirect dismissal). In case of forced liquidation proceeding, with the sale of the debtor company's assets, all employment agreements of the encompassed employees will be automatically terminated and new agreements must be entered into with the purchaser, if the purchaser has such intention.

40 Pension claims

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

In Brazil, entities that must pay pension-related claims, such as the government and financial institution, are not allowed to file reorganisations and may not be liquidated under BRL.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The main environmental entity in Brazil is SISNAMA. There are national, state and municipal environmental regulatory entities responsible for controlling environmental problems and for remediating the damage caused.

Environmental liabilities of shareholders, directors, officers and third parties will be determined by specific environmental laws, with no possibility of being imposed on creditors.

42 Liabilities that survive insolvency or reorganisation proceedings

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

In a judicial reorganisation proceeding, any credit that exists on the date of filing, even if not yet matured, is covered by the proceeding and cannot be enforced by the creditor within the stay period. However, some specific types of credits are excluded from proceedings and may be immediately enforced upon; this means that these liabilities remain intact. The credits are: tax credits, creditors with title to assets and foreign exchange advancements credits. Credits that are subject to the proceeding will be paid according to the reorganisation plan and are due until its payment. If not paid in due time while the proceeding is still running, it may cause the decree of forced liquidation; if not paid in due time after the end of the proceeding, the credit may be enforced.

In forced liquidation proceedings, only credits secured by fiduciary sale of assets are excluded from the proceeding – they must, however, file a request for restitution in the proceeding to repossess the assets given in guarantee and that does not belong to the debtor company anymore. All the debtor company's obligations will be considered extinguished if it is able to pay all of its debts, if it is able to pay up to 50 per cent of its unsecured debts, after five years from the end of the proceeding, or after 10 years of the end of the proceeding if there was any conviction for a bankruptcy crime.

The reorganisation plan presented by a debtor company may provide for a judicial sale of branches or business units belonging to the debtor, which can also occur in a forced liquidation proceeding.

A judicial sale, according to section 1425 of BRL, may: take the form of an auction; be effected through proposals submitted in sealed envelopes; or be a combination of these two options.

Once a judicial sale is effected, the relevant branch or business unit will be free and clear of any liability, liens and encumbrances, and the purchaser will not succeed to the debtor with respect to any indebtedness. As a consequence, the creditors of the debtor company are not able to claim any amounts from the purchasers of branches or business units, and the corresponding assets cannot be enforced upon to satisfy the debt.

43 Distributions

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

In reorganisation proceedings, creditors that are subject to those proceedings will be paid according to the approved and ratified reorganisation plan. In the forced liquidation proceeding, creditors will be paid with the proceeds of the sale of the debtor company's assets according to the legal order of payment, below:

- labour claims of up to 150 times the prevailing minimum wage for each creditor, and claims deriving from accidents at work;
- secured credits up to the value of the relevant collateral;
- tax debts;
- credits with special privileges;
- credits with general privileges;
- unsecured credits;
- contractual penalties, tax penalties and fines deriving from violations of legal provisions; and
- subordinated credits (as considered by law or agreement, and shareholders' and certain managers' credits).

Some credits should be prioritised and paid before all of those mentioned above, in the order set forth below:

- the compensation payable to the trustee and his or her assistants, and labour-related claims or occupational accident claims referring to services rendered after the decree of the forced liquidation;
- sums provided to the bankruptcy estate by the creditors;
- expenses with schedules, management, asset sale and distribution of the proceeds, as well as court costs of the forced liquidation proceedings;
- court costs with respect to actions and enforcement suits found against the bankruptcy estate; and
- obligations resulting from valid legal acts performed and contracts agreed during the judicial restructuring proceeding, such as loans

and continuity of supply, or after the decree of the forced liquidation, and taxes relating to triggering events postdating the decree of the forced liquidation.

In addition, if the debtor is in possession of assets (including money) that belong to third parties at the time the forced liquidation is decreed (by a leasing or fiduciary sale agreement or advance of foreign exchange currency agreement, for example), rightful owners may request restitution of their assets before the payment of any creditor, which may be understood also as a priority over the order of preference of BRL. This is the case because such assets (which may include money) are understood by law and case law to not belong to the debtor, and, therefore, cannot be included as part of the bankruptcy estate.

Security

44 Secured lending and credit (immovables)

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

The two main types of security taken on immovable (real) property are mortgage and fiduciary lien. In case of a mortgage, the debtor maintains the property of the asset and will only lose it if the credit is enforced and the asset is sold in a judicial auction or adjudicated by the creditor. In case of fiduciary lien, the property is transferred to the creditor and it has the right of repossession of the property in the event of default. Both securities must be duly registered and give the creditor special treatment in case of judicial reorganisation or forced liquidation proceedings.

In a judicial reorganisation proceeding, creditors secured by mortgage or pledge are a specific class of creditors and will be paid according to the provisions of the approved and ratified reorganisation plan; and in a forced liquidation proceeding these creditors are the second in the ranking of creditors for payment purposes, which is applied after the payment of priority creditors. Credits secured by fiduciary transfer of assets are not subject to judicial reorganisation or forced liquidation proceedings, meaning that they may enforce the respective contracts and securities even if the debtor company is facing an insolvency proceeding.

45 Secured lending and credit (movables)

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

The two main types of security taken on movable (personal) property are pledge and fiduciary transfer of assets. In case of a pledge, the debtor maintains the property of the asset and will only lose it if the credit is enforced and the asset is sold in a judicial auction or adjudicated by the creditor. In case of fiduciary transfer, the property is transferred to the creditor and it has the right of repossession of the property in the event of default. These securities also give the creditor special treatment in case of judicial reorganisation or forced liquidation proceedings.

In a judicial reorganisation proceeding, creditors secured by mortgage or pledge are a specific class of creditor and will be paid according to the provisions of the approved and ratified reorganisation plan; and in a forced liquidation proceeding these creditors are the second in the ranking of creditors for payment purposes, which is applied after the payment of priority creditors. Credits secured by fiduciary transfer of assets are not subject to judicial reorganisation or forced liquidation proceedings, meaning that they may enforce the respective contracts and securities even if the debtor company is facing an insolvency proceeding.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

BRL contains a list of actions that shall produce no effects with respect to the bankruptcy estate, regardless of whether the parties were aware of the financial difficulties facing the debtor or whether there was any

Update and trends

On 9 May 2018, the Brazilian President introduced Bill of Law No. 10.220/2018 to modify BRL. Based on works made by a group of legal experts, the Legislative Bill was introduced to the President at the end of 2017 by the Finance Minister to the Civil Office and, after amendments, was introduced to the Brazilian National Congress.

The main changes presented of the Bill are as follows:

- Classes of creditors must be created by the judicial reorganisation plan: the current four classes of creditors will be extinguished and classes will be created and divided in accordance with the plan, provided that the creditors of each class have homogeneous interest.
- Prohibition of distribution of profits or shareholders' dividends: the Bill forbids the legal entity in the process of judicial reorganisation (or bankruptcy) the payment of profits or dividends to shareholders. BRL is silent in this regard.
- Regulation of abusive vote: for instance, voting will be considered abusive in cases of unlawful advantage for the creditor, if it is carried out with the purpose of harming the debtor or third parties. BRL does not regulate the abusive vote, but there are some precedents of Brazilian courts considering the abuse of the vote based on the abuse of rights in general (eg, in Schahin's judicial reorganisation, later converted into a bankruptcy, the court declared that the votes of a group of secured creditors was abusive due to the refusal to negotiate with the debtor).
- Derivatives: the Bill expressly states that the request for judicial reorganisation does not affect guarantees provided on repurchase agreements or derivatives. BRL does not contain any provisions with respect to the effects of the judicial reorganisation request on repurchase agreements or derivatives.
- Legal term in judicial reorganisation: the BRL provides for the legal term – a suspicious period during which certain transactions may be declared ineffective in the event of collective insolvency proceedings – only in liquidation cases. The Bill provides that the legal term will also be applicable to judicial reorganisation proceedings.
- An alternative judicial reorganisation plan may be submitted: the Bill sets forth that creditors may submit a plan provided

that (i) it is accepted by more than one-third of the total credits subject to the judicial reorganisation and (ii) it does not contain new obligations to the shareholders that were not established in previous agreements and sacrifice more of their capital than it would result from liquidation in case of a bankruptcy decree; and (iii) the debtor's managers are necessarily removed. Currently, BRL only allows the filing of the plan by the debtor. Creditors, shareholders and other stakeholders cannot submit an alternative plan. In the judicial reorganisation of Oi, a group of creditors (bondholders) filed an alternative plan, but the plan was rejected by the court.

- Judicial reorganisation conclusion: the termination of the judicial reorganisation procedure will occur when the judge homologates the judicial reorganisation plan (ie, the supervision period of two years, during which the court and the judicial administrator supervise the compliance of the plan by the debtor, would no longer exist).
- DIP financing: it might be carried out by creditors, partners and companies of the same group of the debtor and must be approved by the creditors. The DIP creditor will receive its payments with absolute priority in the order of receipt in case of liquidation.
- Procedural and substantial consolidation: the Bill regulates the hypotheses of procedural and substantive consolidation of judicial reorganisation. The BRL is silent on requirements to apply substantive consolidation.
- Extrajudicial reorganisation: the Legislative Bill provides the possibility of inclusion of the labour class in out-of-court reorganisation and application of the stay period (suspension of 180 days). Despite the lack of provision for extrajudicial reorganisation, Brazilian Courts have been applying the stay period in extrajudicial reorganisation cases (*Máquina de Vendas, Colombo Group, Triunfo*, etc).
- Bankruptcy and cross-border judicial reorganisation: the Bill provides for adoption of the UNCITRAL model.

The Bill is currently pending deliberation by a special commission in the House of Representatives.

fraudulent intent. Such actions are deemed incompatible with the reasoning underlying BRL. Accordingly, they may be disregarded automatically by the court or at the request of any interested party.

Actions considered ineffective include, for instance:

- payment of unmatured debts during the suspect period;
- payment of overdue debts effected during the suspect period in a manner that is different from what was established in the original agreement;
- the creation of security interests during the suspect period to secure payment of pre-existing indebtedness; and
- donations and other equivalent actions effected within the period of two years preceding the forced liquidation.

In addition to those actions deemed automatically ineffective, any action aimed at intentionally defrauding creditors may be revoked. In this case, however, the party seeking the revocation must prove, in a separate lawsuit, that there was a fraudulent scheme arranged between the debtor and a third party, and that the bankruptcy estate actually suffered damages as a result of such scheme.

The bankruptcy legal term, also known as the 'suspect period' or 'look back period', shall be set by the court upon the declaration of forced liquidation. It may retroact until 90 days before the forced liquidation request, the application for judicial restructuring later converted into forced liquidation or the first protest for non-payment lodged against the debtor.

Regarding reorganisation proceedings, there are no specific provisions under BRL to nullify or void certain acts of the debtor. However, creditors may opt to file lawsuits to nullify or void these acts in accordance with the Brazilian Civil Code and Code of Civil Procedure.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

In judicial reorganisation proceedings, insider claims of the debtor company's shareholders or parent, subsidiary or affiliate company will be ranked as unsecured and do not have voting rights in the general meeting of creditors. In forced liquidation proceedings, insider claims are classified as subordinated claims, which are the last in the legal order of payment.

Groups of companies

48 Groups of companies

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

The filing of an insolvency proceeding does not have a direct impact on a parent, subsidiary or an affiliate company of the debtor, once only the company that makes the request is considered under reorganisation or forced liquidation. However, parent, subsidiary or affiliated companies may be held responsible for the debtor company's liabilities in case of recognition of economic group and piercing of the corporate veil. The essential requirements are: abuse of the corporate veil, with deviation of the company's purpose or assets confusion between the companies. In each concrete case, the court will verify if such requirements are met – these requirements are more objective than just 'fraud' or 'abuse', but the decision by the court remains very subjective.

The distribution of group company assets pro rata without regard to the assets of the individual corporate entities involved may be determined; it is called substantial consolidation and it is very common in recent judicial reorganisation proceedings.

49 Combining parent and subsidiary proceedings

In 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?

The filing of an insolvency proceeding does not have a direct impact on a parent, subsidiary or an affiliate company of the debtor, once only the company that makes the request is considered under reorganisation or forced liquidation. There are grounds for procedurally consolidating insolvency proceedings involving related parties – it is actually common for companies of the same economic group filing together for reorganisation, and is commonly accepted by courts. However, there is case law discussion about substantively consolidating insolvency proceedings – if the reorganisation plan should or could or not be the same – and each court has its own understanding on the matter. There is no provision under the BRL addressing the transferring of assets between countries.

International cases**50 Recognition of foreign judgments**

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?

Brazil is not signatory to a treaty on international insolvency or on the recognition of foreign judgments. There are, however, provisions in Brazil that allow recognition and enforcement of foreign decisions (interlocutory or final) by the Superior Court of Justice, once legal requirements are fulfilled, but not recognition of processes themselves. The decision must be in compliance with Brazilian public policy, sovereignty and principles of morality, such as human dignity, and some formalities must be observed, such as sworn translation of the decision and notarisation or apostilled of signatures. Moreover, there must be an identified counterparty that has the right to present a defence.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Brazil has not adopted the UNCITRAL Model Law or any other treaty related to cross-border or multi-jurisdictional insolvency proceedings.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors have the same treatment of Brazilian creditors; however, their corporate documents and signatures in Brazilian documents, such as power of attorneys, must be notarised, apostilled and translated by a sworn translator.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

There is no provision under BRL addressing the transferring of assets between countries.

54 COMI

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?

As already mentioned, the competent court to ratify out-of-court reorganisation plans, grant judicial reorganisation proceedings and decree the forced liquidation of a company is the court where the main establishment of the company is located. Thus, in Brazil there is no specific concept of COMI, only a reference to 'main establishment'. When interpreting this concept, the majority of scholars and court precedents indicate that the location where the company has its registered office or major office is not important, but rather the location that concentrates the centre of management or main activities of the company. It is, therefore, an economic test.

55 Cross-border cooperation

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?

Neither BRL nor any other Brazilian laws contain any specific rules dealing with extraterritorial bankruptcy or insolvency proceedings or provisions regarding the recognition of other countries' statutory processes, unlike Chapter 15 of the US Bankruptcy Code, for example. In fact, bankruptcy and restructuring proceedings involving Brazilian companies, with their centre of main interest in Brazil, must necessarily be administered by a Brazilian court. As a result, any effects and consequences of possible ancillary or parallel proceedings in foreign jurisdictions will have to be dealt with on a case-by-case basis, subject to applicable conflicts of law provisions in cross-border matters. The cases in which foreign companies (with no subsidiaries in Brazil) have had insolvency proceedings accepted by Brazilian bankruptcy courts are specifically related to companies that are part of Brazilian economic groups, established in other countries just for investment purposes, with no operation abroad.

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56 Cross-border insolvency protocols and joint court hearings

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?

Please refer to question 55. Also, some Brazilian companies that entered into a judicial reorganisation proceeding according to Brazilian legislation have also entered into Chapter 15 proceedings in the United States, but the communication of such fact in Brazilian courts usually occurs through the debtor company itself.

British Virgin Islands

Andrew Willins, Justin Davis and Olwyn Barry

Appleby

General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The BVI Business Companies Act 2004 contains provisions relating to the implementation of Plans of Arrangement, but it is the Insolvency Act 2003 and its associated rules, the Insolvency Rules 2005, which provide the main source of the insolvency jurisdiction in the British Virgin Islands (BVI). Additionally, it is possible to put a company into a voluntary solvent liquidation under the provisions of BVI Business Companies Act 2004, but those provisions are beyond the scope of this chapter as they are not used in an insolvent context.

2 Excluded entities and excluded assets

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

The Insolvency Act 2003 (the Act) applies to companies and to individuals. Companies are defined as companies incorporated or continued within the BVI, although there is also a jurisdiction to wind up foreign companies where a sufficient nexus with the BVI is shown (*KMG International NV v DP Holding SA* BVIHCMA2017/0003 being a recent example of that jurisdiction being engaged). The insolvency regime does not apply to other entities, such as statutory bodies or to limited partnerships (which are the subject of their own regime for dissolution).

Where the Act does apply, there is no legislation that seeks to exclude or exempt certain assets from the claims of creditors, except where assets are not, properly speaking, the asset of the company at all (as where proprietary claims exist over them). Assets that are the subject of security are protected for the benefit of the secured creditor.

3 Public enterprises

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

Private companies can be wound up in the usual way, whether or not they are wholly owned government enterprises. However, governmental or statutory bodies are creatures of the statutes creating them, and it would require statutory intervention in order to dissolve them.

4 Protection for large financial institutions

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

The BVI has enacted no such legislation.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The Eastern Caribbean Supreme Court (ECSC) is the superior court of record in the British Virgin Islands. The ECSC acts as the superior court of record to nine jurisdictions, of which six are independent territories (namely (i) Antigua and Barbuda, (ii) the Commonwealth of Dominica, (iii) Grenada, (iv) St Christopher and Nevis, (v) St Lucia and (vi) St Vincent and the Grenadines) and three are British overseas territories (Anguilla, Montserrat and the Virgin Islands). The ECSC comprises two divisions: the High Court and the Court of Appeal.

Each jurisdiction (the BVI included) is home to a permanent High Court. Like the ECSC, the Court of Appeal is based in St Lucia, and the Court of Appeal is an itinerant court, which visits the British Virgin Islands usually three times per year (although it will also deal with more urgent matters on other islands). In addition, the British Virgin Islands is one of two jurisdictions within the ECSC that are home to a commercial division. In the BVI, the commercial division has jurisdiction over insolvency and restructuring matters with a value of at least US\$500,000 with the result that, in practice, virtually all insolvency work proceeds before the commercial division.

Appeals from the High Court (or the commercial division of the High Court) lie to the Court of Appeal, and then ultimately to the Privy Council. An appeal to the Court of Appeal exists as of right against any final decision which, on the 'application test', would have been determinative of the cause of action or matter, whichever way it is decided. An appeal lies as of right against a limited category of decisions, most notably in injunction applications (or applications for the appointment of receivers or provisional liquidators). Otherwise, an appeal exists only with leave of the Commercial Court Judge or the Court of Appeal. From the Court of Appeal, appeals lie to the Privy Council.

There is no automatic obligation to post security to proceed with an appeal, but the Civil Procedure Rules (CPR) provide that a respondent may seek security for the costs of the appeal, and in practice it is often granted. A condition of an appeal to the Privy Council is that the US dollar equivalent of £500 must be paid into court as security for the costs of the appeal. In addition, where directors exercise their reserved powers to appeal against the making of a winding-up order against a company, they are at risk of being required to provide security: *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* BVIHCV 2009/389.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

There are three means by which a company may commence a voluntary liquidation:

- If the debtor is solvent, the directors and shareholders may resolve to put the company into a solvent liquidation under the provisions of the BVI Business Companies Act 2004. Except in relation to regulated entities, there are no restrictions as to the identity of the liquidator.

- The shareholders may resolve, by means of a qualifying resolution that has been passed at a properly convened meeting of the members, to put the company into an insolvent liquidation under the provisions of the Insolvency Act 2003. Except where the memorandum and articles of association provide otherwise, a qualifying resolution is a resolution of at least 75 per cent of the members entitled to vote.
- The directors may resolve to make an application to the court for the appointment of a liquidator under the provisions of the Insolvency Act 2003. Following the English decision in *Re Emmadart Ltd* [1979] 1 Ch 540, followed in the Cayman Islands in *China Shanshui Cement Group Ltd* (Unreported, Grand Court, 25 November 2015), it is an untested question of BVI law whether the directors may resolve to do so where the M&A of the company reserve the right to the shareholders. However, the more fashionable view is that they can: see the Bermuda decision in *Re First Virginia Reinsurance Ltd* [2003] Bda LR 47.

BVI law does not distinguish between the powers available to an Insolvency Act liquidator, whether the appointment is made voluntarily or not. In each case, where a company is put into liquidation under the Insolvency Act 2003, an eligible insolvency practitioner must be appointed. In each case, the effect of that appointment is to displace the powers of the directors to act, except as permitted by the office holder, and to invest the liquidator with the powers set out within Schedule 2 to the Insolvency Act 2003. The only material difference is that a liquidator appointed by a qualifying resolution of the members must call a first creditors' meeting at which the creditors may resolve to appoint an alternative liquidator in his or her place (see section 179(4) of the Insolvency Act 2003), and that in practice, where the appointment is achieved by an order of the court, the court will typically direct that certain of the powers set out at Schedule 2 may be exercised only with the sanction of the court.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

The Insolvency Act 2003 contains provisions that would implement a regime for the administration of companies, but it is important to note that these provisions (like the provisions implementing the Model Law) have not been brought into force. The only tool by which a debtor may commence a voluntary reorganisation is therefore to seek leave to convene a meeting of the creditors to vote upon the implementation of a scheme of arrangement under section 179A of the BVI Business Companies Act 2004.

Particularly in the aftermath of the financial crisis of 2008, the BVI courts have sanctioned a number of schemes, but in practice a creditors' scheme of arrangement remains a relatively little-used tool in the armoury, such that the BVI has yet to develop a body of reported case law in which schemes have been considered. However, for a scheme to be sanctioned, section 179A(3) of the BVI Business Companies Act 2004 requires that a majority in number representing at least 75 per cent of the creditors present and entitled to vote should resolve to approve any such compromise that is sanctioned by the court. An important limitation to this regime is that it contains no moratorium on the commencement of proceedings or the pursuit of winding-up proceedings while the scheme is being considered. The tool that is adopted in other jurisdictions, that of the 'soft touch' or 'light touch' provisional liquidation, has not been adopted in the BVI.

8 Successful reorganisations

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

For a scheme of arrangement to succeed in the BVI, a majority in number representing 75 per cent in value of the creditors or members present and voting either in person or by proxy at each creditors' or members' class meeting, as the case may be, must approve the scheme.

Classes of creditors are determined by the requirement for a class to be confined to those persons whose rights (as affected by the

proposed scheme) are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

A scheme of arrangement may include third-party releases from liability, subject to the law governing the underlying obligation.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

An application to place a debtor into an insolvent liquidation may be made by any creditor or member of the company, or by the company itself. The creditor would need to show that it is either just and equitable that a liquidator would be appointed or, as is more commonly the case, that the company is insolvent. In the BVI, a company will be insolvent where its liabilities exceed its assets (the balance sheet basis) or if it is unable to pay its debts as they fall due (the cash flow basis). Because of the obvious difficulties in proving balance sheet insolvency, cash flow insolvency is usually relied upon in practice. The court will infer insolvency where the company is either unable, or fails, to pay an admitted debt, or where it is unable, or fails, to pay a debt to which there is no genuine and substantial dispute.

Just as there is no material difference between the powers of a liquidator appointed involuntarily from one appointed voluntarily, there is no material difference in the procedure save that, for obvious reasons, a company is not required to prove service of the application upon itself.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Technically, an application that would require a company to convene a meeting of its creditors for the purposes of approving a compromise by means of a scheme of arrangement may be made either by the company, or by a creditor. It may therefore be made on an involuntary basis. There is, however, no material distinction between the two proceedings once commenced.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

No formal procedures exist in the British Virgin Islands for expedited reorganisations or 'pre-packaged' reorganisations. However, it is not unheard of for the management of a distressed entity to engage with insolvency practitioners and to engage in a sales process prior to the appointment of a liquidator, and for the liquidator to then continue that process – usually subject to the approval or sanction of the court.

12 Unsuccessful reorganisations

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 scheme will be defeated where:

- the court refuses to sanction the convening of a scheme meeting;
- the requisite majority of the creditors fail to vote in support of the scheme; or
- the court considers that the scheme is oppressive to a particular class of creditors.

There is no automatic consequence to the failure of a scheme. However, a likely consequence is that a creditor whose debt is due and unpaid that is dissatisfied with the scheme process will make an application for the appointment of liquidators or provisional liquidators over the company. Alternatively, the creditor might seek to rely upon the scheme documentation as evidencing the insolvency of the company on a balance sheet basis, even if its debt is not yet due.

13 Corporate procedures

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

A company will be dissolved upon the completion of its liquidation. However, a company will also be dissolved if it has been struck off the register for at least seven years; for example, for the non-payment of annual licence fees to the BVI Financial Services Commission. This is a slow and unsatisfactory route to the dissolution of a company: an application may be made to restore the company by simply paying the outstanding fees at any time before it has been dissolved; and following the dissolution of the company for more than seven years (section 217 of the BVI Business Companies Act 2004), no application may be made for its restoration. This has the result that any property that has not been distributed will vest *bona vacantia* in the Crown, with little hope of redemption.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

An insolvent liquidation will be formally concluded when the liquidator files notice of completion of the liquidation, and his or her final report. The company will then be dissolved. In practice, the liquidator will often make applications to the court prior to the completion of the liquidation for the approval of his or her fees, and for his or her release from liability under section 235 of the Insolvency Act 2003. All of that may itself be preceded by an application to the court for a direction under section 186(5) of the Insolvency Act 2003 for 'sanction' to take a particular step in the liquidation.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

A debtor will be insolvent if:

- it is unable to pay its debts as they fall due (cash flow insolvency); and
- it is insolvent on a balance sheet basis.

Insolvency will be proved if a company fails either to comply with a statutory demand, or fails to make an application to set aside that demand within the requisite time that is ultimately successful, or where execution is returned on a judgment of the BVI court.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

There is no mandatory obligation that requires companies to file insolvency proceedings. However, there is a risk to directors in failing to do so: a director that allows a company to continue trading after he or she knew or ought to have known that there was no reasonable prospect of avoiding an insolvent liquidation may find him or herself liable for insolvent trading to contribute to the assets of the company incurred after that point, unless he or she took every reasonable step open to minimise the risk to the company's creditors (see section 256 of the Insolvency Act 2003).

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

As noted above, a director that allows a company to continue to trade after he or she knew or ought to have known that the company had no reasonable prospect of avoiding an insolvent liquidation may be liable to contribute to the assets of the company for insolvent trading. To

escape liability, the director will need to show that he or she took every step reasonably open to minimise the risk to the company's creditors.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Leaving to one side pre-incorporation transactions, directors are not usually personally liable in respect of the company's obligations. However, they may find themselves saddled with liability if:

- they allowed the company to trade insolvent (see above);
- the court is satisfied that the company was carried on with the intention of defrauding creditors, or for any fraudulent purpose (section 255 of the Insolvency Act 2003);
- they committed any breach of their statutory or fiduciary duties to the company under sections 120 to 122 of the BVI Business Companies Act 2004: broadly, to act for a proper purpose in the bona fide best interests of the company, and to act with the skill and care that a reasonable director would exercise in like circumstances having regard to the nature of the responsibilities undertaken by him or her, the nature of the company and the nature of the decision (among other relevant factors); or
- they permitted an unlawful distribution of the company's assets to occur at a time when the company was insolvent (see sections 58 and 59 of the BVI Business Companies Act 2004). In such circumstances, the company is entitled to recover from the directors that which it is unable to recover from the members.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Except in special circumstances, the duties of the director of a company are usually owed to the company, and are enforceable by the company. Where the company is solvent, those duties will usually be synonymous with the interests of the shareholders. However, where a company enters the 'zone of insolvency', then the director's duties switch to acting in the best interests of the company's creditors as a whole. Even in such circumstances, those duties are generally enforceable only by the company directly (and often by its liquidator).

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

The powers of the directors remain in full force and effect during the continuation of winding-up proceedings and any application to sanction a scheme of arrangement. It is at the point that a winding-up order is made that the directors cease to have any powers or functions, except those permitted by the liquidator (section 175 of the Insolvency Act 2003) but they will have a continuing duty to provide assistance to the liquidator.

Although this is not expressly provided for within the Insolvency Act 2003, it is likely that the directors stand possessed of a residual power to appeal against any winding-up order that has been made against the company, and in the company's name. However, as noted above, there is some authority that suggests that the court may impose conditions to the exercising of that power, including as to the provision of security for costs: see *Grand Pacific v Pacific China* BVIHCV 2009/389.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria
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?

A limitation of the regime relating to schemes of arrangement is that there is no automatic moratorium on the ability of creditors to commence or pursue winding-up proceedings while the scheme is being considered. For this reason, it is common for parallel applications to be made in other jurisdictions where such a regime exists.

Following the appointment of a liquidator (but not following the commencement of winding-up proceedings), there is also a moratorium on the ability to pursue proceedings to judgment or execution in the British Virgin Islands (see section 175(1) of the Insolvency Act 2003). However, there is no moratorium on the ability of a secured creditor to enforce its security (section 175(2) of the Insolvency Act 2003) and neither, as noted above, can this problem be avoided by the debtor company by commencing administration proceedings in the BVI. There is little reported BVI authority in relation to the circumstances in which the stay will be lifted, but a likely circumstance is where court proceedings can bind all relevant parties in circumstances where the insolvency proceedings could not: see, for example, *B&P Advisors Inc v McDonald* BVIHCV 2010/0133.

Section 175(1) does not, however, operate extraterritorially against preventing persons that are not subject to the territorial jurisdiction of the BVI courts from commencing proceedings in other jurisdictions (see the decision of the Privy Council in *Stichting Shell Pensioenfonds v Krjs* [2014] UKPC 41).

22 Doing business
When can the debtor carry on business during a liquidation or reorganisation? 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?

BVI law imposes no restrictions on the ability of the directors of a company to continue to act in the name of that company, absent the appointment of a liquidator or a provisional liquidator. BVI law also contains no provision equivalent to section 127 of the Insolvency Act 1986 in England that would require a company against whom a winding-up petition has been filed to make applications to validate payments or transactions.

However, the filing of a winding-up petition begins a six-month (or in the case of a connected party, two-year) 'look-back' period. The significance of the look-back period in relation to transactions undertaken following the commencement of winding-up proceedings is that a transaction may be impeached if it was either an undervalue transaction or a preference. In practice, those receiving payments or entering into transactions with companies during the twilight of their existence are likely to find those transactions scrutinised by liquidators with particular care.

23 Post-filing credit
May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

In the case of an application for the approval of a scheme of arrangement, as noted above, the powers of the directors are untouched and they will be entitled to cause the company to borrow or to grant security. Floating charges are, however, also capable of being attacked in much the same way as with a preferential payment or an undervalue transaction (see section 247 of the Insolvency Act 2003).

Similarly, where a company is the subject of an application to wind it up, the powers of the directors are unaffected – although the willingness of creditors to lend money is probably more constrained.

Following the appointment of a liquidator, it is within the powers of a liquidator under Schedule 2 to the Insolvency Act 2003 to 'borrow money, whether on the security of the assets of the company or

otherwise'. That power will usually be capable of being exercised without the need for the sanction of the court, although a prudent liquidator may nevertheless wish to obtain it. The priority relating to the repayment of the loan would depend upon the terms of the agreement pursuant to which it has been advanced, but it is unlikely to be a liability of the company 'at the relevant time' (ie, the date that the winding-up order was made) and thus provable in the liquidation. Rather, it is likely to be payable in priority pursuant to Rule 199 of the Insolvency Rules 2005 as an 'expense properly incurred by the liquidator in preserving, getting in or realising the assets of the company'. Indeed, it is difficult to think of a circumstance in which it would be appropriate for an insolvent company to borrow money if it was not to satisfy that objective.

24 Sale of assets
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?

Subject to the terms of the contract pursuant to which the sale takes place, and to any other proprietary claims to the asset, a purchaser would acquire the assets of an insolvent company from its liquidator free and clear of other claims, such as other unsecured creditor claims.

25 Negotiating sale of assets
Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The liquidator of an insolvent company is an officer of the court with a duty to seek to maximise the return to creditors. The liquidator will have a wide discretion in how he or she negotiates the sale of assets, always subject to the supervision of the court.

It is common for liquidators to conclude conditional sale contracts, by which they agree to sell the asset subject to the approval of the court. If the court does not then approve the transaction, the condition is not satisfied. In principle, this arrangement gives some scope for a stalking horse bid, because it opens up the possibility that an improved offer will be made and the court will then be persuaded not to sanction the original sale. That said, most professionally drafted conditional sale agreements would oblige the liquidator to conclude the sale, subject only to the discretion of the court to sanction it, and a court is unlikely to be enthusiastic about sanctioning what would, subject to the court's approval of the individual transaction, amount to a breach of the contract with the original buyer.

It is not unusual for creditors to seek a distribution in specie of the company's assets, in a way that will allow them, effectively, to credit bid their debt against the asset. However, this is only likely to be approved by the court if it is conducted in such a way as not to disadvantage other creditors of the company: such as, for instance, in the case of a single asset company, the largest creditor taking the sole asset, subject to paying money back that pays an appropriate percentage on the pound to other unsecured creditors.

26 Rejection and disclaimer of contracts
Can a debtor undergoing a liquidation or 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?

Section 217 of the Insolvency Act 2003 provides that a liquidator is entitled to disclaim an unprofitable contract, or assets of a company that are unsalable or not readily saleable or that may give rise to a liability to pay money or perform an onerous act. There are no restrictions on the types of contracts that may be disclaimed, although there are particular rules in relation to the disclaimer of leasehold property.

The disclaimer of onerous property operates so as to determine the rights, interests and liabilities of the company in or in respect of the property disclaimed, but except insofar as necessary to release the

company from liability, does not affect the rights or liabilities of any other person. However, a person suffering loss or damage as a result of the disclaimer may claim in the liquidation of the company as a creditor for the amount of the loss and damage (section 220(2) of the Insolvency Act 2003).

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The ability of an IP licensor to terminate a debtor's right to use IP depends on the terms of the contract between the licensor and the company. In principle, there is no reason under BVI law why the licensor should not terminate the contract.

28 Personal data

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

There are no BVI law restrictions relating to the transfer of personal information or customer data to a purchaser, except where the data are received by the liquidator or the company in confidence and subject to an implied or an express obligation not to disclose it.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

It is most usual to see arbitral proceedings occur in relation to charter parties, where there are back-to-back insured obligations that cannot easily be addressed within the winding-up process. A party may also agree with a liquidator that it is appropriate to litigate disputes relating to the admission of claims through an arbitral process, rather than have the liquidator adjudicate the claim and for any challenges to that adjudication to be considered by the court.

Creditor remedies

30 Creditors' enforcement

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 only circumstance in which the assets of a business may be seized by a creditor without taking enforcement proceedings is where the creditor has security over the assets of the company in question.

In practice, it is unusual for the assets of BVI companies to be physically situated within the BVI unless those assets consist of shares in BVI companies that BVI law treats as having their situs in the BVI. In such cases, it is common for share charges to include documents that will allow the creditor to enforce out of court, such as signed but undated directors' resignation letters, forms of proxy to vote the shares held by the debtor company, and instruments of transfer. Alternatively, the share charge is likely to permit the appointment of a receiver - which is effected by written notice.

A creditor may take a floating charge over the assets of a BVI company, which would be enforceable by the appointment of receiver, but depending upon the nature and location of those assets, it is more likely that a fixed charge security would be created under the laws of the jurisdiction in which those assets are to be found.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

An unsecured creditor will be forced to take proceedings in respect of the debt. The debtor would have between 28 and 56 days to defend the claim (depending upon whether it is served within or outside of the jurisdiction). If the debtor failed to defend the claim, default judgment could then be entered. If the debtor mounted a defence to the claim, it would be open to the creditor to make an application for summary judgment if the debtor was unable to show that it had a sufficiently arguable defence to the claim. If an application for summary judgment failed or was not available, then proceedings would typically take between nine months and 18 months to resolve to judgment (depending upon their complexity).

After judgment, the creditor would be entitled to take advantage of the post-judgment enforcement regimes available within the CPR (such as to obtain an oral examination, a third-party debt order or a charging order). The court would also be entitled to appoint a receiver by way of equitable execution in appropriate cases. In practice, as it is unusual for a BVI company to have assets in the BVI other than shares in BVI subsidiaries, applications for charging orders are most typically seen. Otherwise, the creditor is likely to choose to commence winding-up proceedings.

If the creditor were able to show that the debtor has no genuine or substantial defence to the claim, it might simply seek to serve a statutory demand and then commence winding-up proceedings, or simply to commence winding-up proceedings. Research by Appleby suggests that winding-up proceedings in the BVI are generally finally determined within six to eight weeks of the presentation of the originating application.

There is no process in the BVI for pre-judgment attachments.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

An application to the court to put a company into an insolvent liquidation will be advertised in the official gazette in the BVI, and in a national newspaper in circulation in the jurisdiction where the creditor believes that it is likely to come to other creditors' attention.

Upon the appointment of a liquidator (whether by the court or by a qualifying resolution of the members) the liquidator is obliged to advertise his or her appointment. The liquidator will also undertake an investigation of the company's affairs and notify any creditors that come to his or her attention of the fact of his or her appointment.

The liquidator will then:

- convene a creditors' meeting (although a liquidator appointed by the court may dispense with the need for such a meeting);
- report periodically to any creditors' committee that is established pursuant to a resolution of the creditors at the first meeting. Typically, a report would also be given to the committee when the liquidator seeks the approval of his or her fees;
- prepare a preliminary report and circulate it to all known creditors within 60 days of his or her appointment;
- convene a creditors' meeting where he or she is directed to do so by the court, or a meeting is requisitioned by the creditors; and
- send every creditor a final report upon the completion of the liquidation.

The liquidator is obliged to convene the first meeting of creditors within 21 days of his or her appointment (except where he or she is entitled to dispense with the meeting). Where a creditors' committee is established, the liquidator must convene that meeting within 28 days of the establishment of the committee, and then whenever the committee or the office holder decide.

33 Creditor representation

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?

As noted above, the creditors may elect to establish a creditors' committee at the first meeting of creditors, which must consist of not less than three and not more than five members. The members of the committee will be voted upon at the first meeting of the creditors, by value of the claims admitted by the office holder for voting purposes.

The committee does not have the power to give directions to the office holder: its main purpose is to act as a consultative body, and to approve the office holder's remuneration. It also has the power to require the office holder to appear before it, and to make reasonable requests of the office holder for reports and information. It is the committee that will be served with any application to the court for the approval of the office holder's remuneration, and the committee may also convene creditors' meetings and (upon cause) apply to the court for the removal of the office holder.

The Insolvency Act 2003 does contain provision for the payment of the reasonable expenses of the members in attending a committee meeting. Members of the committee may of course retain advisers, but the costs of doing so will fall upon the committee members themselves unless the court otherwise orders.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

Where the liquidator does not have assets to fund the pursuit of a claim, he or she may:

- seek funding from the creditors, or from third parties – such as litigation funders. In this event, the fruits of the claim belong to the company, subject to any rights that the funder has to be paid as a priority out of the recoveries; or
- sell or assign the claim to a third party. In this event, subject to any other agreement between that third party and the liquidator, the fruits of the claim would belong to the third party.

Creditors otherwise have no rights to pursue the remedies of the estate.

35 Claims

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

Following the appointment of a liquidator, the liquidator will give notice of his or her appointment to any known creditors and advertise this appointment. Any creditor that wishes to participate in the first meeting of creditors, and to vote upon the constitution of a creditors' committee, will be required to submit its claim in the liquidation on form R184, and to submit relevant documents. The liquidator will then admit the claim either for dividend, or more usually just for voting purposes. The creditor can claim for any admissible claim in the liquidation – this includes unliquidated claims and contingent claims. The submission of this form is an important step: it is likely to constitute a submission to the insolvency processes of the BVI court, see *Shell Pensioenfonds v Kryz and another* [2014] UKPC 41.

The liquidator has a free hand in deciding when to formally adjudicate claims in the liquidation. Any creditor that is dissatisfied with the decision of the liquidator may make an application to the court under section 273 of the Insolvency Act 2003 or (where the decision is taken at a meeting) under Rule 59 of the Insolvency Rules 2005.

The liquidator will be obliged to admit the claim, or reject it, on the same basis as the court would (ie, the creditor must prove its claim, and the claim will be admitted to the extent that the company is under

a legal liability in respect of the obligation). It therefore does not matter that the claim was acquired by the creditor at a discount.

36 Set-off and netting

To what extent may creditors 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?

Any contractual right of set-off or non-set-off or netting arrangement agreed between the company and any creditor prior to the commencement of the liquidation is binding on the company in liquidation (section 435 of the Insolvency Act 2003).

37 Modifying creditors' rights

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

There are no provisions in BVI law that give the court jurisdiction to change the rank of a creditor's claim.

38 Priority claims

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

Under BVI law the following claims (preferential claims) are paid in priority to all other debts, including those that are the subject of security charges:

- the costs and expenses of the winding up;
- employees' wages, salaries and holiday pay;
- amounts due by the debtor to the BVI Social Security Board;
- amounts due by the debtor in respect of pension contributions or contributions in respect of medical insurance;
- sums due to the government of the Virgin Islands in respect of any tax, duty, including stamp duty, licence fee or permit; and
- sums due to the Financial Services Commission in respect of any fee or penalty.

After payment of the costs and expenses of the winding up, the remaining preferential claims rank equally among themselves and are to be paid in full (subject to defined maximum sums). If the assets of the company are insufficient to meet them, they are to be paid *pari passu*.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Wages and salaries, including commission and any amount payable by way of allowance or reimbursement, due in respect of the whole or part of the period of six months immediately prior to the commencement of the liquidation or bankruptcy stand as preferential claims. As does accrued holiday pay in respect of any period before the commencement of the liquidation or bankruptcy, whether the employee's contract of employment was terminated before or after the commencement of the liquidation or bankruptcy.

Where there are numerous claims for wages owed to employees, it is permissible for one proof to be made by one person on behalf of all the creditors in the class.

40 Pension claims

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

The amounts due in respect of pension contributions payable during the 12 months immediately before the commencement of the

liquidation or bankruptcy by the debtor as the employer of any person, including any amounts deducted from the employee, stand as preferential claims.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

There are no environment-specific provisions in the BVI's insolvency or reorganisation processes that provide for the controlling and remediation of environmental damage.

42 Liabilities that survive insolvency or reorganisation proceedings

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

Generally, no liabilities of the company will survive the winding up of that company.

In reorganisation proceedings, only those liabilities that are compromised or otherwise discharged pursuant to the terms of the scheme of arrangement will be compromised or otherwise discharged. All other liabilities will survive the reorganisation proceedings.

43 Distributions

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

The liquidator makes a distribution by distributing dividends among the creditors whose claims he or she has admitted. Prior to making a distribution, the liquidator will issue a notice stating that he or she intends to distribute a dividend and that a creditor who does not submit a claim by the date specified in the notice will be excluded from the distribution.

It is common for liquidators to make interim distributions, after making an allowance for the costs of the liquidation, and for any unsecured creditor claims.

Otherwise, the distributions will take place prior to the completion of the liquidation.

Security

44 Secured lending and credit (immovables)

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

Mortgages and equitable fixed charges are the customary forms of security taken on real property.

45 Secured lending and credit (movables)

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

Equitable or legal mortgages over the shares of a BVI company, charges over bank accounts and fixed and floating charges over assets are the customary forms of security taken on personal property.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Part VIII of the Insolvency Act defines four types of voidable transaction claim that a liquidator may seek to recover company funds and property.

Unfair preferences

A transaction entered into by a company is an unfair preference given by the company to a creditor if the transaction:

- is an insolvency transaction (ie, it is entered into at a time when the company is insolvent; or it causes the company to become insolvent);
- is entered into within the vulnerability period, that is:
 - in the case of a preference given to a connected person, the period commencing two years prior to the onset of insolvency and ending on the appointment of the administrator or liquidator;
 - in the case of a preference given to any other person, the period commencing six months prior to the onset of insolvency and ending on the appointment of the administrator or liquidator; and
- has the effect of putting the creditor into a position which, in the event of the company going into insolvent liquidation, will be better than the position he or she would have been in if the transaction had not been entered into.

However, a transaction is not an unfair preference if the transaction took place in the ordinary course of business.

Transactions at an undervalue

A company enters into an undervalue transaction with a person if:

- the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or
- the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company; and
- in either case, the transaction concerned:
 - is an insolvency transaction (as defined above); and
 - is entered into within the vulnerability period (as defined above).

However, a company does not enter into an undervalue transaction with a person if:

- the company enters into the transaction in good faith and for the purposes of its business; and
- at the time when it enters into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

Voidable floating charges

A floating charge created by a company is voidable if:

- it is created within the vulnerability period (as defined above); and
- it is an insolvency transaction (as defined above).

A floating charge is not voidable to the extent that it secures:

- (i) money advanced or paid to the company, or at its direction, at the same time as, or after, the creation of the charge;
- (ii) the amount of any liability of the company discharged or reduced at the same time as, or after, the creation of the charge;
- (iii) the value of assets sold or supplied, or services supplied, to the company at the same time as, or after, the creation of the charge; and
- (iv) the interest, if any, payable on the amount referred to in points (i) to (iii) immediately above pursuant to any agreement under which the money was advanced or paid, the liability was discharged or reduced, the assets were sold or supplied or the services were supplied.

Extortionate credit transactions

A transaction entered into by a company within the vulnerability period (in this context, the period commencing five years prior to the onset of insolvency and ending on the appointment of the administrator or liquidator) for, or involving the provision of, credit to the company is an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit:

- the terms of the transaction are or were such as to require grossly exorbitant payments to be made in respect of the provision of credit; or
- the transaction otherwise grossly contravenes ordinary principles of fair trading.

Where it is satisfied that a transaction entered into by a company is a voidable transaction the court, on the application of the liquidator:

- may make an order setting aside the transaction in whole or in part;
- in respect of an unfair preference or an undervalue transaction, may make such order as it considers fit for restoring the position to what it would have been if the company had not entered into that transaction; and
- in respect of an extortionate credit transaction, may by order provide for any one or more of the following:
 - the variation of the terms of the transaction or the terms on which any security interest for the purposes of the transaction is held;
 - the payment by any person who is or was a party to the transaction to the office holder of any sums paid by the company to that person by virtue of the transaction;
 - the surrender by any person to the office holder of any asset held by them as security for the purposes of the transaction; and
 - the taking of accounts between any persons.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There are no such restrictions in the BVI.

Groups of companies

48 Groups of companies

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

As a rule, the court will uphold the legal concept of separate legal identity that accrues to a company. A court cannot order a distribution of group company assets pro rata without regard to the assets and liabilities of the individual corporate entities involved.

49 Combining parent and subsidiary proceedings

In 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?

Proceedings for the insolvencies and reorganisations of a group of companies may occur concurrently for practical efficiency but remain legally separate proceedings. In the absence of a scheme of arrangement or other consensual arrangement between the group of companies and their creditors, the assets of the companies are not pooled for distribution. There have been cases in offshore jurisdictions where pooling orders have been made, but these are extremely rare.

International cases

50 Recognition of foreign judgments

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?

The BVI is not a party to a treaty on the recognition of foreign judgments. However, there are two domestic statutory routes to the enforcement of foreign judgments in the BVI, under the Reciprocal Enforcement of Judgments Act 1922 (which applies to final and conclusive monetary judgments made in the courts of a limited number of jurisdictions – New South Wales, England & Wales and Scotland among them) and the Foreign Judgments (Reciprocal Enforcement Act) 1964. Some have argued that the list of jurisdictions designated under the 1964 Act was carried out ineffectively, with the result that there is some debate as to the utility of these provisions.

Where neither Act applies, the courts of the BVI will have the power to recognise foreign judgments at common law. This route requires proceedings to be issued in the BVI, and for reliance then to be placed on the foreign judgment as giving rise to estoppels on the matters established by that judgment on any application for summary judgment.

Foreign insolvency judgments give rise to different considerations, however: see *Rubin v Eurofinance SA* [2012] UKSC 46.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Part XVIII of the Insolvency Act contains provisions based on the UNCITRAL Model Law but this Part is not in force. However, Part XIX of the Insolvency Act enables orders to be made in the BVI in aid of foreign insolvency proceedings in certain designated jurisdictions (ie, Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the UK and the USA). The BVI court may for example grant a stay of execution against a debtor's property in the BVI, entrust the administration or realisation of property to a foreign representative and facilitate the coordination of concurrent insolvency proceedings. In deciding whether or not to make such orders, the BVI court is required to protect the interests of BVI creditors and any order it does make may not affect the rights of secured creditors.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

There are no special procedures with which foreign creditors must comply when submitting claims in BVI insolvency proceedings. They are dealt with on the same basis as any domestic claims.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

The BVI has enacted administration provisions, but these have not been brought into force.

54 COMI

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 concept of COMI does not have direct application in the BVI.

55 Cross-border cooperation

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?

As noted above, Part XIX of the Insolvency Act enables orders to be made in the BVI in aid of foreign insolvency proceedings in certain designated jurisdictions (ie, Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the UK and the USA).

On 11 May 2017 the BVI adopted new guidelines for communication and cooperation between courts in cross-border insolvency proceedings (the JIN Guidelines). The guidelines are designed to enhance communication between courts, insolvency representatives and other parties in the context of global restructurings and insolvency. The guidelines have also been adopted by New York, Delaware, Singapore and Bermuda. Inter alia, the guidelines provide a default setting that foreign laws, regulations and orders have been properly enacted or made.

There is some first instance authority which suggests that the entitlement of the court to provide assistance at common law to jurisdictions that are not designated jurisdictions was impliedly repealed by the enactment of the Insolvency Act 2003, and the failure to bring Part XVIII into effect: see *Re C (A Bankrupt)* BVIHCM 80/2013. This decision is much debated, and it remains to be seen whether it would be followed.

56 Cross-border insolvency protocols and joint court hearings

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 noted above, in which provision is made for joint hearings. We are not aware of any such joint hearing having taken place to date.

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

Bankruptcy liquidations are governed by the Bankruptcy and Insolvency Act (BIA). Restructuring proceedings may be initiated under the BIA or the Companies' Creditors Arrangement Act (CCAA), both of which are federal legislation. The BIA provides for both reorganisations and liquidations of insolvent businesses and individuals. The CCAA provides for only reorganisations or liquidations of corporate entities, although the courts frequently authorise significant asset sales in CCAA proceedings. The CCAA applies to a company or an affiliated group of companies with liabilities in excess of C\$5 million.

Where complex or fundamental changes must be made to the shareholdings and debt structures of corporations, the 'arrangement' provisions of the Canada Business Corporations Act (CBCA) and comparable provincial legislation may be applicable. CBCA corporate reorganisations can include amalgamations, liquidations, dissolutions or a combination of any of these. Occasionally, 'arrangement' proceedings are used in conjunction with reorganisations under the BIA or the CCAA.

2 Excluded entities and excluded assets

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

Federally incorporated banks and insurance companies are excluded from the BIA and CCAA and are dealt with under the Federal Winding-up and Restructuring Act (WURA). The BIA also excludes railways, savings banks, insurance companies and trust and loan companies. Upon bankruptcy, the debtor's property vests in the trustee in bankruptcy with certain exceptions. Property owned by third parties or held in trust by the debtor for third parties does not vest in the trustee. Certain types of property are exempt by provincial and federal statutes from claims of creditors (eg, pension benefits, retirement plans and household goods).

3 Public enterprises

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

The Canadian experience is limited in this regard. Although there are no specific provisions in the BIA, WURA or CCAA pertaining to government-owned enterprises, there is some limited case law in which Canadian courts have held that bankruptcy legislation is not applicable to government-owned enterprises such as cities and school corporations. In some cases, government-owned enterprises are specifically prohibited from initiating formal insolvency proceedings by legislation. In addition, legislative reforms have imposed strict borrowing limits and regulatory oversight upon such entities as safeguards against default. Where the potential for default is significant, the provincial or

federal government has the power to intervene and assume control of the defaulting entity.

The pursuit of contractual claims can be complicated depending on the nature of the government-owned enterprise. For instance, although creditors are generally able to initiate court proceedings against a government-owned enterprise, prior to doing so, they must deliver formal written notice to the government entity setting out particulars of the proposed claim within a prescribed period of time, otherwise they will risk having the court proceedings dismissed. Another consideration is determining the level of court, either federal or provincial, in which the claim against the government-owned enterprise can be commenced.

4 Protection for large financial institutions

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

Several of Canada's largest banks have been designated as 'too big to fail' by the federal regulator, the Office of the Superintendent of Financial Institutions. The designation stems from the framework issued by the Basel Committee on Banking Oversight and means that such financial institutions are subject to increased capital requirements and supervision. The measures are designed to limit the likelihood that a major bank failure would negatively affect the Canadian economy.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Under federal bankruptcy law, the superior court in each of Canada's provinces has jurisdiction over bankruptcy matters. There is no formal, separately established bankruptcy court. Superior court judges in the common law jurisdiction provinces are considered to have an inherent jurisdiction to deal with matters, even if there are no specific statutory provisions dealing with a particular matter.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

A voluntary liquidation under the BIA commences when a debtor files an assignment in bankruptcy with the government bankruptcy office, accompanied by a sworn statement listing its assets and obligations. All of the debtor's unencumbered assets vest in its bankruptcy trustee, subject to the rights of the debtor's secured creditors to deal with their collateral. Unsecured creditors' remedies against the debtor's assets are stayed, but there is only a very limited stay against proceedings by secured creditors.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Voluntary reorganisations under the BIA are commenced by either filing a proposal (which constitutes the debtor's reorganisation plan) or by filing a notice of intention to file a proposal. In either filing, an automatic comprehensive stay of proceedings is invoked, which remains in place until the debtor successfully completes its reorganisation or its reorganisation fails. Where a notice of intention is filed, the debtor must file cash-flow statements for its business within 10 days and must file its proposal within 30 days. The court can extend the time for filing a proposal (provided that the debtor is proceeding with diligence and in good faith) for up to a maximum of six months, although it can only grant extensions for up to 45 days at a time. The debtor normally carries on its business in the normal course, subject to review by the proposal trustee and the supervision of the court.

To commence a voluntary reorganisation under the CCAA, a debtor must make an application to the court for reorganisational protection under the CCAA. In granting relief to a reorganising debtor, a Canadian court will routinely grant a very comprehensive stay of proceedings against actions by creditors while the debtor's plan is being negotiated and developed. If relief under the CCAA is granted, the court appoints a 'monitor' as an independent court officer to look after the interests of the creditors generally and to report to the court and to the creditors on the debtor's progress with its reorganisation.

8 Successful reorganisations

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

Both CCAA plans and BIA proposals must be accepted by a 'double majority' of creditors (ie, by 50 per cent in number holding two-thirds in value of the unsecured creditors voting on a BIA proposal and by 50 per cent in number holding two-thirds in value of each class of creditors voting on a CCAA plan) and approved by the court. Creditor classes in CCAA proceedings are established based on a 'commonality of interest' test. The court will approve a plan or proposal that has been accepted by creditors as long as it is 'fair and reasonable' from the point of view of the general body of creditors.

A BIA proposal or plan of reorganisation may provide releases for non-debtor third parties provided that it is demonstrated that the releases are rationally related to the purpose of the plan or proposal, that they are essential to the success of the plan, that they are not overly broad or offensive to public policy and that the parties receiving the releases contributed to the successful plan or proposal.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

A creditor can initiate involuntary liquidation proceedings in respect to a debtor under the BIA if the creditor has an unsecured claim of at least C\$1,000. To obtain a bankruptcy order, the creditor must establish that the debtor is insolvent and has committed an 'act of bankruptcy' within the six months preceding the commencement of the case. The most common 'act of bankruptcy' is failing to meet liabilities generally as they become due. A debtor can also be placed in liquidation under the BIA if its proposal (see question 11) is rejected by its unsecured creditors or is not approved by the court, or if certain filing deadlines are not met. The practical effect of a liquidation is the same whether it is commenced voluntarily or involuntarily.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Under the BIA, a receiver or bankruptcy trustee can commence an involuntary reorganisation on behalf of the debtor over which it has been appointed. Involuntary BIA reorganisations commenced by creditors are rare. Creditors can commence involuntary reorganisations under the CCAA, but these are also infrequent.

The stays of proceedings against actions by creditors in involuntary reorganisations are comparable to those in voluntary reorganisations. In voluntary reorganisations, however, the debtor is more likely to be able to create a broader reorganisational framework of protective court orders than a creditor could obtain in an involuntary reorganisation that is being resisted by the debtor.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Neither the BIA nor the CCAA contains formal procedures for implementing expedited reorganisations. Nonetheless, the provisions of both statutes are flexible enough to accommodate pre-packaged reorganisations at a very early stage in restructuring proceedings. With sufficient advance planning and creditor consultation and support, 'pre-packaged reorganisations' can be accommodated in both BIA proposals and CCAA plans.

12 Unsuccessful reorganisations

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 BIA proposal must be approved by at least 50 per cent in number and two-thirds in value of the claims of unsecured creditors voting on the proposal. If this approval is not received from the creditors, the debtor is automatically placed in liquidation. If a secured creditor class votes against the proposal, an automatic liquidation does not take place, but the stay of proceedings against the secured creditors of that particular class ends. A proposal will also fail if the court refuses to approve it. Subsequently, if the debtor defaults in performing a proposal that has been approved by creditors and the court, the court may annul the proposal, which leads to an immediate liquidation of the debtor's assets, although transactions properly undertaken during the reorganisation period are not nullified.

Under the CCAA, there is no automatic liquidation if unsecured creditors reject the CCAA plan, but the court-imposed stay of proceedings may be terminated, allowing creditors to exercise their remedies. This could include a request to place the debtor into liquidation proceedings under the BIA. A secured creditor class that votes against the plan may thereafter deal with its security regardless of whether the plan succeeds or fails. Failing to obtain support from major secured creditors may jeopardise the liability of a plan. As in the BIA, the court must approve a plan before it becomes effective.

13 Corporate procedures

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

The court may order the amendment of the debtor's constating documents (ie, its articles of incorporation, by-laws and shareholder agreements) to reflect the terms of the debtor's plan or proposal and can dispense with the requirement of shareholder approval. The CBCA and comparable provincial legislation allow shareholders to carry out non-insolvent liquidations and also provide for liquidation under the supervision of the court. A court liquidation may be instituted by the corporation itself (voluntary cases) or by a shareholder or creditor (involuntary cases).

The 'arrangement' procedures in the CBCA and comparable provincial legislation that allow exchanges of securities and

amalgamations have been used increasingly in complex reorganisations either separately or in conjunction with insolvency procedures.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

A corporate debtor in liquidation under the BIA can only obtain a discharge from bankruptcy by paying all of its creditors in full, which is usually accomplished by means of a BIA proposal. A liquidation case can conclude once the trustee has distributed the assets to the creditors and has obtained its discharge from the court upon reporting on the administration of the estate.

A reorganisation in a BIA proposal is completed when the proposal is fully performed and a certificate of completion is issued by the proposal trustee. A CCAA reorganisation concludes when the CCAA plan is fully performed and the monitor is discharged by the court.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

A factual analysis is required to determine if a debtor is insolvent. A debtor is insolvent if they are unable to meet their obligations as they generally become due, they have stopped paying current obligations in the ordinary course of business as they generally become due, or their property is not, at a fair valuation, sufficient to enable payment of their obligations due and accruing due.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Companies are not required to commence insolvency proceedings nor does Canada have legislation that imposes liability on directors when a company carries on business while it is insolvent or nearing a state of insolvency. As a general rule, unless the insolvent business is carried on in a manner intended to defeat or delay the claims of creditors or deliberately perpetrate harm or financial loss, there are no specific legislative remedies available apart from the 'oppression remedy' – a remedy arising under corporate legislation. The oppression remedy is a broad equitable remedy that permits the court to review and order appropriate relief in favour of creditors where a corporation or its directors have acted in a way that is oppressive or unfairly prejudicial or that unfairly disregards the interests of the creditors affected.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

There is no requirement that a company commence insolvency proceedings at a particular time. Provided that directors act in the best interests of the corporation and otherwise fulfil their statutory and fiduciary duties of care, they will generally be protected from personal liability.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Directors are liable to employees for up to six months' arrears of wages for services performed by the employees during their directorships. Directors are also liable for certain amounts payable by the corporation to governmental revenue authorities, such as unremitted source deductions (eg, income tax, government pension plan contributions,

employment insurance premiums deducted from employees' wages and, in certain circumstances, sales taxes that were collected but not paid by the corporation prior to bankruptcy). Directors may escape liability for these payments if they exercise the 'due diligence' and skill of a competent director.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Directors and officers owe the same duties to a corporation whether it is solvent or insolvent. They must act in the best interests of the corporation, and work towards creating a 'better' corporation at all times. When determining the 'best interests', the directors may consider, among other things, the interests of other stakeholders, including employees, creditors, consumers, shareholders, governments and the environment.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

In a bankruptcy, the property of the debtor vests in the trustee in bankruptcy, leaving the directors without the ability to control the company's property. However, directors retain certain limited residual powers and their directorships are not automatically terminated upon a bankruptcy filing. In practice, many directors resign when a company files for bankruptcy.

In reorganisation proceedings, including proposal proceedings pursuant to the BIA and proceedings under the CCAA, the directors retain control of the debtor's assets and oversee the development of the proposal that will be put to the creditors. Directors are more likely to remain in their positions in reorganisation proceedings, particularly if the goal is that the company emerge from the reorganisation in some form.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

In a BIA reorganisation, an automatic stay of proceedings is imposed on secured and unsecured creditors. However, the stay does not apply to those secured creditors who took possession of their collateral before the filing or who gave formal notice of their intention to enforce their security more than 10 days before the filing. The court can lift a stay in a BIA reorganisation if the creditor is likely to be 'materially prejudiced' by the stay or if it is otherwise equitable that the stay be lifted.

In a BIA liquidation, there is an automatic stay of proceedings by unsecured creditors, but the stay does not affect secured creditors, who are generally free to enforce their security outside of the liquidation process. A limited stay of a secured creditor's realisation in a liquidation can be sought from the court by the trustee to preserve the value of the assets of the estate. Although an unsecured creditor can apply to the court for relief from the stay, unsecured creditors are virtually never permitted to pursue seizure remedies.

In a CCAA reorganisation, a very broad stay of proceedings is imposed against both secured and unsecured creditors. The initial period of the stay is limited to 30 days, although the stay period is usually extended by the court if the debtor is working constructively toward a suitable plan of arrangement. The CCAA contains no specific provisions dealing with relief from the stay but, in general, stays have been lifted where a debtor's plan was likely to fail or where the debtor showed no progress in developing a plan of arrangement.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

During both BIA and CCAA reorganisations, the debtor typically continues to carry on business in the normal course. BIA proposal trustees and CCAA monitors must be appointed in reorganisations, but they do not normally play an active role in the debtor's business operations during a restructuring except for transactions that are outside the ordinary course of business. Significant transactions that are out of the ordinary course of the debtor's business must be submitted to the court for its approval.

The role of trustees and monitors is generally confined to monitoring and reporting to the creditors and to the court as to the debtor's business and operations, and the debtor's progress in its reorganisation. During a reorganisation, parties to contracts with the debtor are prohibited from terminating their agreements on the grounds of insolvency, but they may require that the debtor pay for goods and services in cash.

In reorganisation proceedings, directors and officers can usually (subject to an order to the contrary by the supervising court) carry on business in the ordinary course in normal and routine matters that do not require the approval of the court. In liquidations, where a licensed insolvency trustee is appointed, the assets and business of the debtor company vest in the trustee and the directors and officers have no further authority to act on behalf of the company. The result is the same in the case of receiverships, although the assets of a debtor corporation do not vest in a receiver in a receivership proceeding. In appropriate cases, the receiver may elect to operate the business to generate value and sell the business as a going concern.

23 Post-filing credit

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

Provisions under both the BIA and the CCAA allow funding analogous to US debtor-in-possession financing. Under Canadian practice, there are fewer protective provisions regarding post-filing secured credit. For example, there is no provision for 'adequate protection'. A reorganising company with a viable prospective restructuring, however, will be permitted to borrow and grant security ranking ahead of the claims of unsecured creditors.

There is no 'administrative expense priority' available under either the BIA or CCAA for general post-filing credit obtained by the debtor in the normal course. While both acts contain provisions that creditors are not obliged to supply on credit, the CCAA also allows a court to order that a critical supplier continue to supply, on the basis of security over the debtor's property.

24 Sale of assets

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 liquidations under the BIA, the assets of the debtor (apart from assets that are subject to secured claims and assets that are held in trust) vest in the licensed insolvency trustee who is empowered to sell them with the permission of the inspectors of the estate. Sales of assets out of the ordinary course of business and, particularly, a sale of the debtor's business as a whole, require the permission of the court.

The rights of the debtor in a CCAA reorganisation to sell assets are set out in the court order that grants protection to the debtor. Sales of assets in the ordinary course of business are permitted, but sales out of the ordinary course of business, including a sale of the debtor's entire business, require the permission of the court.

In both BIA and CCAA proceedings, it is possible to conclude a sale of assets of the debtor, including a sale of substantially all of the assets

of the debtor, without the necessity of awaiting a formal BIA proposal or CCAA plan. However, the court may not approve a sale unless it is satisfied that the debtor 'can and will' make the employee and pension plan payments required for approval of a BIA proposal or a CCAA plan.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Stalking horse bids are becoming more common, but are not yet routine in Canadian proceedings. In such cases, it must be demonstrated that the sale transaction is warranted, the sale will benefit the stakeholders, no creditor objects to the sale and there are no better alternatives. If approved by the court, a publicised sale process is conducted in which superior bids are sought before a bid deadline, with a possible auction in the event there are multiple bids. Competing bids generated through this process will have to exceed the original bid price plus the break fee (representing the original bidder's participation costs) to be considered a superior overbid.

There has recently been limited acceptance of credit bidding in asset sales. In other words, allowing a secured creditor to bid some or all of its debt in lieu of making payment in order to acquire the assets to which its security attaches. Subject to the discretion of the court, secured creditors can bid up to the full face value of the secured claim, even if the value of the claim exceeds the fair market value of the assets. In considering a stalking horse credit bid, a court will require that the sale process allow sufficient opportunity for superior bids to be submitted. Where the debtor is particularly distressed, a court may consider a 'pre-pack' or 'quick flip' sale under the BIA or CCAA provided the court has evidence that there has been some form of reasonable marketing process, the sale maximises recovery and is supported by creditors. Support of the proposed monitor or court-appointed receiver will also be crucial.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 both CCAA and BIA reorganisations, a restructuring debtor may disclaim burdensome or unfavourable contracts with the approval of the monitor or trustee or the court. Disclaimers are carried out by a simple notice or letter delivered to the counterparty. Counterparties who wish to challenge the disclaimer must apply to court for relief within 15 days of receipt of the disclaimer. In determining whether to uphold a disclaimer, the court will consider, *inter alia*, the prospects for a viable restructuring and whether the disclaimer will create significant financial hardship for the counterparty. Counterparties whose contracts have been terminated may file an unsecured claim in a CCAA debtor's plan or a BIA debtor's reorganisation proceedings for the damages caused by the termination. Certain types of contract, however, cannot be disclaimed, such as collective bargaining agreements, financing agreements where the debtor is the borrower, and leases of real property if the debtor is the lessor.

Where a breach of contract occurs after an insolvency case is opened, the other party must be careful not to contravene the statutory and court-ordered protections that are given to the debtor. In most cases, this will require the other party to the contract to obtain the approval of the court for the exercise of any remedies against the debtor or even, if the court order prohibits it, for permission to cease its performance under the contract. This type of approval is rarely granted in *bona fide* reorganisations.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The commencement of bankruptcy proceedings under the BIA does not automatically terminate a contract. A bankruptcy trustee is entitled to step into the shoes of the debtor and perform a contract (except for those that are personal in nature, such as employment contracts), and to require the other party to perform it as well. If, however, the trustee does not begin fulfilling the debtor's obligations under a contract within a reasonable period, the other party can treat the contract as terminated.

A bankruptcy trustee of a licensee may disclaim an agreement with the licensor. Although new provisions allow for a restructuring debtor to disclaim agreements, an agreement for the use of intellectual property rights may not be disclaimed by the restructuring debtor or the trustee of a licensor as long as the counterparty continues to perform its obligations under the agreement.

Under the CCAA, a debtor remains in possession of its property and therefore continues to have the benefit of contracts to which it is a party. A CCAA initial order will typically prohibit third parties from terminating their agreements with the debtor.

28 Personal data

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

Although the BIA and CCAA are silent in respect to the use of personal information and privacy, the collection and use of personal information by private Canadian companies in the course of commercial activities in Canada is governed federally by the Personal Information Protection and Electronic Documents Act or by equivalent provincial legislation. Under this legislation, a business is required to obtain consent to collect, use and transfer an individual's personal information.

'Personal information' is broadly interpreted, meaning that privacy legislation will impact the manner in which a debtor, licensed insolvency trustee or court-appointed receiver use or transfer personal information in insolvency matters. As determining whether consent was properly obtained may prove to be difficult or create an impediment to realisation efforts, parties often seek a court order that limits the need to obtain express consent in appropriate circumstances – such as in the context of a court-approved sale process. To that end, template court orders have been developed across Canada for use in insolvency proceedings that allow for personal information to be disclosed to prospective purchasers under confidentiality orders. In some cases, such as with personal health information, the purchaser may be required to notify the individual of the transfer and provide an opportunity to transfer such information if requested.

Related to the use and disposition of personal information is the ability to communicate with third parties, for instance, as part of a sale process. Canada's Anti-Spam Legislation (CASL) prohibits the transmission of a 'commercial electronic message' unless prior consent has been obtained from the recipient or the communication falls within one of the statutory exemptions. As the distribution of court orders, notices and other correspondence to stakeholders or interested parties in insolvency proceedings may be precluded under CASL, a court may grant an order exempting the application of this legislation on the basis that it would enhance a restructuring or realisation efforts, or both, for the general benefit of stakeholders.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

There are no specific provisions in the BIA or CCAA relating to arbitration processes. To the extent that arbitration proceedings are in

progress at the time of the debtor's filing, they would be subject to any applicable stay of proceedings.

Within insolvency proceedings, there is judicial precedent for referring stakeholder disputes to alternative forms of dispute resolution such as mediation. Moreover, the practice in CCAA cases is to delegate responsibility for resolving creditor claims to 'claims officers', who are often senior insolvency lawyers or retired judges. Decisions of claims officers are subject to a right of appeal to the court.

There are no specific provisions that preclude particular types of disputes from being arbitrated. In general terms, disputes that involve the application of public laws or policies that are regarded as matters of public policy or public order are considered to be non-arbitrable. Disputes in insolvency cases can be arbitrated, but the permission of the supervising court should be obtained in advance so as not to contravene any applicable court order and not to conflict with any procedures under way before the court.

Creditor remedies

30 Creditors' enforcement

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?

Although receivership is available as a court-ordered remedy, receivership can also be an out-of-court procedure (or 'private receivership') whereby a secured creditor appoints a receiver under its security to take possession of all or part of the debtor's assets that are subject to its security. The receiver will usually sell the debtor's business. Liquidations of businesses in out-of-court receiverships are becoming less common in Canadian practice, but are still often encountered in smaller cases.

Secured creditors with security on movable property can enforce their security by seizure and sale either in court or out of court. Creditors with security on immovable property can take possession of and retain the property in satisfaction of their claims through court proceedings or sell the property out of court or in court proceedings to satisfy the obligations owed to them.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

In the absence of formal insolvency proceedings, an unsecured creditor must first prove its debt through proceedings in court. Once a judgment is obtained, assets of the debtor (including amounts owing to the debtor) may be seized and sold by a court officer, through a variety of mechanisms, to satisfy the judgment. The proceeds are distributed pro rata among all creditors holding judgments against the debtor in the locality in which the seizure took place. These remedies are not difficult or time-consuming unless the legal proceedings are defended. Although somewhat uncommon, pre-judgment attachments may be available in some provinces prior to judgment being recovered by the creditor. A creditor may also be able to obtain one of several types of temporary orders that have the effect of freezing or tying up personal or real property pending a court hearing on the creditor's claims against it.

There is no distinction between foreign and domestic creditors, except that a foreign plaintiff may be required to pay money into court as security for the legal costs of the defendant if the defendant is successful in having the creditor's claim dismissed because of the 'loser pays' rule in Canadian litigation.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

In a bankruptcy, within five days of its appointment, the trustee in bankruptcy must send to all known creditors of the bankrupt, a notice

of the bankruptcy and notice of the first meeting of creditors, which is to take place within 21 days of the trustee's appointment and no earlier than 10 days after the notice is sent. The first meeting of creditors is held at the office of the Official Receiver, or a place designated by the Official Receiver, and the first meeting must involve the affirmation of the trustee's appointment, a review of the bankrupt's affairs, and the appointment of inspectors of the bankrupt's estate. The trustee in bankruptcy must report from time to time on the condition of the bankrupt's estate, including the moneys on hand, if any, and particulars of any remaining unsold property.

In a proposal proceeding, the proposal trustee must call a meeting of all creditors within 21 days of a proposal being filed. The proposal trustee must send a copy of the proposal, with a statement of the debtor's assets and liabilities, a list of all creditors owed C\$250 or more, notice of the date and time of the creditor meeting, and a proof of claim form and voting letter at least 10 days before the meeting. Creditors must return a proof of claim form to the proposal trustee before the meeting in order to vote on the proposal at the meeting.

In a reorganisation under the CCAA, the court-appointed monitor must, within five days of the initial order, post a copy of the initial order on its website, send a notice to every known creditor owed C\$1000 or more advising that the initial order is available, and post a list of creditors on its website along with each creditor's address and the estimated amount of their debt. This information will help creditors determine their position and inform them of the date and time of the comeback hearing, where the court will determine whether to extend the stay of proceedings.

33 Creditor representation

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 court has a wide discretion to appoint legal and financial representatives on behalf of creditor groups in CCAA or BIA reorganisations. Such appointments are typically made in larger and more complex CCAA proceedings so as to provide representation for particular stakeholders, such as current and retired employees who may otherwise lack resources to participate effectively in the restructuring. Creditor representatives are appointed on application made on notice to affected secured creditors. Their powers and responsibilities are defined in the appointment order. Funding for their professional charges is normally secured by a court-ordered priority charge on the assets of the reorganising debtor. There is a form of creditors' committee in BIA proceedings, but its primary function is to provide advice to the trustee and it does not have separate legal representation in the proceedings.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

If the bankruptcy trustee under the BIA fails or is unable to pursue remedies that would benefit the estate, a creditor may, with court approval, pursue the remedies and any benefit received will belong to that creditor and other participating creditors to the extent of their claims and applicable costs. Any surplus must be paid to the bankruptcy trustee. The distinctive feature is that creditors who do not participate in the proceedings do not share in any of the recoveries unless there is a surplus paid to the estate.

35 Claims

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

Both secured and unsecured creditors must file proofs of claim with the BIA trustee or CCAA monitor, including creditors with contingent or unliquidated claims. In the BIA, there is no statutory time limit for filing proofs of claim, but a creditor that does not file a proof of claim cannot vote at meetings of creditors and will not receive a distribution on its claim. Once a proof of claim has been filed, the trustee or monitor either accepts or disallows the claim. A creditor that is dissatisfied with a decision of the trustee or monitor may appeal the decision to the court.

Bar-date procedures for filing claims in a CCAA reorganisation are usually created by a separate court order and are not provided for in the statute. The court order will also prescribe the procedure for the creditor to follow on a disallowance of its claim by the monitor.

Neither the BIA nor the CCAA contain provisions dealing with the purchase, sale or transfer of claims against the debtor. A transferee of a claim must provide formal notice of the transfer to the trustee or monitor to confirm the transfer.

Claims are determined in a summary manner by the BIA trustee or the CCAA monitor, subject to appeals to a court-appointed claims officer or the court or both.

If a proper and valid claim is acquired at a discount, it can be enforced for its full face value, absent any improper conduct by the holder of the claim. Interest on unsecured claims, with rare exceptions (as in a plan that provides for post-filing interest), will cease to accrue on the opening of a case and interest will not be payable thereafter on unsecured claims unless there is a surplus remaining after the payment of the principal amount of all claims. Interest on secured claims continues to accrue after the opening of a case up to the value of the collateral subject to the security interest.

36 Set-off and netting

To what extent may creditors 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?

Canadian law recognises claims for 'legal set-off' and 'equitable set-off' in liquidations and reorganisations. Legal set-off requires that claims be both liquidated and mutual. Equitable set-off can exist regardless of whether debts are liquidated. Instead, the court looks at the connection between the various claims in respect of which set-off is asserted. If the connection between such claims would make it unfair or inequitable to permit one party to recover its claim without permitting the other party to set off what is owed to it, the courts will permit the claims to be set off against each other.

Valid set-off claims are expressly preserved in the BIA. In a CCAA reorganisation, the initial court order may suspend the exercise of rights of set-off. Set-off will, however, be recognised and permitted for the purposes of creditors' claims in a CCAA plan. Both the BIA and CCAA contain special provisions that expressly permit netting of particular types of financial contracts such as swaps, repurchase agreements and commodity contracts.

37 Modifying creditors' rights

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

Canadian experience in this area is limited, but continues to develop. In a handful of cases, it has been suggested that a court may modify the priority of creditors' claims under the BIA to remedy unfair conduct. Other statutory measures exist to modify priorities in cases involving improper conduct.

38 Priority claims

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

Excepting employee-related claims, major priority claims in liquidations and reorganisations include governmental claims for taxes withheld from employees' wages, environmental clean-up costs, and real property taxes. Property held in trust by the debtor is not included in the property of the estate. Ranking below secured creditors under the BIA are specified preferred claims, such as administrative expenses, certain municipal taxes and rent arrears. Under the CCAA, there are no statutorily specified preferred creditors, although CCAA orders often provide for comparable priority claims. After secured and preferred creditors have been paid in full, unsecured creditors receive any remainder on a pro rata basis.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

The two common types of employee claims that arise when employees are terminated in restructurings or liquidations are for 'termination pay' and 'severance pay'. Under Canada law, an employer must provide 'reasonable notice' when an employee's employment is terminated. As such, when employees are terminated without such notice they are entitled to termination pay for the notice period to which they were entitled, which usually depends on the length of their employment with the employer. In addition, special rules for termination pay may apply where the employment of 50 or more employees is terminated within a short and specific period of time (eg, four weeks). These special rules vary from province to province in Canada. Claims for termination pay generally rank as unsecured claims in restructurings or liquidations. Some provinces additionally provide for severance pay according to a legislatively prescribed schedule that depends on the employees' seniority and the length of employment with the employer. Severance pay claims also rank as unsecured claims in restructurings and liquidations.

Employees are also given priority claims ranking ahead of all creditors for unpaid wages over the debtor's liquid assets (ie, inventory, cash and accounts receivable) where the debtor is bankrupt or the subject of a receivership. This priority usually results in claims for unpaid wages being paid in full. A similar priority is given to employees for arrears of contributions to employee pension plans.

40 Pension claims

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

Provincial governments in Canada generally regulate pension obligations and set procedures to determine the extent of employers' obligations under pension plans. Pension plan deficiencies in defined benefit pension plans are generally treated as unsecured claims against an employer in insolvency proceedings. Where a pension plan is being wound up prior to insolvency proceedings being commenced, however, the pension plan deficiency will be given a super priority status with priority over the claims of other creditors including secured creditors. Such contributions are generally treated in this way regardless of whether the employer is undergoing a bankruptcy proceeding.

In formal bankruptcy proceedings, the priority of pension deficiency claims is determined by federal insolvency legislation under which deficiency claims are generally treated as unsecured claims against the insolvent employer. However, unremitted amounts deducted from employees' salaries and amounts required to be paid by the employer to the pension fund are the subject of a super-priority claim. There has recently been significant litigation over pension plan deficiencies in insolvencies in Canada in which the courts have considered such non-insolvency issues as the extent of the duties of the employer to the pension beneficiaries on the particular facts involved.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Canadian environmental legislation imposes duties and remediation responsibilities on anyone who has had management or control over property having environmental problems. These duties and responsibilities (including remediation responsibilities) extend to directors and officers of corporations that have environmental problems, even if they are no longer involved with the corporation. Moreover, to avoid liability, directors and officers must affirmatively prove that they acted properly and prudently to avoid environmental problems, which can be a difficult onus to discharge. In insolvencies, the environmental authorities are given a super-priority first charge for the costs of remediation over the affected property. In addition, insolvency administrators are given special protection from environmental liabilities created by the debtors.

42 Liabilities that survive insolvency or reorganisation proceedings

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

In a BIA liquidation, debtors are not released from pre-filing liabilities arising from fraud or from fines and penalties imposed by a court. In both BIA and CCAA reorganisations, the debtor and any purchaser of the debtor's business are bound by collective bargaining agreements (labour agreements with unions) and remain liable for environmental clean-up costs. Further, pre-filing secured creditors continue to have claims against pre-filing and post-filing assets of the debtor in which they have been granted a security interest. Contractual claims against directors cannot be compromised under a BIA proposal or a plan of reorganisation.

43 Distributions

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

In a BIA liquidation, the trustee must first make payment of priority claims before making distributions to unsecured creditors. In a major case, a trustee will often make one or more interim distributions to unsecured creditors. A final distribution is made to unsecured creditors once all of the property of the debtor has been realised and all claims against the estate have been settled.

Under a BIA proposal or a CCAA plan of reorganisation, distributions are made in accordance with the terms of the respective proposal or plan. Because plans and proposals are tailored to the specific debtor, distributions times and amounts will vary.

Security**44 Secured lending and credit (immovables)**

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

Security on immovable property is usually taken in the form of a 'mortgage' or 'charge' that is registered in the Land Registry Office in the province in which the real property is located. Upon default, the secured party can usually choose between selling the property and claiming any deficiency in the amount owing from the debtor, or obtaining title in court proceedings to retain the property as its own, in which case its claims against the owner are extinguished.

45 Secured lending and credit (movables)

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

Security interests in movable property are dealt with on a province-by-province basis under provincial personal property security legislation in Canada's common law provinces. This legislation provides

the requirements for taking 'security interests' in 'personal property' through the mechanism of 'security agreements'. It also prescribes conditions for enforcing security interests and the ranking of competing security interests. Finance leases of movables are generally considered to be security interests and, in many provinces, leases of movables for terms exceeding a year must be registered as security interests. Non-possessory security interests usually require registration in the general public registration system.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

The BIA, in both liquidations and reorganisations, allows the bankruptcy or proposal trustee to apply to the court to annul certain transactions. The CCAA allows the monitor to use the BIA provisions. The transactions that are subject to challenge, include:

- transactions at an undervalue (TUVs), namely, transactions in which the consideration received by the debtor is less than the fair market value given by the debtor;
- preferences that, in the case of arm's-length creditors, are transactions made with the intent to prefer the creditor within three months of the date of bankruptcy or, in the case of non-arm's length creditors, transactions within 12 months of bankruptcy that have the effect of giving a preference to the creditor; or
- dividends that are paid when a corporate debtor is insolvent.

For TUVs, the court may annul the transaction or order that any party to the transaction (or any person privy to the transaction) pay the difference between the consideration and the fair market value involved in it.

Trustees may also use provincial avoidance legislation to challenge pre-bankruptcy transactions. If a transaction is annulled, the trustee may recover property from the purchaser, unless the purchaser is a bona fide purchaser for value.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

The BIA precludes the payment of equity claims until all creditor claims are satisfied. The CCAA similarly stipulates that a court cannot sanction a plan of compromise or arrangement that permits the payment of equity claims before the claims of creditors are satisfied in full.

In BIA proceedings, claims of related parties and non-arm's length creditors are often postponed. The legislation provides that a non-arm's length creditor that enters into a transaction with the debtor prior to the debtor's bankruptcy is not entitled to a dividend in respect of that transaction until the claims of all other creditors have been satisfied unless, in the opinion of the trustee or the court, the transaction was a 'proper transaction'.

Groups of companies

48 Groups of companies

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

Canadian courts are receptive to recognising insolvency and reorganizational proceedings in other jurisdictions and to coordinating administrations of Canadian assets with administrations in other countries. The principal means of doing so is through the use of cross-border insolvency protocols.

A creditor that is related to the debtor can vote against, but not for, the debtor's plan of compromise or arrangement.

Cross-border insolvency protocols have been adopted and approved by the courts in several dozen major cases involving Canada and the United States. Additionally, joint hearings have been held between courts in Canada and the United States in many recent cross-border reorganisations.

49 Combining parent and subsidiary proceedings

In 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?

For reasons of efficiency, insolvency proceedings of corporate group members may be consolidated on a procedural basis. Under the BIA, a court may grant an order procedurally consolidating the insolvency proceedings of several related debtors.

In proceedings under the CCAA, a corporate group may bring a single application. However, each of the members of the corporate group must qualify as debtor companies under the CCAA. Corporate debtors may also be added to the proceedings at a later date upon a motion by the applicants.

Canadian courts have occasionally permitted substantive consolidation of estates. In determining whether or not substantive consolidation is appropriate, courts will consider a number of factors including the difficulty of segregating assets, the intertwining of corporate functions, whether particular creditors will be prejudiced by consolidation and whether consolidation is fair and reasonable in the circumstances.

International cases

50 Recognition of foreign judgments

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?

Canada has a treaty with the United Kingdom that provides for the reciprocal enforcement of judgments as between the two countries. It has been implemented by both the federal and provincial governments, except Quebec, and sets out a streamlined process for registration and enforcement by the court of a foreign judgment for the payment of money.

Otherwise, apart from Quebec, the matter is dealt with in accordance with the common law. Generally speaking, a Canadian court will enforce a foreign judgment for a sum certain, without reconsideration of the merits, where the action to enforce is commenced within the applicable limitation period, the decision is final in nature, and there is a real and substantial connection between the jurisdiction in which the judgment was obtained and the subject matter of the action.

A foreign non-monetary judgment (eg, for injunctive relief) can also be enforced, provided that it is not quasi-criminal or penal in nature (such as a foreign contempt order). In determining whether to enforce a foreign non-monetary judgment, a court will consider a variety of fairness factors including whether the foreign order is clear and specific, whether third parties are affected, and whether the use of judicial resources is consistent with what would be allowed for domestic litigants.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Canada adopted substantially all of the UNCITRAL Model Law on Cross-Border Insolvency in 2005.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors are dealt with in accordance with their relative priorities, which is the same as domestic creditors.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

There is some precedent for doing so. Asset transfers of this nature would need to be court approved on notice to all affected parties.

54 COMI

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 general approach of Canadian courts is to determine the location of the registered (head) office of a corporate debtor. The COMI of the debtor will then be presumed to be in that jurisdiction. This presumption can be rebutted by evidence showing that the head office functions of the debtor are located in another jurisdiction. The test is to establish where the 'nerve centre' of the debtor's business is located and that jurisdiction will be regarded as its COMI for insolvency purposes. Thus, in several cases, the COMI of a company incorporated in Canada and with its head office in Canada has been held to be outside Canada in the jurisdiction of the parent company where the debtor was a member of a corporate group that was operated and controlled in the other country. Canadian courts have identified three main criteria for determining the location of the COMI of a debtor: the location is readily ascertainable by creditors; the location is one in which the debtor's principal assets or operations are found; and the location is where the management of the debtor takes place. Reference in this regard can be made to the Principles for Coordination of Multinational Enterprise Group Insolvencies that have been promulgated and approved by the membership of the International Insolvency Institute (at www.iiglobal.org).

55 Cross-border cooperation

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?

Canadian courts have long been receptive to cooperating with courts in other countries in multinational cases. Several Canadian courts have adopted and approved the use of the Guidelines for Court-to-Court Communications in Cross-Border Cases (the Guidelines) developed by the American Law Institute and the International Insolvency Institute. The objective in approving the Guidelines is to facilitate cooperative procedures in insolvency proceedings that involve cross-border and international cases. There are several recent examples of major cases (eg, *Nortel* and *AbitibiBowater*) where there has been careful coordination between Canadian courts and courts in other countries in the development and progress of cross-border reorganisations and restructurings, which has resulted in improved outcomes for stakeholders.

Canadian courts have a long history of recognising foreign proceedings and a strong history of cooperating with foreign courts in international insolvency proceedings and have rarely refused to recognise proper foreign proceedings or to cooperate and coordinate with foreign courts.

56 Cross-border insolvency protocols and joint court hearings

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?

Canadian courts have been receptive to recognising insolvency and reorganisational proceedings in other jurisdictions and to coordinating administrations of Canadian assets with administrations in other countries. The principal means of doing so is through the use of cross-border insolvency protocols.

Cross-border insolvency protocols have been adopted and approved by the courts in several dozen major cases involving Canada and the United States. Additionally, joint hearings have been held between courts in Canada and the United States in many recent cross-border reorganisations.



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The Companies Law (2018 Revision) and the Companies Winding Up Rules, 2018 are applicable to corporate insolvencies. Recent amendments to the Winding Up Rules apply certain provisions of the Grand Court Rules, which govern proceedings in court generally, to winding up proceedings. One of those rules gives the court wider discretion as to how it deals with parties who do not comply with the Winding Up Rules. The Companies Law also provides a regime for what are known as arrangements and reconstructions, enabling companies to reach compromises or arrangements with their creditors or members, and a regime for the merger or consolidation of Cayman companies and Cayman companies with foreign companies.

It is noted that the corporate insolvency regime also applies to the winding up and dissolution of exempted limited partnerships and limited liability companies, save to the extent that it is varied by the Exempted Limited Partnership Law (2018 Revision) and the Limited Liability Companies Law (2018 Revision), respectively; and that the Bankruptcy Law (1997 Revision) and Grand Court (Bankruptcy) Rules, 1977 (as amended) apply to personal bankruptcies.

2 Excluded entities and excluded assets

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

All companies that are formed and registered under the Companies Law and the Limited Liability Companies Law, or that existed under Cayman Islands law prior to the original enactment of the Companies Law, may be susceptible to customary insolvency proceedings. A foreign company may also be susceptible to customary insolvency proceedings, but only where it has property situated in the Cayman Islands, is carrying on business in the Cayman Islands, is the general partner of a Cayman Islands exempted limited partnership or is registered as a foreign company in the Cayman Islands.

Assets over which the company has granted a creditor security will be excluded from the insolvency estate. While the liquidator might realise such assets with the consent of the secured creditor, the net proceeds after deduction of the liquidator's costs can be paid only to the secured creditor. Assets that a company holds as trustee are similarly excluded from the insolvency estate.

3 Public enterprises

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

There are a number of entities that the government has established to perform particular public functions. Such entities are created by specific enactments that generally do not address what is to happen in the event of their insolvency. The government generally provides subsidies, as needed, to ensure insolvency does not occur.

In the event that the government decides that a particular entity should be dissolved, it will typically need to enact specific legislation to achieve that purpose, for example, the Health Services Authority (Dissolution) Law 1993, which dissolved the Health Services Authority and vested all of its property, rights and liabilities in the government. One exception is the Cayman Islands Development Bank, in respect of which the Monetary Authority is given specific powers under the legislation that established the bank to (among other things) appoint a person to advise the bank on the proper conduct of its affairs where the bank is or appears likely to become insolvent and to report to the Monetary Authority thereon within three months of his or her appointment; upon receipt of the report, the Monetary Authority will have power to (among other things) permit a reorganisation of the bank's affairs or request that it be wound up.

4 Protection for large financial institutions

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

No such legislation has been enacted.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Insolvency proceedings will be commenced in the Financial Services Division of the Grand Court. Where an appeal from a decision of the Grand Court is possible, it would be made to the Cayman Islands Court of Appeal, and any possible appeal from the Court of Appeal would be made to the Judicial Committee of the Privy Council in England.

The court will have the power to wind up a company if:

- the company has passed a special resolution requiring it to be wound up by the court;
- the company does not commence business within a year of its incorporation, or suspends its business for a year;
- the period, if any, fixed for the company's duration by its articles of association expires, or an event occurs upon which the articles of association provide it is to be wound up;
- the company is insolvent; or
- the court is of the opinion that it is just and equitable that the company be wound up (eg, because of fraud, managerial misconduct, breakdowns of trust and confidence, loss of substratum).

The court thus has the power to wind up a company in each of the circumstances in which its winding up should be appropriate. Where a winding up order is sought on the just and equitable basis, the court will, however, be cautious to ensure that the winding up is not being sought for an ulterior purpose, as the Grand Court has recently affirmed; and in the appropriate circumstances the court may strike out such a winding up petition.

An order for the winding up of a company is treated as a final order and the respondents to the winding-up petition will therefore have an automatic right of appeal against that order. Orders that are made in the course of, or by way of regulation of, a liquidation and any other

orders that are ancillary to or consequential on a winding-up order are, however, treated as interlocutory orders and a party who wishes to appeal against any such order must therefore obtain permission to proceed with an appeal. The appellant is required to deposit CI\$50 with the Grand Court as security for the due prosecution of the appeal, and the court has a broad discretion to order the appellant to provide further security for the respondent's anticipated costs of the appeal. The amount of security that an appellant may be ordered to provide will be based on the anticipated costs, and, in deciding whether to make such an order, the court will have regard to, inter alia, the prospects of the appeal succeeding, the location of the appellant and the appellant's conduct in the proceedings, including its attitude to adverse costs orders made against it.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

A company may place itself into voluntary liquidation by a special resolution of its members, or its articles of association may require it to go into voluntary liquidation at a particular time or upon the occurrence of a particular event. Once the voluntary liquidation commences, the company will only be permitted to carry on business if and to the extent that doing so is beneficial for its winding up, and any share transfer will be void unless sanctioned by the liquidator. In order for the liquidation to continue as a voluntary liquidation (without the court supervising), the directors must swear a declaration of solvency within 28 days of its commencement. Provided the declaration is sworn, the person or persons appointed as voluntary liquidators will exercise their powers to wind up the company's affairs and distribute its assets, and the company will be dissolved thereafter.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

A debtor company may commence a formal financial reorganisation by petitioning the court for its approval of a scheme of arrangement. The scheme will be required to show some element of accommodation by both the company and its creditors or members (as the case may be), and will be required to provide sufficient information to enable creditors or members to reach an informed decision on the proposal. Procedurally, evidence will need to be filed describing the purpose and effect of the proposed scheme, and providing information that enables the court to determine whether meetings of classes of creditors or members should be convened and the appropriate composition of the classes. If creditor or member approval is obtained at properly convened meetings (see question 8), the court will be asked to approve the scheme, and may do so either absolutely or subject to certain conditions in light of any opposition to the scheme.

In conjunction with the scheme, the company may seek the appointment of provisional liquidators to trigger and take advantage of the statutory moratorium on claims. It is commonplace for provisional liquidators to be appointed for the purposes of proposing the scheme, as the law permits.

8 Successful reorganisations

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

Creditors will be placed into classes for voting purposes if their legal rights are so dissimilar that they cannot sensibly consult with each other with a view to their common interest. The meeting or class meetings of creditors will need to be convened in accordance with directions from the court, and the scheme of arrangement will have creditor approval (but remain subject to court approval) where it is approved by a majority in number representing 75 per cent in value of those voting at the meeting or at each class meeting.

It is typical for a scheme to provide indemnities and releases to parties (particularly provisional liquidators) involved with its

implementation. It is also possible that it may release non-debtor parties from liability, which might be appropriate where the benefit to the company in waiving its claim and retaining the party's services is considered greater than the value of the claim.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Whereas voluntary liquidations generally do not involve the court's supervision, involuntary liquidations may be commenced by a creditor petitioning the court on the ground that the debtor company is insolvent and obtaining a winding-up order. Upon the making of the winding-up order, any disposition of the company's property and any transfer of shares or alteration in the status of its members made after the presentation of the petition will be void, unless the court otherwise orders. The winding-up order will also trigger the liquidators' obligations to collect, realise and distribute the company's assets to its creditors, and any surplus to its members, and to report to creditors and members on the liquidation.

As to the effects of the winding-up order on the commencement or continuation of legal proceedings against the debtor company, see question 21.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

The Companies Law does not permit a company to be reorganised involuntarily.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

There is no expedited scheme of arrangement process in the Cayman Islands. The speed with which a scheme of arrangement will obtain court approval will vary from case to case, and depends on (among other things) how quickly creditor or member approval can be obtained and the level and strength of any opposition to the scheme.

Members of a company may, however, choose to make use of the statutory merger and consolidation regime to effect a reorganisation, which is a streamlined out-of-court process requiring only members' approval of the proposed plan.

12 Unsuccessful reorganisations

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 reorganisation, either by scheme of arrangement or a merger or consolidation, will be defeated if it is not approved by the necessary majorities of creditors or members, as the case may be. A scheme of arrangement may also be defeated, even if approved by the requisite majorities, if the court refuses to approve it on the basis that it is unfair or there is some sufficiently serious and justifiable objection to its implementation. In the case of a merger or consolidation, it will be open to a member of a constituent company to commence proceedings to challenge its validity on the ground that the statutory approval process was not complied with, or that it was approved on the basis of inadequate or incorrect information.

If a debtor company were to fail to perform a scheme, it is likely that a creditor would petition for its winding up and it would be placed into insolvent liquidation.

13 Corporate procedures

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

There is no process other than a formal liquidation by which a company may be dissolved. While a company may cease to exist where the Registrar of Companies strikes it from the register of companies (either at the request of the company or of his or her own motion), unlike a dissolution, the striking off may be reversed by an order of the court up to 10 years after the company was struck.

Solvent companies often use the strike-off process to bring their existence to an end where they are able to verify to the Registrar that they have no assets and liabilities, they consider the more formal voluntary liquidation process unnecessary and wish to save time and expense. The Registrar may also strike a company from the register of his or her own motion where he or she has reason to believe that it is no longer carrying on business or in operation, often because it has failed to pay its annual fees. Where a company has been struck from the register in either case, it will be open to the struck off company (acting by a former director) or a member of that company to apply to the court for an order restoring it to the register on the ground that it was in fact carrying on business or in operation at the time of the striking off, or that justice requires it to be restored. A creditor of a struck-off company may also petition the court to restore the company and put it into liquidation. The effect of a restoration is that the company will be treated as never having ceased to exist.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

A liquidation case will be formally concluded when the company is dissolved. In the case of a voluntary winding up, the dissolution will follow the filing of the liquidator's return with the Registrar. In the case of a compulsory or court-supervised winding up, once the affairs are fully wound up and any assets distributed in accordance with the law, the liquidators will i) produce a final report for creditors; ii) schedule a court hearing of the application for dissolution of the company; and ii) publish notice of the hearing at least 14 days before the date of the hearing in accordance with the Winding Up Rules. The dissolution of the company will then follow the filing of the court order.

A reorganisation by way of a scheme of arrangement will be concluded in accordance with the terms of the scheme. Where the scheme is a creditors' scheme that has been carried out in conjunction with the appointment of provisional liquidators to take advantage of the statutory moratorium on claims, it will, however, also be necessary to apply to the court for an order discharging the provisional liquidators and bringing the provisional liquidation to an end.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

A debtor company will be insolvent if it is unable to pay its debts as they fall due for payment. The onus is on the party petitioning for the winding up of the company to prove that it is insolvent, not on the company to prove its solvency.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

The Companies Law does not impose any obligation on a company to commence insolvency proceedings at any time. As to voluntary liquidation proceedings, see question 6.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

No civil or criminal liability will arise purely because a company in fact continued to trade after it had become insolvent. Criminal liability may, however, arise in such circumstances where steps have been taken by officers of the company (among others) with an intent to defraud its creditors. Additionally, any persons who were knowingly parties to the carrying on of the company's business with an intent to defraud its creditors or for any fraudulent purpose may be held liable to contribute to the company's assets. Directors may also incur civil liability where it can be shown that they breached their duties in permitting the company's business to be carried on while it was insolvent.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Corporate officers and directors are not ordinarily liable for their corporation's obligations. It is, however, possible for them to assume responsibility for payment of particular liabilities by giving personal guarantees in respect of them. It is also possible for an officer or director to be declared liable to contribute to his or her company's assets where the court finds that he or she was knowingly a party to the company carrying on business with the intent to defraud its creditors or for some other fraudulent purpose.

Aside from this, where an officer or director acts in breach of the fiduciary duty or duty of care that he or she owes to his or her company, he or she may be held liable to compensate the company for any loss; alternatively, where he or she profits from a breach of fiduciary duty, he or she may be held liable to pay the profit to the company.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Directors owe their duties to the company. In normal circumstances this in practice means to the general body of the shareholders. However, where a company is insolvent, or at risk of becoming insolvent (of doubtful solvency), the duties of the company's directors extend to the interests of its creditors. There are a number of Commonwealth authorities to this effect, which have been approved and followed in the Cayman Islands.

Accordingly, where the interests of the company's creditors intervene, they replace the interests of the shareholders and in such circumstances the directors will owe a duty to the company to take due care to protect the interests of the creditors.

The effect of this is that in the insolvency scenario, a company's directors must act in the creditors' interests, effectively putting aside the interests of the shareholders at least until such time as the company is solvent again. This does not automatically necessitate the directors ceasing trading and putting the company into liquidation. However, the directors must consider the financial position of the company and take a view on the most effective way of maximising a return for creditors. It will usually be sensible for the company to take the advice of an insolvency practitioner as to the options available.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

In a scheme of arrangement, the directors may carry on the company's business for the purpose of the restructuring, subject to the supervision of any appointed provisional liquidators. In a liquidation, the liquidators essentially step into the role of the directors in the management of the company for the purpose of the winding up, and the directors' powers cease, save that directors retain residual powers to allow them to initiate an appeal against the winding-up order.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

There is no prohibition against the continuation of legal proceedings or the enforcement of claims by creditors in a voluntary liquidation. However, once an order has been made for the winding up of a company under the court's supervision or for the appointment of a provisional liquidator, no legal proceedings (including arbitration proceedings) may be commenced or continued against that company without the permission of the court; the exception to this rule is that a secured creditor may enforce its security without first obtaining such permission. In determining whether to grant permission to commence or continue legal proceedings against the company, the court will consider whether it is right and fair to all parties to do so in the circumstances of the case, and whether it is necessary to impose any conditions on the granting of such permission to alleviate any potential unfairness. It is also noted that, in the period between the presentation of the petition and the making of a winding-up order, a creditor, member or the company itself may apply for an order staying any proceedings being pursued against the company before the local courts or restraining further proceedings from being pursued before a foreign court. While there is no reported local authority that indicates the matters the court will consider in determining whether to grant such an order, it is expected that the main consideration will again be what is fairest to all parties in the circumstances of the case.

There is no prohibition against the continuation of legal proceedings or the enforcement of claims by creditors in a reorganisation by way of a scheme of arrangement. However, the appointment of provisional liquidators may be sought in conjunction with the scheme to trigger and take advantage of the statutory moratorium on claims while the scheme is implemented.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

There is no statutory provision dealing directly with insolvent trading in the Cayman Islands. The terms of a scheme of arrangement may restrict or qualify the company's ability to do certain things (eg, obtaining credit). If provisional liquidators have been appointed in conjunction with the scheme, they may carry on the company's business for the purposes of the restructuring or, less frequently, may supervise the directors of the company in carrying on its business. As to liquidations, see the answers to questions 6 and 9. Directors may be liable for breach of fiduciary duties if the company continues to incur liabilities while it is unable to pay its debts.

Creditors can stay involved in liquidation proceedings by reviewing the liquidators' reports on the financial status of the company and progress of the liquidation, or have even greater involvement through election to the Liquidation Committee, upon which they can attend court hearings of the liquidators' applications for the court's sanction of proposed dealings with the assets of the company (see the answers

to questions 32 and 33). In a scheme of arrangement, the sanctioning of the scheme itself, once approved by the requisite majority of creditors, is subject to the court's approval. Creditors are entitled to attend the sanction hearing.

23 Post-filing credit

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

There is no absolute legal prohibition against loans or credit being obtained by the liquidators of a company in liquidation or by a company undergoing a reorganisation: a liquidator may borrow and grant security over the company's assets with the court's permission, and a company's ability to borrow during a reorganisation by way of a scheme of arrangement will be delimited by the terms of the scheme.

Funds borrowed by a liquidator for the purposes of carrying out a liquidation will generally be expenses of the liquidation and would be paid in priority to the claims of preferred and other unsecured creditors in the liquidation.

24 Sale of assets

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?

The terms of a scheme of arrangement may address matters concerning the sale of company assets or the company's entire business, if considered necessary. In a liquidation (save for a provisional liquidation for the purposes of reorganisation), the liquidator will be seeking to realise the assets of the company in the manner that produces the greatest return for creditors or members. The purchaser will acquire the assets on such terms as to liabilities and encumbrances as the sale agreement provides.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

There is no prohibition on sales processes that involve 'stalking horse' bids or credit bidding. In a court-supervised liquidation, the court will, however, need to consider whether a sale on either of those bases should be approved as being likely to produce the best outcome for the creditors as a whole. While a sale agreement that permits 'stalking horse' bids may lead to the liquidator achieving a substantially better price for the asset, credit bidding is less likely to result in the best price being paid.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

Cayman Islands law does not permit a debtor undergoing insolvency proceedings to reject or disclaim an unfavourable contract without the usual consequences for breach following. In a reorganisation, the debtor may nevertheless seek to renegotiate the terms of the contract if there is some prospect that the counterparty might agree to more favourable terms.

If there is a breach of contract by the company following the commencement of insolvency proceedings that gives rise to a claim for damages, the party having the claim will likely file a proof of debt in the liquidation. Where, however, the contract conferred a proprietary right on the counterparty prior to the commencement of the liquidation, the counterparty may call on the company for a transfer of the property and, if necessary, seek the court's permission to sue the company for the property.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The licence agreement will typically set out the circumstances in which termination of the licence by either party is permissible, or when termination will automatically occur. If the agreement does not provide for automatic termination in the event of insolvency, the company (and thus its liquidator) will continue to be entitled to make use of the rights until such time as the licence is terminated. The liquidator may terminate the agreement with the court's permission if appropriate, but would not be entitled to make use of the IP in any manner that is adverse to the interests of the licensor or owner.

28 Personal data

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

Where a company owes a common law duty of confidence to a person from whom it has received information, that duty will generally prevent the company from disclosing the relevant information. The Confidential Information Disclosure Law, 2016 (CIDL) lists a number of instances where the disclosure of such confidential information will not, however, constitute a breach of the duty of confidence and will not be actionable at the suit of any person: examples include disclosure in compliance with certain orders of the court and other authorities, in compliance with statutory obligations and to high-ranking police officers in connection with their investigation of a criminal offence; another key instance is where the person to whom the duty of confidence is owed consents to the proposed disclosure. If it were necessary for an insolvent company (acting by an officer or officers) to give evidence in its insolvency proceeding that consisted of or included information that it held in confidence for others and could not disclose under any such exception in the CIDL, it would be necessary for an application to be made to the court in a separate proceeding under the CIDL for directions as to whether the evidence should be given, and whether any safeguards should be imposed to maintain its confidentiality. If an insolvent company were contemplating transferring information that it held in confidence for others to a purchaser of all or part of its business, it would be prudent for it to seek the consent of the persons to whom the duty of confidence was owed before making such a transfer. The Cayman Islands Data Protection Law (the DPL) was passed in March 2017, is expected to come into force by January 2019 and will apply to the processing of all personal data in the Cayman Islands. Drafted around a set of internationally recognised privacy principles, the DPL provides a framework of rights and duties designed to give individuals greater control over their personal data. The DPL requires data controllers to put in place policies and procedures to ensure that their handling of personal data complies with the new law, that all data is transferred and stored securely and is protected against unauthorised access and use. In addition, any business that offers goods or services to individuals in the European Union now also has to comply with the EU's General Data Protection Regulation, which came into effect on 25 May 2018.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Cases have arisen locally where a company has sought to restrain the presentation of a creditor's winding-up petition on the ground that the debt is disputed and the relevant agreement requires the dispute to be arbitrated. Recent judgments indicate that where a debt is disputed and subject to an arbitration clause, unless there are 'exceptional circumstances', the court will exercise its discretionary power to stay or dismiss the petition in order to compel the parties to resolve the dispute

through arbitration. The effect of the commencement of insolvency proceedings on the commencement and continuation of arbitration proceedings is addressed above in the response to question 21. An arbitration agreement between the company and a third party will remain enforceable after the commencement of insolvency proceedings and, where the liquidators wish to pursue a claim which the company has agreed to submit to arbitration, they may commence and continue the arbitration in respect of that claim with the permission of the court. If court proceedings were commenced in spite of an arbitration agreement, the defendant might assert its entitlement to have the dispute arbitrated and seek a stay of the court proceedings, but the court will not enforce that entitlement of its own motion.

Creditor remedies

30 Creditors' enforcement

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 creditor will typically be permitted by the terms of its charge to appoint a receiver without needing to apply to the court, and the terms of the charge will determine the circumstances and manner in which the appointment may be made (typically by written notice to the chargor). Where the receiver is appointed over real property, notice of the appointment must, however, also be filed with the Registrar of Lands.

Where real property is let, a landlord may seize and sell property belonging to the tenant on the premises to set off the sales proceeds against unpaid rent. In the sale of goods context, where the contract for sale contains an effective title retention clause and the purchaser fails to pay for goods received, the clause may cause the purchaser to return the goods to the seller without requiring litigation to be pursued.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

An unsecured creditor will generally need to commence proceedings against a debtor company to recover its debt in the event of non-payment. If the debt is disputed, the proceedings are typically commenced by writ of summons. If the creditor obtains judgment in such proceedings for payment of the debt, it may then take steps to enforce its judgment against the assets of the company, and what step will be appropriate will depend on the nature of the assets against which enforcement is sought: for example, land and shares may be charged and, if necessary, sold; debts owed to the company may be garnished; and other movable property may be seized by the court's bailiff and sold. If the debt is not disputed, the creditor may prefer to serve a statutory demand for payment on the company and, in the event of non-payment, petition the court to wind the company up on the ground that it is insolvent. If the winding-up order is made, the creditor would then (at the appropriate time) prove its debt in the liquidation.

Proceedings commenced by writ can take between months or years to be decided, depending on how vigorously they are defended. Where there is no strong defence to a claim for payment, judgment may be delivered within a year or less. If the defence has no prospect of success, the creditor may even obtain summary judgment against the debtor and accelerate to the enforcement stage well within a year. The time it will take to enforce a judgment can also vary considerably depending on (among other things) the nature and location of the assets against which enforcement will be sought, and indeed whether those assets first need to be discovered.

The time it takes to carry out a liquidation will depend on the state of the debtor company when liquidators are appointed: if information is readily available and assets can easily be realised, the liquidation should be completed within a short time frame, but, if the opposite is found, the process could be very lengthy.

Pre-judgment attachments are not available under Cayman Islands law. A creditor may, however, apply to the court for an injunction restraining the debtor from disposing of its assets up to the value of the claim if (among other things) there is a real risk that the debtor will dispose of the assets to render a judgment against it nugatory or

more difficult to enforce. The court also has the power to award interim payments in respect of amounts that a plaintiff is almost certain to be awarded at trial.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Notice of the hearing of a creditor's winding-up petition and the hearing of a dissolution application at the end of the winding-up process must be advertised once in a newspaper circulated in the Cayman Islands and, where the company carries on business outside the Islands, once in a newspaper that is most likely to bring it to the attention of creditors there, unless the court directs that such advertisements are not required. Under recent amendments to the Companies Winding Up Rules, the court can dispense with the requirement of liquidators to publish notices in newspapers if the expense is disproportionate or would be unlikely to serve any useful purpose. The court may therefore allow liquidators to publish notices through more effective and less expensive means, such as companies' websites. Creditors will also be notified of (among other things) the making of a winding-up order and the appointment of official liquidators, as well as any meeting of creditors that is to be held and the liquidators' intention to declare and distribute a dividend.

In an insolvent liquidation, the liquidator will convene a first meeting of creditors primarily for the creditors to elect their liquidation committee. Thereafter, meetings of creditors may be held as often as the liquidator considers necessary, at creditors' requests, at the direction of the court and, in any event, not less than once per year. The liquidation committee will also meet on the dates or at the intervals that it resolves, as requested by any two of its members and, in any event, not less than semi-annually.

Official liquidators will report to the liquidation committee on the administration of the estate, and the company's assets and liabilities. The information is typically communicated by way of detailed written report and accounts, which the liquidators also produce to the court.

33 Creditor representation

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 Winding Up Rules require a liquidation committee to be established in respect of every company that is being wound up by the court, though permitting the court to dispense with the requirement in particular cases. The committee will be composed of members, creditors or both, depending on whether the company is solvent, insolvent or of doubtful solvency: its composition will be determined by a vote of the creditors where the company is insolvent, members where it is solvent, and both where its solvency is doubtful (with a majority of creditors being elected). Any creditor will be eligible for appointment as long as he or she has submitted a proof of debt that has not been rejected, and members (including beneficial owners of shares certified as such by their custodians or clearing houses) will be eligible for appointment. A person cannot be a committee member as both a creditor and member, and cannot act as representative of more than one committee at once, or act as both committee member and representative of another committee member.

Official liquidators are under a duty to report to the committee on matters that are of concern to it with respect to the winding up. Liquidators and committees typically meet regularly, and not less than semi-annually, and any two committee members can requisition a meeting. The committee will often be asked to approve certain matters by resolution (either by majority vote at a meeting or unanimously in writing) on which the liquidators propose to seek the court's permission, such as obtaining funding to pursue litigation, engaging legal

counsel or other professionals, sales of property and payment of the liquidators' own remuneration.

Recent decisions of the Grand Court have shown that liquidation committees can, where necessary, get the court to intervene in the liquidators' conduct of the liquidation by seeking orders requiring the liquidators to do or refrain from doing certain things in order to expedite the process and maximise overall returns for creditors.

The committee is entitled to engage a legal adviser, and the legal fees and expenses that the committee reasonably and properly incurs in obtaining legal advice will be paid out of the assets of the company as an expense of the liquidation.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

Creditors are not permitted to pursue the estate's remedies themselves. They may, however, decide to provide the liquidator with funding to pursue the claim if they expect to benefit sufficiently from any recoveries that the liquidator may make. Any funding they provide would also be an expense of the liquidation, for which they would be reimbursed out of any assets in the estate before any distribution is made. Alternatively, where for example funding is unavailable or the claim is considered too risky, the liquidator might seek the court's permission to sell and assign the claim to a third party, who might then pursue it for his or her own benefit.

35 Claims

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

A creditor must set out details of its claim on a proof of debt form and submit the form, together with any relevant documentary evidence, to the liquidator. Time limits are addressed in the response to question 43. The liquidator may admit the proof of debt, either entirely or in part, for a distribution, or reject it.

The liquidator must give the creditor notice of a rejection or admission of only part of its proof of debt, with the reasons thereof, and informing the creditor of its right to apply to the court for a reversal or variation of his or her decision. An application to the court must be made by summons within 21 days of the creditor receiving the notice, with supporting evidence. The Grand Court has recently held that cross-examination of witnesses may be allowed at the hearing of such an appeal, despite there being no express provision for cross-examination in the applicable rules.

Creditors are permitted to assign their rights to receive distributions to third parties or instruct the liquidator to pay them to third parties. Notice of an assignment would need to be given to the liquidator to enable the liquidator to pay the distribution to the assignee.

Claims for contingent and unliquidated amounts can be proved in a liquidation, and the liquidator adjudicating a proof for such a debt must consider the proof and supporting documents and make a just estimate of the value of the claim.

36 Set-off and netting

To what extent may creditors 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 remain able to exercise existing common law and contractual rights of set-off and netting as against a company following the commencement of its liquidation. In the case of an insolvent liquidation, save where the creditor had notice at the time the debt fell due for payment that liquidation proceedings had been commenced, set-off will be automatic, absent any contractual arrangement to disapply it. Where

it applies, an account will be taken of what the company owes to the creditor and vice versa as at the commencement of the liquidation and the balance after the set-off will be paid to the party to whom it is due.

In a reorganisation by way of a creditors' scheme of arrangement, the terms of the scheme may restrict or exclude rights of set-off or netting, if approved by the statutory majority of creditors and by the court.

37 Modifying creditors' rights

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

The court has no power to alter the rank of a creditor's claim, which is fixed by statute.

38 Priority claims

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

Apart from employee-related claims, debts due to bank depositors and taxes due to the Cayman Islands government will rank as preferred debts over those owed to other unsecured creditors. There is no type of unsecured claim that has priority over secured creditors.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Employees who are terminated as a result of a restructuring are often terminated for redundancy, which is a fair reason for dismissal under Cayman Islands employment law. The employer must, however, be seen to have acted reasonably in all the circumstances to avoid liability for unfair dismissal. It is wise to consult employees in advance of termination for redundancy in a restructuring, and employees terminated for this reason are entitled to notice and severance pay. Where employment is terminated by reason of a company going into liquidation, the law provides that the employee is entitled to severance pay. Severance pay is calculated as one week's wages at the employee's latest basic wage for each year of service the employee has completed, but legislative reforms are being considered that may increase the amount employers are required to pay in future cases. The financial liability on employers for severance pay and compensation for unfair dismissal (where a claim is successfully brought) does not change whether a claim is brought by one employee or a number of employees, or where a business ceases operation. For each individual employee, severance pay and unfair dismissal compensation are capped.

40 Pension claims

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

A company with employees in the Cayman Islands is generally required by law to contribute to their pensions: the employer and employee must each contribute 5 per cent of the employee's earnings, though they may contribute more.

Employers typically assume responsibility for deducting and delivering their employees' contributions to the pension plan at the same time that they pay in their own. Where the employer has failed to pay its own contributions to the pension plan, it therefore tends to be the case that it has also failed to deliver its employees' contributions. Both classes of unpaid contributions will be held by the company on trust and will fall outside of the insolvency estate: undelivered employee contributions are held on trust for the employee and unpaid employer contributions are held on trust for the beneficiaries of the pension plan as a whole. The law additionally provides that the administrator of the pension plan has a lien and charge on assets of the employer in an

amount equal to the amount of the unpaid contributions that it holds on trust, thus making the administrator a secured creditor.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

This is not a matter addressed by local legislation. It is, however, noted that claims in tort may lie against the company and possibly others who are responsible for causing environmental damage.

42 Liabilities that survive insolvency or reorganisation proceedings

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

In the case of corporate insolvency, the debtor company will be dissolved once its affairs are completely wound up and any assets have been distributed. It is not possible for any liability of the debtor company to survive this process, because dissolution means that the debtor company has irreversibly ceased to exist.

In the case of a reorganisation by way of a creditors' scheme of arrangement, the scheme will set out the terms on which all liabilities to the creditors to which the scheme applies will be discharged. Once the scheme is approved by vote and receives court approval, its terms will bind all creditors and all liabilities to them will be discharged in accordance with the terms of the scheme.

43 Distributions

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

A liquidator may declare an interim distribution to creditors when he or she determines that sufficient assets have been realised to be able to make the distribution. Upon making that determination, the liquidator is required to publish a notice of his or her intention to declare the distribution, fixing a date not less than 30 days from the date of publication by which proofs of debt must be lodged with him or her and stating that any creditor who lodges its proof of debt after that date will be excluded from the interim distribution but not from any subsequent interim or final distribution.

The liquidator is required to declare a final distribution once he or she has i) realised all of the company's assets, or so much of them as can be realised without needlessly protracting the liquidation; and ii) divided any unrealised assets among the creditors in specie, if and to the extent that it was practical to do so. The liquidator is again required to publish a notice of his or her intention to declare the distribution, but, in this case, fixing a date not less than 60 days from the date of publication by which all proofs of debt must be lodged with him or her and stating that any creditor who lodges its proof of debt after that date may be excluded from the final distribution.

While the Winding Up Rules do not fix a deadline for the liquidator to adjudicate proofs of debt submitted for the purposes of an interim distribution, the liquidator is obliged to adjudicate proofs of debt submitted prior to the final date for lodging proofs of debt (fixed by the notice of his or her intention to declare a final distribution) within 14 days from the final date.

The manner and timing of distributions to creditors in a reorganisation by way of a scheme of arrangement will be determined by the terms of the scheme; similarly, the manner and timing of payments to members that are being cashed out in a merger or consolidation will be determined by the plan of merger or consolidation.

Update and trends

The Cayman Islands continues to dominate, as it has done in recent years, as the offshore jurisdiction most popular for merger and consolidation activity. Activity in this area has continued to grow, and with it, the number of appraisal actions (ie, actions to determine the fair value to be paid to dissenting minorities in compensation for the expropriation of their shares) that are proceeding before the courts. Since *In re Integra Group* [2016] 1 CILR 192, which confirmed that the Cayman courts would apply the Delaware definition of 'fair value' under Cayman Islands law and provided helpful indications as to their approach to expert valuation evidence, well over 20 appraisal actions have been commenced, having arisen almost exclusively out of take-private (MBO) transactions involving US-listed Cayman Islands companies that own and operate businesses in mainland China.

The Cayman Islands has also been a leading offshore jurisdiction in the area of creative and practical cross-border restructuring and insolvency. The number of such cases has recently increased, given that participants in and service providers to the distressed oil and gas sector often have Cayman entities in their group structure. Recent examples include the cross-border restructuring of CHC Group Ltd, being one of the world's largest commercial helicopter services providers primarily engaged in servicing the offshore oil and gas industry, and the cross-border restructuring of companies in the Ocean Rig Group, a publicly listed, deepwater oil drilling contractor, which last year became the largest (in debt value) restructuring ever approved by the Cayman Court, involving interlinked schemes of arrangement for the various companies within the group.

Security

44 Secured lending and credit (immovables)

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

The principal type of security that is taken on immovable property in the Cayman Islands is a registered charge, all land in the Cayman Islands being registered. The charge will not transfer title to the immovable property to the chargee, but will entitle the chargee to take steps in the event of non-payment, typically leading to a sale of the charged property.

45 Secured lending and credit (movables)

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

The principal types of security that are taken on movable property are mortgages, fixed and floating charges, liens and pledges.

A mortgage will involve a transfer by the mortgagor of its interest in the mortgaged property to the mortgagee to secure repayment, subject to the mortgagor's right to redeem its interest in the property upon repayment.

A fixed charge is a security interest that the chargor grants over specific property (without transferring the specific property) to the chargee to secure repayment. It requires the chargor to retain the charged property and gives the chargee certain rights of enforcement against the charged property in the event of a default.

A floating charge is a security interest that the chargor grants over property it needs to remain able to deal with freely, but that will crystallise into a fixed charge over the property it holds, and give the chargee rights of enforcement against such property in the event of a default in repayment.

A lien may arise by operation of law where a creditor has lawful possession of an asset and payment is due to him or her for services rendered to the owner.

The creditor may retain the asset until payment is made, but will not be entitled to sell it to settle the account.

A pledge will involve a debtor depositing goods with his or her creditor to secure the debt, which the creditor may then sell if the debtor fails to meet its obligation to pay the debt.

Contracts for the sale of goods may also provide for the supplier to retain title to the goods until full payment has been received, enabling it to call for the return of the goods in the event of default.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

As indicated in the response to question 9, any disposition of the company's property and any transfer of shares or alteration in the status of its members made after the commencement of the winding up will, unless the court otherwise orders, be void. Additionally, where a company has made a payment or transferred property to a creditor while insolvent, and within the six months preceding the commencement of its insolvency proceedings, with the dominant intention to prefer that creditor over other creditors, the liquidator may ask the court to declare the payment or transaction void and to order that the payment be refunded or the property returned to the company (known as a voidable preference claim). The liquidator may also ask the court to declare a disposition of property by the company void where the company has disposed of the property at an undervalue with the intention of defeating an obligation owed to a creditor and seek an order for restitution (an undervalue claim). A creditor prejudiced by such a disposition may also seek such relief under the Fraudulent Dispositions Law whether or not insolvency proceedings have been commenced or are ongoing. The Grand Court has held, and the Court of Appeal affirmed, that the usual common law defences to a restitutionary claim cannot be raised to defeat such statutory claims. The decision has been appealed to the Privy Council and the judgment is now pending.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There is no restriction in insolvency proceedings on bona fide claims being made by insiders or non-arm's length creditors. The claim will be subject to proof in the usual way and the liquidator will need to be satisfied by the evidence that it is valid (both as to liability and as to the amount claimed) and take into account any claim that the company may set off against it, before admitting it for payment.

Groups of companies

48 Groups of companies

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

A parent or affiliated corporation may be responsible for certain liabilities of a subsidiary or affiliate where it has given a guarantee to the creditor to whom those liabilities are owed. Absent a contractual assumption of responsibility for the payment of such liabilities, the parent or affiliated corporation might only be made responsible if it can be shown that it has abused the separate corporate personality of the subsidiary or affiliate to evade payment or frustrate the enforcement of those liabilities, such that the corporate veil of the subsidiary or affiliate can be pierced.

49 Combining parent and subsidiary proceedings

In 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?

While the insolvency proceedings relating to each group company must be commenced by a separate petition, the court will take a pragmatic approach to the management of the proceedings and may permit the proceedings to be dealt with together in appropriate cases.

Save where there are reasons for piercing the corporate veil (see the response to question 48), it will generally not be possible for the assets and liabilities of separate companies to be pooled for distribution purposes: one possible exception is where the affairs of the separate companies are so interwoven, and improperly and inadequately accounted for, that it would be impracticable or uneconomic to attempt to treat the companies separately and distinctly for the purposes of their

liquidations. Where, however, a single Cayman Islands company has operations in various jurisdictions and there are liquidators appointed in one or more of those jurisdictions, then (subject to court sanction) a pooling arrangement may be entered into (ie, the assets realised in each jurisdiction may be aggregated and distributions to admitted creditors, pursuant to claims of creditors in the respective jurisdictions, are made from that pool of assets).

International cases

50 Recognition of foreign judgments

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?

Cayman law permits a representative appointed in foreign bankruptcy proceedings to apply to the court for orders in aid of foreign insolvency proceedings. Where the court is willing to exercise its discretion, it may:

- grant the foreign representative recognition (power to act in the Cayman Islands);
- enjoin the commencement or stay the continuation of legal proceedings against the debtor;
- stay the enforcement of any judgment against the debtor;
- require a person in possession of relevant information to be examined and produce documents; and
- order the delivery up to the foreign representative of any property belonging to the debtor.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

While the Cayman Islands is not a signatory to any treaty on international insolvency, the court is willing to exercise its powers in aid of foreign proceedings based on comity. These powers and the basis on which they will be exercised follow many of the principles enshrined in the UNCITRAL Model Law, but stop short of implementing it.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors are treated the same as local creditors. If a foreign creditor has obtained judgment in a foreign court against a debtor with assets situated in the Cayman Islands, it may seek to enforce that judgment against the assets in the Cayman Islands. Such enforcement will generally require proceedings to be commenced in the Cayman court claiming the judgment debt from the debtor (though there is a statutory regime that simplifies the enforcement of Australian judgments), and, once a Cayman judgment is obtained, it may then be enforced against the assets in the Cayman Islands by the usual processes.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

With respect to cross-border transfers and asset pooling in liquidations, see the answers to questions 49 and 50.

54 COMI

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 the Cayman Islands, there are no threshold tests for the grant of assistance in respect of foreign insolvency proceedings, or automatic rights based on the COMI of the debtor. The foreign representatives must satisfy the court that it is appropriate for it to exercise its discretion to grant the relief sought by their application.

55 Cross-border cooperation

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?

With respect to recognition, see the response to question 50. The court is willing to cooperate with foreign courts and foreign representatives in cross-border insolvencies based on comity, a consequence of which is that the court may refuse to grant recognition or other assistance where to do so would be materially inconsistent with Cayman Islands law and contrary to public policy. This willingness to cooperate in appropriate circumstances has recently been affirmed by the Grand Court, including by the exercise of non-statutory powers to assist and recognise Hong Kong liquidators of a Cayman company in sanctioning a parallel scheme of arrangement between the company and its creditors in the Cayman Islands in circumstances where there were no ongoing insolvency proceedings in Cayman, and in granting the application of Hong Kong provisional liquidators of a Cayman incorporated (but Hong Kong Stock Exchange listed) company to wind up the company in the Cayman Islands and be appointed as provisional liquidators.

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56 Cross-border insolvency protocols and joint court hearings

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?

In any case where a company in liquidation or its assets are subject to bankruptcy proceedings in another jurisdiction, a Cayman liquidator is required to consider whether it would be appropriate to enter into a cross-border protocol with any relevant foreign representative. The court may authorise cross-border protocols requiring the pooling of assets, information sharing and allocation of responsibility between liquidators to ensure fairness, efficiency and costs savings.

The court in appropriate cases may communicate or hold joint hearings with courts in other countries, and has previously done so with courts in, for example, England, the United States and Luxembourg. The Grand Court's Practice Direction 1 of 2018 now further requires

official liquidators to consider whether to enter into a cross-border protocol by providing that not only office holders appointed in Cayman but any company subject to court-supervised restructuring proceedings and any other interested party involved in a cross-border insolvency case should consider at the earliest opportunity whether to incorporate some or all of two sets of published guidelines, with suitable modifications, either into an international protocol to be approved by the court or an order of the court adopting the guidelines. Those two sets of guidelines are: the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases; and The Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters. Those guidelines primarily cover the procedural rules that may be applied in particular cross-border cases for regulating the manner of communications between the courts involved, the appearance of counsel in each court, notification to parties in parallel proceedings, the acceptance as authentic of official documents or orders made in the foreign jurisdiction or court and joint hearings. Such guidelines are ideal in situations where there are parallel schemes of arrangement or ancillary proceedings in different jurisdictions.

China

Xiuchao Yin and Ning Ye

Dentons

General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The Enterprise Bankruptcy Law of the People's Republic of China [2006] (the EBL) governs insolvency and reorganisations in China. Alongside this, the Supreme People's Court issued two significant judicial interpretations that include provisions about several issues concerning the law of the People's Republic of China (PRC) on enterprise bankruptcy promulgated on 9 September 2011 and the provisions on several issues relating to the application of the enterprise bankruptcy law of the PRC promulgated on 5 September 2013, both of which may apply to insolvencies and reorganisations. The High Courts of the provinces and municipalities in the PRC also establish specific rules for the implementation of the EBL within their local areas.

2 Excluded entities and excluded assets

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

EBL 2006, article 135

The natural person and organisations are not eligible to be included in China's bankruptcy system. Article 135 provides that the liquidation of any organisation that is not an enterprise legal person under other laws, is bankruptcy liquidation, which shall refer to bankruptcy procedures under the EBL.

EBL 2006, article 30

The assets belonging to a debtor are governed by article 30 EBL, which includes assets of a debtor at the time when the court accepts the bankruptcy application and assets acquired by a debtor from the time after acceptance of the bankruptcy application to the termination of the bankruptcy process.

The debtor's assets include both the currency and physical items belonging to a debtor and the properties and proprietary rights, such as claims, equity interests and intellectual property, which may be valued by money and transferred pursuant to the laws.

Although a range of properties and proprietary rights are recognised as property of a debtor, certain properties shall be excluded from the scope and may therefore be exempt from the insolvency proceedings, including:

- properties in the possession of the debtor based on contract of storage, lease, consignment, deposit or other legal relationship;
- properties in a retention of title transaction of which the debtor has not acquired ownership;
- properties that are not permitted to be transferred and belong exclusively to the state; and
- properties that are not owned by debtors based on laws and administrative regulations.

3 Public enterprises

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

Law of the People's Republic of China on State-owned Assets in Enterprises, article 31

In general, there are no differences in the insolvency procedures and creditors' remedies between government-owned enterprises and civilian-run enterprises; however, the bankruptcy of government-owned enterprises funded by the State-owned Assets Supervision and Administration Commission is required to be approved by the department of operation and management.

EBL 2006, article 34

In addition, the bankruptcy applications of wholly state-owned enterprises shall be decided by organs performing duties of the investor. With respect to the bankruptcy application of significant state-owned enterprises, the organs mentioned above shall report to the government at the same level for approval before making any decision or issuing any instructions to designate shareholder representatives to attend the general meeting and certain meetings of shareholders of the state-controlled company. It is noted that whether the state-owned enterprise is significant shall be decided by the regulations of the State Council.

4 Protection for large financial institutions

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

EBL 2006, article 134

Financial institutions are not entitled to file a bankruptcy application, while the financial supervision and administration authorities of the State Council may file an application for financial institutions' reorganisation or liquidation to the court. Certain measures of takeover or trust may be adopted by the authority and the implementation is specified by the State Council.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

EBL 2006, article 3

Generally, bankruptcy cases will be under administration of the court with jurisdiction where the relevant debtor is domiciled, which means the place where the main office of the relevant debtors is located. If the debtor has no office, it shall be under the jurisdiction of the court in the place where it is registered.

EBL 2006, article 12

Where a bankruptcy application is not accepted by the People's Court, the applicant who is not satisfied with this ruling may appeal to the higher-level court within 10 days from the date of delivery of the rule.

The requirement for security depends on whether the appellant applies for property preservation. The security shall be post if the appellant applies for property preservation. The amount of security shall be determined by the amount of property preservation that the appellant applies for.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

EBL 2006, article 2

The EBL provides the following circumstances for a debtor to commence bankruptcy liquidation:

- the debtor is unable to clear off its debt as it has become due and there are no sufficient assets to repay all of the debts; and
- the debtor is unable to clear off debt as it becomes due and obviously lacks the ability to settle.

EBL 2006, article 8

Where the debtor applies to the court for liquidation, the debtor shall submit the required materials to the court, which covers a form of bankruptcy application, relevant evidence, a statement of asset status, a list of debt, a list of creditors' rights, the financial and accounting report, a scheme of staff settlement as well as the payment statement of social security and staff salaries.

EBL 2006, articles 13, 18, 19, 20, 25 and 35

Once the court accepts the bankruptcy application, it shall result in the following effects:

- pending civil litigation and arbitration relating to debtors shall be suspended (article 20);
- preservation measures adopted for the debtor's assets shall be terminated and enforcement procedures shall be suspended (article 19); and
- the court shall appoint an administrator at the acceptance of bankruptcy application who principally displaces the company's management (article 13).

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

EBL 2006, article 2

A debtor may file an application of reorganisation in the following circumstances:

- the debtor cannot pay off the debt as it becomes due and the debtor's assets are insufficient to clear all of debts;
- the debtor cannot pay off the debt as it becomes due and it clearly lacks the ability for settlement; or
- there is a possibility that the debtor is obviously insolvent.

EBL 2006, article 70

Generally, the debtor or the creditor may directly file an application for reorganisation to the court. However, if a creditor applies for a bankruptcy liquidation against the debtor, the debtor or its shareholders who hold 10 per cent or more of the registered capital of the debtor may petition for reorganisation after the acceptance of bankruptcy application, but before the declaration of debtors' bankruptcy.

EBL 2006, article 73

The debtor may dispose of its debts and operate business under the administrator's supervision according to the debtor's application and the approval of the application by the court in the reorganisation procedure.

EBL 2006, articles 74 and 80

Where a debtor manages the business and assets mentioned above, the debtor shall formulate a draft reorganisation plan. Once the draft is approved, it will place a restriction applicable to all creditors and debtors (article 80). While the administrator is responsible for disposing of the debtor's business and assets, the administrator should make a draft plan for reorganisation (article 80), and may hire management

personnel of the debtor to take charge of the business and assets (article 74).

EBL 2006, article 75

During the reorganisation procedure, no security holder is permitted to exercise the security interest on the debtor's assets unless the security interests are likely to be clearly reduced in value or even be damaged.

EBL 2006, article 77

Moreover, in the reorganisation procedure, the shareholder is not entitled to distribute investment gains. The directors, supervisors or senior managers of the debtors are not permitted to transfer any equity interest of the debtor to any third party.

8 Successful reorganisations

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

EBL 2006, article 82, article 86

The creditors are divided into different groups to discuss a reorganisation plan according to different categories of creditor rights, which includes secured creditors' rights, employees, tax owed by debtors and unsecured creditors' rights (article 82). These groups shall vote on the plan separately and the plan would be approved if all of the groups pass the plan (article 86).

The reorganisation plan is not permitted to arbitrarily release the liability of any third party, unless the third party provides compensation for the creditor or the creditor obtains corresponding consideration.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

EBL 2006, article 7

A creditor may file a bankruptcy application against a debtor that is unable to repay its debts as they become due (article 7).

EBL 2006, article 8

The creditor, for the purpose of commencing a liquidation procedure, is required to submit an application form, supporting evidence, a statement of creditor-debtor relationship, a statement of unpaid debts by the debtor and relevant application documents required in the liquidation proceedings.

The court carries out an investigation of the debtor after the submission of a bankruptcy application. If the application is accepted by the court, the involuntary liquidation has the same effect as voluntary liquidation. However, in voluntary liquidation, the debtor may apply to the court to appoint a liquidation group as the administrator. The debtor may make a reorganisation plan (article 80) and an asset distribution plan on their own, which give the debtor easier access to manage its business.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

EBL 2006, article 6

A creditor may file an application of reorganisation if the debtor cannot clear off its debts as they become due. The involuntary reorganisation has the same effects as voluntary reorganisation.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Although there is no expedited reorganisation under provisions of the EBL, it exists in certain cities and provinces in practice, such as Zhejiang and Shenzhen.

12 Unsuccessful reorganisations

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?

EBL 2006, article 84

The proposed reorganisation is defeated if:

- less than half of the creditors who attend the meeting approve the reorganisation plan within the same voting group;
- the creditors' rights of creditors who approve the plan represent no more than two-thirds of the total creditors' rights in the same group; and
- the court does not approve the reorganisation plan.

EBL 2006, article 88

The administrator or the debtor may negotiate with the voting groups that do not approve the reorganisation plan, and these groups may vote again after the negotiation. If such groups refuse to vote or the plan is not approved again, the administrator or debtor may file an application to the court to approve the reorganisation plan – otherwise, the court shall rule on the termination of the reorganisation process and declare the debtor bankrupt.

EBL 2006, article 93

If the debtor fails to conform to the reorganisation plan, the court should make a ruling to terminate the plan and declare the debtor bankrupt, which results in the commitment of adjustment to creditors' rights becoming invalid, though the settlement to creditors would remain valid. The creditors' unpaid rights would be recognised as bankruptcy creditor rights.

13 Corporate procedures

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

Company Law of the PRC 2013, article 180

The circumstances of non-bankruptcy liquidation regulated under the Company Law of the PRC 2013 include:

- the business term of a corporation provided in the articles of association has expired or other circumstances leading to the dissolution regulated in the articles of association has occurred;
- the general meeting of shareholders or the board of shareholders passes the dissolution resolution;
- the business licence is revoked or the corporation is closed down or dissolved; and
- the dissolution of the corporation is because of merger or division.

Company Law 2013, article 182

In addition, if the company suffers serious difficulties that may not be solved by other means, and its continued operation would cause significant loss of interest to shareholders, the shareholder who represents 10 per cent or more of the company's shares may request the court to dissolve the company. The reasons for bankruptcy procedures are listed in question 15.

Company Law 2013, article 183

Under the Company Law 2013, the company is required to establish a liquidation group within 15 days from the occurrence of dissolution. Otherwise, the creditor may request that the court appoint a liquidation group, which shall be accepted by the court. However, the bankruptcy procedure shall strictly abide by the bankruptcy law, and the court creates the bankruptcy liquidation group.

EBL 2006, article 185

The liquidation group shall notify creditors within 10 days and make an announcement in the newspaper within 60 days from its establishment. A creditor that has received the notice shall declare claims within 30 days and creditors who have not received notice shall conduct the claims' declaration within 45 days from the receipt of notice.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

EBL 2006, articles 78 and 93

Under EBL 2006, during the reorganisation procedure, based on a request by the administrator or interested parties, the court may terminate the reorganisation process in the following circumstances:

- the continued deterioration of business conditions and asset status, in the absence of any possibility of recovery;
- the debtor has committed fraud, maliciously decreased the debtors' assets, or committed other actions that are a significant detriment to the creditors;
- the debtor's act makes the administrator unable to perform duties (article 78); and
- the debtor does not implement or is unable to implement a reorganisation plan (article 93).

EBL 2006, articles 79 and 87

Moreover, if the debtor or administrator does not submit a reorganisation plan within the specified time period (article 79) or the court does not approve the plan, the court shall make a rule to terminate the reorganisation procedure and declare the debtor bankrupt (article 87).

EBL 2006, article 108

During the liquidation procedure, the court should rule on the termination of the bankruptcy procedure and in the following circumstances, prior to the public announcement of the termination of bankruptcy procedures:

- the third party has repaid all of the debtor's debts as they become due or has provided full security; and
- the debtor has cleared off all debts as they become due.

In addition, if the debtor has no assets to distribute, the administrator should request the court to rule on the termination of a bankruptcy procedure.

EBL 2006, articles 104 and 105

In the settlement procedure, after the court accepts the bankruptcy application, the debtor may reach an agreement with all of its creditors on the disposal of debts and creditors' claims, and request the court to rule on approval and terminate the bankruptcy procedure. However, if the debtor is unable to implement or does not implement such a settlement agreement, based on the request of creditor, the court should make a rule to terminate the settlement agreement and declare the debtor bankrupt.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

EBL 2006, article 2

If the enterprise or legal person is unable to clear off debts as they become due, and there are no sufficient assets to pay off all of the debts or it clearly lacks the ability of repayment, this may be recognised as insolvency.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Provisions of the Supreme People's Court on Issues Relating to Application of Company Law of the PRC, article 17

In the involuntary liquidation procedure of a corporation, the court is responsible for appointing a liquidation group. The group is liable to make a liquidation plan if the assets of the corporation are not sufficient

to repay debts, and then it should apply to the court for bankruptcy if the liquidation is not confirmed by the creditor.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

EBL 2006, article 125

Directors, supervisors and senior officers in China have no legal obligations if they do not file an application for bankruptcy; however, if they do not perform loyalty and diligence duties that lead to the company insolvency, they shall bear civil liabilities. Also, they are forbidden to serve as a director, a supervisor or a senior manager within three years of the termination of insolvency proceedings.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Laws of the PRC impose no obligations on officers and directors to file an application.

EBL 2006, article 127

If a debtor refuses to turn over properties, seals, accounts and documents, or they fabricate or destroy certain materials that serve as evidence, which renders the status of its assets unclear, the court may impose fines on the persons who bear direct responsibility.

EBL 2006, article 128

If the debtor commits revocable or void actions that are detrimental to the creditors' interests, the legal representative and other directly responsible persons shall assume the compensation liability.

If the debtor commits the following actions (for more information see question 46), which are detrimental to the creditor's interests, the legal representative or other person directly responsible should assume the compensation liability.

EBL 2006, article 31

The actions outlined below involving the debtor's assets may be annulled if they occurred within one year prior to the acceptance of the bankruptcy application:

- transactions conducted at an obvious unreasonable price;
- the settlement of undue debt;
- the waiver of creditors' claims;
- the transfer of property without compensation; or
- security provision for debts without security.

EBL 2006, article 32

If a debtor who is insolvent pays off any of the individual creditors within the six months before the acceptance of the bankruptcy application, the administrator may apply to the court to annul the action unless the individual payment benefits the debtor's assets.

EBL 2006, article 33

In addition, if a debtor conceals or transfers assets to evade debts, fabricate debts or admit to debts that do not exist, such actions relating to debtors' assets are invalid.

Generally, the administrator may annul such transactions during the liquidation or reorganisation procedures; if the administrator does not exercise the duty or delay doing so, the creditor may exercise the duties belonging to the administrator.

EBL 2006, article 129

If the legal representative and the person who bears direct obligations breach the provisions to leave the place where they are domiciled

without approval, the court may impose a fine or detain such persons based on provisions of the law.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

EBL 2006, article 36

The abnormal income obtained and company assets embezzled by the directors, supervisors and senior officers shall be deemed to be insolvency properties – the creditor is entitled to acquire assets from such properties.

Company Law 2013, article 20

Generally, directors do not bear duties to creditors. However, if the directors abuse the independent status of the company and limited liability of shareholders to escape debts, which results in the loss of the company's assets and further affect creditors' interests, the directors should assume joint duties as regards the company's debt to the creditors.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

EBL 2006, article 73

In liquidation procedures, the director and senior managers have no right against their corporation, while in reorganisation procedures, if the application is approved by the court, the debtor may manage its assets under the supervision of the administrator.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

EBL 2006, article 20

After the court accepts the bankruptcy application, all of the arbitration procedures and civil procedures involving the debtor shall be suspended until the administrator takes over the assets of the debtor.

EBL 2006, article 19

Moreover, after the acceptance, the preservation measures of the debtor's assets shall be terminated and the enforcement proceedings shall be suspended.

EBL 2006, article 38

As for the assets seized by the debtor but which do not belong to the debtor, the relevant owner of such assets may recover the assets through the administrator.

EBL 2006, article 39

If the goods are shipped when the court accepts the bankruptcy application, and the debtor has neither received the goods nor paid the full price, the seller may recover such goods in transit. However, the administrator may request the seller deliver the goods through paying the full price.

EBL 2006, articles 109 and 110

Creditors who have security interests on certain bankruptcy assets have priority to receive repayment from the assets (article 109). If the creditor exercises such priority but fails to receive repayment in the full amount, the unpaid claims shall be deemed as ordinary claims. The claims of the creditor who waives priority shall be deemed as ordinary claims (article 110).

EBL 2006, article 75

During the reorganisation period, security interests of certain assets are required to be suspended. However, if the suspension is likely to damage the creditor's rights, the creditor may ask the court to revive the exercise of security interests.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

During the reorganisation, a debtor may operate business under the administrator's supervision after an application filed by the debtor and approved by the court. The debtor is not permitted to damage collateral. Claims arising from the supply of goods and services after the filing are regarded as priority claims, which means creditors have priority over the assets of debtors.

Creditors and the court have regulatory powers over debtors under the provisions of EBL 2006; they exercise this power subject to the decision of the creditors' meeting and the reorganisation plan. The sale or use of assets are required to be approved by the creditors' meeting, and the creditor is entitled to require the debtor to provide guarantees or recover the debtor's possession. However, in practice, the power of creditors is limited and the process of reorganisation is principally under the supervision of the court.

23 Post-filing credit

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

EBL 2006, article 75

In bankruptcy liquidation, the debtor or administrator may not take secured or unsecured loans during the period of reorganisation. The debtor or administrator may raise a loan and create a security interest on the loan for the purpose of the continuation of business.

24 Sale of assets

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?

EBL 2006, article 112

The disposal of specific assets or the entire business of the debtor is required to be agreed by the creditors' meeting and approved by the court, and the disposal of assets must be conducted through auction, unless other resolutions are adopted by the creditors' meeting. The purchaser will obtain the assets 'free and clear' of claims in this process.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

'Stalking-horse' bids and credit bidding in sale processes are not prohibited by the provisions under EBL 2006, but the 'stalking horse' bid has been applied to some cases in practice.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

EBL 2006, article 18

The debtor is not entitled to reject or disclaim an unfavourable contract. However, after the acceptance of the bankruptcy application, the administrator has the right to terminate any pending contract before the acceptance of application. It is noted that if the administrator fails to inform the opposite party or fails to reply within 30 days of the administrator receiving the opposite party's reminder, the contract is deemed dissolved.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

EBL 2006, article 18

The issue of whether the IP licensor may exercise rights on the termination of the debtor's right to use it depend on stipulations of the licence agreement. If there is no agreement, the administrator is entitled to decide on the continuation or termination of the agreement that has been concluded before acceptance of the bankruptcy application but has not been completed.

EBL 2006, article 18

The IP licensor has the right to decide whether to continue or terminate the agreement between a debtor and a licensor or owner. If the administrator decides to continue to use the IP for the purpose of common benefit of creditors, the licensor or owner may require the administrator to provide a security deposit. If the administrator refuses to provide security, the agreement shall be recognised as terminated.

28 Personal data

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

The individual credit reporting system has been in the process of construction under the supervision of the People's Bank of China. At present, the collection of individual information must be agreed by the person, or the certificate letter must be obtained from the judicial authority.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

EBL 2006, article 20

Arbitration is not permitted in a bankruptcy procedure. After the acceptance of the bankruptcy application, the arbitration that is commenced but still not completed by the parties should be suspended until the administrator takes over the debtor's assets.

The court is not permitted to direct or require any of the parties to submit disputes to arbitration.

Creditor remedies

30 Creditors' enforcement

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?

EBL 2006, articles 109 and 110

In a liquidation procedure, creditors that have security interests on specific bankruptcy assets have priority to receive repayment from the assets (article 109). If the creditor exercises such priority but fails to receive repayment in the full amount, the unpaid claims shall be deemed ordinary claims. The claims of creditors that waive priority shall be deemed as ordinary claims (article 110).

EBL 2006, article 75

During a reorganisation procedure, security interests of certain assets are required to be suspended. However, if the suspension is likely to damage or reduce the value of the collateral, and further harm the interests of secured party, the secured party may ask the court to revive the security interest.

EBL 2006, article 96

In the settlement procedure, the creditor who has security interests on specific assets of the debtor may exercise their rights from the date that the court makes a rule on the settlement.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

There are no special remedies for unsecured creditors. The remedies typically taken by creditors are litigation and arbitration. In general, the procedures are difficult and time-consuming.

There are no pre-judgment attachments available in the PRC.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

EBL 2006, article 14

The court gives notice to known creditors within 25 days of the date of the ruling to accept a bankruptcy application and the public announcement of this ruling. The matters included in the notice and announcement are as follows:

- the name of applicant and respondent;
- the time of the court's acceptance of the bankruptcy application;
- the time limit of declaration of creditors' rights, the place and other notes;
- the name and address of administrator;
- the requirement that the person holding the assets or the debtor pays off the debts or delivery of assets to the administrator; and
- the time and place of holding the first creditors' committee.

EBL 2006, article 62

The first creditors' meeting is convened by the court at least 15 days before the expiry date of the time limit for declaration of creditors' claims. Subsequent creditors' meetings are held if the court deems them necessary, or the administrator, the creditors' committee or creditors holding at least one-quarter of total claims request it of the chairman of the creditor's meeting.

EBL 2006, article 23

The administrator shall report to the court and accept supervision by the creditors' committee and creditors' meeting.

33 Creditor representation

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?

EBL 2006, article 67

The establishment of a creditors' committee is determined by the creditors' meeting – it is composed of representatives from the creditors and the labour union or the employees of the debtors. However, the creditor committee is not permitted to exceed nine members and the membership should be approved in writing by the court.

The committee of creditors has the following powers:

- to supervise the disposal of the assets of debtors;
- to supervise the distribution of bankruptcy assets;
- to propose to hold a creditors' meeting; and
- other duties that are entrusted by a creditors' meeting.

Retaining advisers is not forbidden by the creditors' committee. However, the source of the expenses in practice is a problem.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

The creditor may require the debtor to implement duties – the fruits are recognised as the assets of bankruptcy and shall be assigned to the third party.

35 Claims

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

EBL 2006, article 48

The creditor shall declare its creditor rights to the administrator within the time limit for the declaration of claims specified by the People's Court.

EBL 2006, article 49

The creditor shall submit a written statement that illustrates the amount of creditors' rights, its secured situation and evidence materials. It is noted that a statement should be submitted for joint and several claims.

EBL 2006, article 45

The creditor should submit its creditor's claim within the time limit for declaration of creditor right determined by the court, which is not less than 30 days or not more than three months from the court publicly announcing that it accepts the bankruptcy application.

EBL 2006, article 56

If the declaration of creditor rights is not made within the time limit for declaration, a supplementary declaration may be submitted by the debtor before the final distribution of bankruptcy assets. However, there is no supplementary distribution made to a creditor's claim that has been previously distributed. The creditor should bear the expenses for determination and examination of subsequent declaration.

EBL 2006, article 12

Based on the examination, if the court discovers that the debtor does not meet the conditions of bankruptcy, after the acceptance of bankruptcy application but before the bankruptcy declaration, the court may rule on rejection of the application.

If the guarantor of the debtor or other joint debtors do not clear off debt on behalf of the debtor, they may declare the claim with future right of recourse against the debtor.

EBL 2006 article 117

Administrators may hold claims for contingent or unliquidated the distribution amount.

The claims may be transferred under EBL and it shall be disclosed. A claim obtained at a discount shall be enforced in its full value.

EBL 2006, article 46

The interest of creditors' rights shall cease to accrue after the acceptance of the bankruptcy application.

36 Set-off and netting

To what extent may creditors 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?

EBL 2006, article 40

Article 44 of the provisions on several issues relating to application of the enterprise bankruptcy law of the PRC (II)

A creditor may exercise the right of set-off if the creditor is indebted to a debtor before the acceptance of bankruptcy application, except in the following circumstances:

- the debtor of the debtor acquires creditors' rights to the debtor from another party, after the acceptance of the bankruptcy application;
- the creditor is indebted to the debtor and the creditor is aware of the bankruptcy application or the fact that the debtor is unable to repay a debt as it is due, except if the debt has arisen from the legal provision, or the debt was created within one year prior to the bankruptcy application; or
- the debtor of the debtor acquires creditors' right against debtors because of awareness of the bankruptcy application and the circumstance of the debtor's insolvency, unless the debtor of the debtor obtained the creditors' rights pursuant to legal provisions or this occurred within one year prior to the application of bankruptcy.

37 Modifying creditors' rights

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

EBL 2006, article 59

If the creditor's claim is not determined, the court may determine the rank of a creditor's right provisionally, in order to obtain votes from creditors. However, this rarely occurs in practice.

38 Priority claims

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

The priority claims over secured creditors mainly include the expenses for bankruptcy proceedings, the common benefits debts, employee-related claims, social security expenditure, tax owed by the debtor, the priority of the individual house buyer and the priority of construction projects, as well as personal injury caused by debtors.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

EBL 2006 article 113

If jobs are terminated during the period of reorganisation or liquidation, the employees shall be compensated, including wages, disability subsidies and compensation expenses, basic pension insurance, basic medical insurance expenses and other compensation required under the provisions of laws and administrative regulations. These shall be paid following the settlement of bankruptcy expenses and common benefit debt.

Labour Contract Law of the PRC, article 41

The Labour Contract Law of the PRC governs the procedures of termination of employees' contracts. If a corporation is declared bankrupt, employees' contracts will be terminated; if a corporation undergoing reorganisation terminates more than 20 employees' contracts, the corporation should report this to the labour union 30 days in advance and take advice from the union and employees, and then submit the plan for termination of contracts to the labour administrative authority.

40 Pension claims

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

EBL 2006, article 82

The pension-related claim does not need to be declared, it is ranked as a preferential sequence to compensation, which shall be paid after the bankruptcy expenses and common benefit debt, and followed by tax and normal claims.

Enterprise Annuity Measure article 12

The Enterprise Annuity Scheme shall not be implemented where the enterprise is dissolved, revoked or declared bankrupt according to the law.

Enterprise Annuity Measure article 16

Where the enterprise suspends the contribution to pensions as a result of restructuring and merger or losses incurred from operation, the enterprise may discuss with employees the suspension of the contribution. The contribution, according to the enterprise's actual condition, shall be resumed if the situation above occurs, and the enterprise may make retrospective contributions to the pension scheme for contributions that were suspended. It is noted that the amount of retrospective contributions shall not be allowed to exceed the actual amount for contributions that were suspended.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The relevant regulations on environmental issues are included under the EBL.

42 Liabilities that survive insolvency or reorganisation proceedings

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

Generally, the liabilities of a debtor do not survive the insolvency procedures. As to reorganisation, the liabilities of a debtor shall be disposed pursuant to the reorganisation plan.

43 Distributions

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

EBL 2006 article 112 and 114

During the liquidation procedure, the distribution plan shall be passed by the creditors' meeting and then approved by the court. The disposal of assets is required to be implemented through auction, unless other provisions are made under state laws (article 112). In reorganisation procedures, the distribution is based on the reorganisation plan, which is restricted to all of the creditors. It is noted that the bankruptcy assets shall be distributed in cash form, unless otherwise determined by the creditors' meeting (article 114). However, in practice, the assets may also be distributed in the form of physical objects of the debtors.

Update and trends

China emphasises the use of market mechanisms, economic instruments and legal methods to resolve overcapacity, and the policy plays a significant role in guidance and improving corporate exit mechanisms.

The Central Economic Work Conference stresses promoting supply-side structural reforms and disposing of 'zombie enterprises' in a steady and positive method. The judiciary has taken action to implement market-based insolvency proceedings based on the law. Apparently, the Enterprise Bankruptcy Law of the People's Republic of China has become one of the core systems of supply-side structural reform.

The core of supply-side structural reform is to cut overcapacity, and the core of cutting overcapacity is to deal with 'zombie enterprises', which means that bankruptcy law will play an increasingly significant role in promoting supply-side structural reform.

Although certain areas need to be improved under the China Bankruptcy Laws, the practice experience and multiple perspective will definitely benefit judicial practice and even the perfection of legislation in the future.

Security

44 Secured lending and credit (immovables)

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

Security of real property is principally in the form of a mortgage. Finance lease is the other form of security taken on real estate property under PRC state laws.

45 Secured lending and credit (movables)

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

The securities over movable property usually include mortgages, pledges and liens.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

EBL 2006, article 31

The following actions involving the debtor's assets may be annulled if they occurred within one year prior to the acceptance of the bankruptcy application:

- the transfer of property without compensation;
- transactions conducted at an obviously unreasonable price;
- security provision for debts without security;
- the settlement of undue debt; or
- the waiver of creditor's claims.

EBL 2006, article 32

If a debtor who is insolvent pays off any of the individual creditors within the six months before the acceptance of the bankruptcy application, the administrator may apply to the court to annul the action unless the individual payment benefits the debtor's assets.

EBL 2006, article 33

In addition, if a debtor conceals or transfers assets to evade debts, or fabricates debts or admits unreal debts, such actions relating to the debtor's assets are invalid.

Generally, the administrator may annul such transactions during liquidation or reorganisation procedures; if the administrator does not exercise the duties, or delays doing so, the creditor may exercise the duties belonging to the administrator.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Notice of the Supreme People's Court on the Promulgation of the Minutes of the National Court Work Meeting on Bankruptcy Trials, Point 39

The creditor's right formed because of the abuse of affiliated relationships between related parties shall be paid off after common creditor's rights and have no priority on specific assets provided by other related parties.

EBL 2006, article 113

The relevant employees' claims are in the priority sequence of claims that are repaid after the settlement of bankruptcy expenses and common benefit debts. However, the wages of directors, supervisors and senior managers are calculated on the basis of the average wages of employees in the company.

EBL 2006, article 77

Within the reorganisation period, the shareholders of debtors are not permitted to request distribution of investment incomes; the directors, supervisors and senior managers may not transfer debtors' equity to any third party, except if approval is given by the court.

EBL 2006, article 36

Additionally, the administrator shall recover income obtained in improper ways, or assets embezzled by directors, supervisors and senior managers.

Groups of companies

48 Groups of companies

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

There are no circumstances in which a parent or affiliated corporation assumes the responsibility for the liabilities of subsidiaries or affiliates under the EBL. In practice, the parent corporation should bear the responsibility for its subsidiary if that subsidiary is not an independent entity, or it has conducted an abnormal transaction.

49 Combining parent and subsidiary proceedings

In 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?

The combination of bankruptcy procedures of the parent company and its subsidiaries is permitted in practice. Under such circumstances, the assets and liabilities belonging to the companies may be pooled for the purpose of distribution.

International cases

50 Recognition of foreign judgments

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?

With respect to the effective judgment or rule made by a foreign court on a bankruptcy case that involves the debtor's assets within territories of the PRC, upon an application for recognition or enforcement of the judgment or rule, the court shall examine the application based on the international treaty that the PRC concluded or acceded, or based on the principle of reciprocity; if the application does not violate the basic principles of the PRC's laws and harms national sovereignty, security and public interest, and does not harm legal rights and interests of creditors within the territory of the PRC, the court will recognise and enforce the foreign rule or judgment.

The PRC is not a signatory to a treaty on international insolvency or on the recognition of foreign judgments.

51 UNCITRAL Model Law**Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?**

The UNCITRAL Model Law on Cross-Border Insolvency has been adopted in the PRC. Upon the court recognising the bankruptcy rule made by a foreign court, the domestic assets of debtors are required to clear employees' claims and taxes; the assets left may be distributed pursuant to the regulations of the foreign court.

52 Foreign creditors**How are foreign creditors dealt with in liquidations and reorganisations?**

There are no special provisions relating to reorganisation and liquidation under the EBL for foreign creditors; they have the same right as domestic creditors to declare claims.

53 Cross-border transfers of assets under administration**May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?**

In practice, the assets are permitted to be transferred under the administration in different countries. Nevertheless, it is required that domestic employees' claims and taxes should be settled in full before assets are transferred to another country.

54 COMI**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 general, the COMI of a debtor company or a group of companies is typically determined by the position where the debtor is domiciled, the principal business office, the location of the main property or the place of registration.

Minutes of the National Court Work Meeting on Bankruptcy Trials; Point 35

If the court hears the bankruptcy case of companies through substantive consolidation, this should be under the jurisdiction of the court where the core controlling companies are located. If there are no such companies, it would be under the jurisdiction of the court in the location where the affiliates' main assets are located. If disputes on jurisdiction exist among multiple courts, this should be submitted to the common superior court for the designated jurisdiction.

55 Cross-border cooperation**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?****EBL 2006 article 5**

If the foreign bankruptcy proceedings neither violate the basic principles of the PRC's laws nor harm national sovereignty, security and public interest, and it does not harm legal rights and interests of creditors within the territory of the PRC, the court will recognise and enforce the foreign proceeding.

After recognition of a foreign ruling or judgment of a bankruptcy case by the People's Court, the debtor shall first clear off the secured creditor, the creditors' rights of employees, social insurance and tax with its assets within China, and then distribute the remaining assets based on the regulation of the foreign court.

56 Cross-border insolvency protocols and joint court hearings**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 courts in the PRC have neither entered into any insolvency protocols or arrangements to coordinate procedures with other countries' courts, nor held a joint hearing with courts in any foreign countries.



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

Personal insolvency is governed by the Bankruptcy Law (Chapter 5) and the Bankruptcy Rules. In addition, the Insolvency of Individuals (Personal Repayment and Relief Plans) Law 65(I)/2015 provides for the handling of insolvent individuals.

The Companies Law (Chapter 113) governs corporate insolvency and reorganisation. In 2015, the Companies Law was amended to introduce the notion of examinership into Cyprus Law. As such, companies may be reorganised to meet their financial obligations. Furthermore, the Companies Law allows for corporate reorganisation, which under section 30 of the Income Tax Law 118(I) of 2002 includes the following: merger, division, partial division, transfer of assets, exchange of shares and transfer of registered office.

Certain provisions of the Bankruptcy Law regarding the rights of secured and unsecured creditors are also applicable to the winding up of insolvent companies.

2 Excluded entities and excluded assets

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

There are no excluded entities, either in personal or corporate insolvency.

In personal insolvency, a person may apply to the courts in order to request an order for relief from debts. According to the Insolvency of Individuals Law, debts are erased if the individual has a monthly available income of less than €200, assets of less than €1,000 and is a resident of Cyprus. Under the same law, assets do not include chattels that are necessary for the individual to maintain a minimum quality of life (books, tools, white goods, vehicles etc).

In corporate proceedings, no assets are excluded from claims of creditors other than those that are not beneficially owned by the debtor, such as property held in trust.

3 Public enterprises

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

Government-owned enterprises, otherwise known as semi-governmental organisations (such as the Cyprus Telecommunications Authority, the Cyprus Electricity Authority, the Ports Authority etc), are incorporated based on a separate law that is enacted for each such organisation. Normally, there are no provisions in the law regarding the dissolution and liquidation of such organisations. If the enterprise must for whatever reason be liquidated, the specific law relating to such an enterprise is amended and special provisions for liquidation and dissolution are introduced therein.

4 Protection for large financial institutions

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

In 2013, the Resolution of Credit and Other Institutions Law 17(I)/2013 was enacted. It allowed the Resolution Authority of Cyprus (Central Bank of Cyprus) to take steps in order to maintain stability in the banking and financial services industry, and granted it the power to adopt and implement resolution measures regarding affected institutions. The Resolution Law was implemented ahead of the EU Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 because of the difficulties faced by Cypriot banks in 2013.

The Resolution Law of 2013 was replaced by legislation enacted on 18 March 2016, namely Law 22(I)/2016 on the Regulation of the Resolution of Credit Institutions and Investment Companies and related matters for the purposes of harmonising the measures available under Cyprus law with those set out in Directive 2014/59/EU.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Insolvency proceedings are handled by the district courts. For personal insolvencies, the district court of the district where the individual is residing is the court of jurisdiction, whereas applications to wind up a company are submitted to the district court of the district where the registered office of the company is located.

Court judgments issued in the process of an insolvency proceeding can be appealed to the Supreme Court of Cyprus. In addition, a request can be made to set aside the judgment at the district court level.

There is no requirement to obtain permission or post security in order to appeal or set aside a judgment.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

The procedure is set out in Part V(III) of the Companies Law.

Initially, the directors of the company provide a statutory declaration that, having enquired fully into the affairs of the company, they consider that the company will be able to pay its debts in full within a maximum of 12 months. This declaration must be made within five weeks before the date of the proposed resolution to wind up and must be delivered to the Registrar of Companies before the date of the proposed resolution to wind up. Once the statutory declaration has been delivered to the Registrar of Companies, the liquidation is initiated by the passing of a resolution of members to wind up the company. The procedure applies to all Cyprus-registered companies with the exception of banks and insurance companies, which are subject to different procedures.

As a result of the liquidation, the assets are vested in the liquidator as trustee. The company can no longer trade except to the extent required for beneficial realisation of the assets.

If the directors are unable to make the statutory declaration of solvency or if, having been appointed, the liquidator realises that the company will be unable to pay its debts, the liquidation must be undertaken as a creditors' voluntary liquidation.

The shareholders' resolution to wind up the company must be made by either a special resolution, which requires a 75 per cent majority of votes cast at a general meeting, or, an ordinary resolution, requiring a simple majority of votes cast at a validly convened general meeting.

The liquidator has powers to do whatever is necessary for a beneficial winding up. The liquidator can exercise those powers without reference to anyone, although he or she will need either the approval of the court or the committee of inspection, if there is one, to settle any category of claims in full, or to make compromises of claims. The liquidator can also apply to the court to determine any issue or to exercise any of the powers available to the court in a compulsory liquidation.

A creditor who has issued execution against a company's property or has attached any debt due to the company after commencement of the winding up cannot retain the benefit of the execution or attachment against the liquidator in the winding up. This is subject to the court's power to order otherwise.

Creditors in a debtor's voluntary liquidation must be paid in full within a year of commencement of the liquidation. Realisation and distribution of residual assets to members and formal conclusion of the winding up may take longer. If the liquidation continues for more than one year, the liquidator must convene annual meetings of members and lay accounts before them.

Once the liquidator has realised all the company's assets, discharged its liabilities and distributed the remaining assets among the members, he or she must call a final meeting of members and lay before it an account of the receipts and payments. The liquidator must notify the Registrar of Companies of the meeting within a week of its having taken place. The company is deemed to be dissolved three months after the registration of the return of the meeting, subject to the right of the liquidator or any other interested person to apply to the court for the three-month period to be extended.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

There are two types of voluntary reorganisation by a debtor.

The first one is contained in sections 198 to 201 of the Companies Law. According to section 198, a compromise or arrangement can be proposed between a company and its creditors, or any class of them. If a majority in value of the creditors or class of creditors, present and voting, agree to any compromise or arrangement, the compromise or arrangement if sanctioned by the court, becomes binding on all the creditors or the class of creditors, as the case may be, and also on the company. Following the approval of the scheme, the compromise or arrangement, an application must then be made to the court requesting the sanctioning of the proposed compromise or arrangement and thereafter the order is filed with the Registrar of Companies. The court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters:

- the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;
- the allotting or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company that under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;
- the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- the dissolution, without winding up, of any transferor company;
- the provision to be made for any persons, who within such time and in such manner as the court directs, dissent from the compromise or arrangement; and
- such incidental, consequential and supplemental matters as are necessary to ensure that the reconstruction or amalgamation shall be fully and effectively carried out.

The second type of voluntary reorganisation can be found in sections 202A to 202AH of the Companies Law and is examinership. Examinership is a process providing for the financial reorganisation of a viable company with liquidity problems that aims to keep the business alive and pay back creditors over time. It also seeks to provide relief from actions of creditors of the company so that the company has the time to reorganise its financial affairs.

The company can present a petition for an examiner to be appointed, accompanied by a report by an independent expert providing the information required to demonstrate that the company has a viable future and outlining a recovery plan. The court may appoint an examiner if it considers that one of the following scenarios is true:

- the company is or will probably be unable to service its debts;
- no resolution regarding liquidation of company has been approved and published in the Official Gazette of the Republic of Cyprus; and
- no order has been issued for the liquidation of the company.

The court can make the order requested, dismiss it or make any order it deems appropriate, including a winding-up order.

As regards the examiner's powers, they include putting forward proposals to rescue the company, managing the company and disposing charged property to facilitate the rescue of the company. These powers are subject to the court's supervision.

No petition can be presented for the company to be wound up, and a resolution cannot be passed for it to be wound up. In addition, no legal action can be taken against the company to recover any debt, no receiver can be appointed and any receiver in place can be required to cease to act, and no steps can be taken to repossess goods in the company's possession.

The initial period of court protection is four calendar months from the date of presentation of the petition, and the examiner can request the extension of the protection period for another 60 days. Before the end of this period the examiner must prepare proposals for a scheme of arrangement and present them to the court. Once the examiner's report has been presented, the court can extend the protection period for the time required for the voluntary arrangement to be voted on.

The procedure generally concludes either with the approval of the examiner's proposals for a voluntary arrangement or with their rejection. If the examiner concludes that he or she is not able to put forward proposals, he or she can apply to the court for directions and the court can give such directions or make such order as it deems fit, including an order for the company to be wound up.

8 Successful reorganisations

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

The procedure under section 198 of the Companies Law requires approval from each class of creditors.

The examinership procedure catches all creditors and thus, it is in the discretion of the examiner to distinguish between the classes of creditors after examining the rights each creditor has at the time of filing of the application for examinership.

Section 202AZ of the Companies Law provides that any person who knowingly takes part in the company's business operations with the intention to defraud the company creditors, or for any other fraudulent purpose, will be guilty of an offence, and in the event of conviction will be subject either to imprisonment, a fine, or both. Similarly, when the reorganisation plan and the explanatory report signed by the directors, or the report-assessment signed by experts includes any false statement of facts, any person who has signed the above documents has committed a criminal offence.

In relation to examinership, section 202KE of the Companies Law states that the court needs to approve the financial reorganisation plan and decide whether it will approve the proposals for a debt repayment plan. The court must take into account whether the proposals are just and equitable and in doing so it will consider principles such as the resuming of normal business activities, avoiding employee redundancies and safeguarding creditors so that they are not in a worse position than they would be if the company were to commence liquidation proceedings.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

A creditor can apply to the district court to request the liquidation of the debtor. Liquidation will be ordered by the court if it is of the opinion that it would be just and in accordance with the law of equity. The creditor must prove that the debtor is unable to pay his or her debts as per the insolvency test set out in section 211 of the Companies Law to successfully place him or her in liquidation.

Moreover, a creditor may apply for the liquidation of the debtor if the execution or other process issued on a judgment against the company in favour of a creditor of the company is returned unsatisfied. Another option is to prove that the value of the assets of the company is less than the amount of its liabilities, taking into account the contingent and prospective liabilities of the company.

An involuntary liquidation by the creditors can be commenced by means of an application to a district court. Before the application's approval, the court may appoint a provisional liquidator particularly if the assets of the company are in danger of being dissipated. If the application is approved, the court may appoint the official receiver to act as a liquidator to undertake the liquidation, unless the creditors themselves have already appointed a liquidator following the passing of a meeting of the creditors. The official liquidator may himself or herself also apply to the court to request that another person is appointed as the liquidator. This is as opposed to a voluntary liquidation whereby the liquidator is appointed by the shareholders following the passing of a shareholder resolution.

Once the procedure for either voluntary or involuntary liquidation commences, the procedure thereafter is similar, except with respect to formalities for the conclusion of the liquidation.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Examinership can be commenced by either the company or its members, creditors or guarantors, or by a mixture of those parties. The process is the same in each case.

Furthermore, reorganisation in accordance with section 198 of the Companies Law can also be initiated by the creditors. The procedure for the commencement of reorganisation by the creditors is the same as that followed for the commencement of the procedure by the members. Nonetheless, an approval by the directors must be obtained in all circumstances, thus rendering the procedure not completely involuntary.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

There are no procedures for expedited or prepackaged reorganisation.

12 Unsuccessful reorganisations

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 reorganisation of any of the two types (section 198 and examinership) must meet the respective criteria set out in question 7.

With regard to reorganisation under section 198, the court assumes a rather procedural role (ie, it needs to be satisfied that the plan has been approved by the required majorities, all the necessary meetings have been convened, and that the views and interests of all those who did not approve the plan were given impartial consideration).

In relation to examinership, there are many more considerations to be taken into account as well as time-based formalities that could defeat the procedure. In this case, the company will exit the court protection phase (section 202KΘ of the Companies Law) and will be open

to liquidation claims. In addition, objections can be made that could result in the procedure being defeated.

13 Corporate procedures

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

According to section 327 of the Companies Law, where the registrar of companies has reasonable cause to believe that a company is not carrying on business or in operation, he or she may send to the company by a post a letter inquiring whether the company is carrying on business or in operation. In case of negative answer or no answer within a month, the registrar initiates the procedure for the striking off of the company. The procedure can also be initiated by the shareholders and the directors of the company.

If a company or any member or creditor feels aggrieved by the company having been struck off the register, the court on an application made by the company or member or creditor before the expiry of 20 years from publication of the striking off may, if satisfied that the company was at the time carrying on business or in operations be restored to the register, order the name of the company to be restored, and upon an office copy of the order being delivered to the registrar for registration, the company shall be deemed to have continued in existence as its name had not been struck off.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In members' voluntary liquidation, when the affairs of the company are fully wound up, the liquidator draws up an account of the winding up, showing how it has been conducted and the way in which the property of the company has been disposed of. He or she then calls a general meeting of the company, which is called via an advertisement in the Official Gazette, in order to explain this. Within one week after the meeting, the liquidator sends to the registrar of companies a copy of the account and makes a return of the meeting and its date. The registrar proceeds with registering the same and at the expiry of three months from the registration of the return, the company is deemed to be dissolved.

In cases of dissolution by the court, when the affairs of a company have been completely wound up, the court, if the liquidator makes an application, makes an order that the company be dissolved. A copy of the order is filed at the registrar, which records the dissolution.

In case of a reorganisation within the meaning of section 198 of the Companies Law, an official copy of the order granted by the court is delivered to the registrar, otherwise it has no effect and a copy of every such order is annexed to every copy of the memorandum of the company issued after the order has been made. Furthermore, the provisions set out in the arrangement agreed between the companies in question must be performed.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

According to section 211(e) of the Companies Law, a company may be wound up by the court if it is unable to pay its debts. Section 212 lists the occasions in which this is the case:

- if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding €5,000 than due has served on the company, by leaving it at the registered office of the company, a demand under his or her hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
- if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part;
- if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company; or

- if it is proven to the satisfaction of the court that the value of the assets of the company is less than the amount of its liabilities, taking into account the contingent and prospective liabilities of the company.

There is a similar test for personal bankruptcy in section 5 of the Bankruptcy Law. However, there are also certain restrictions aiming for the upkeep of the individuals and for reasonable assets that would allow them to earn income.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

A company must be able to satisfy all creditors to be able to commence liquidation proceedings and as such the directors must declare that the company is solvent for the purposes of the voluntary liquidation (section 266 of the Companies Law). Any director of a company making a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full within the period specified in the declaration, commits an offence and on conviction thereof is liable to imprisonment or to a fine or to both.

If the liquidator is at any time of opinion that the company will not be able to pay its debts in full within the period stated in the declaration under section 266, he or she must summon a meeting of the creditors, and lay before the meeting a statement of the assets and liabilities of the company.

Directors and officers

17 Directors' liability - failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Section 202AZ of the Companies Law states that any person who knowingly takes part in the company's business operations with the intention to defraud the company creditors, or for any other fraudulent purpose, will be guilty of an offence, and in the event of conviction will be subject either to imprisonment or a fine or both. Consequently, when a company continues trading while being insolvent, the directors run the risk of facing personal liability for charges of fraudulent trading.

18 Directors' liabilities - other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

The courts can pursue directors personally by virtue of the general provisions of fraudulent trading, in order to pay creditors who have been defrauded because of the directors' misconduct. Such sanctions are usually brought in the civil courts but in certain cases criminal charges can also be brought.

There are also other laws that can hold directors personally liable, such as legislation involving the tax obligations of the company.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

The directors remain under a general duty to the company and thereby their creditors. Because an administrator will be taking over the operations of the company in the event of insolvency or reorganisation, he or she will be responsible for the satisfaction of creditor claims; however, directors will at all times remain accountable for actions taken by them.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

According to section 202IT of the Companies Law, officers and representatives of the company are required to provide to the examiner any assistance and help that they reasonably can.

The power to manage the company's business remains in the directors' hands following the appointment of an examiner, unless the order appointing the examiner provides otherwise. Nevertheless, the latter can apply to the court for an order that all, or any of the functions that are vested in the directors are performable only by him or her (article 202IA of the Companies Law).

Unlike examinership, when a liquidator is appointed, the directors no longer have any powers to manage the company and its business, unless and to the extent that the 'supervisory committee', or alternatively the creditors, approve the continuance of such powers (section 279(2) of the Companies Law).

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

According to section 215 of the Companies Law, at any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may:

- where any action or proceeding against the company is pending in any district court or the Supreme Court, apply to the court in which the action or proceeding is pending for a stay of proceedings therein; and
- where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding, and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

On the other hand, when a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose (section 220 of the Companies Law).

In examinership, no claims can be brought or orders made against the company but for a specific time and until the examinership process is concluded or set aside.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

In case of a voluntary winding up, a company must from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof.

As regards examinership, section 202Θ(1) provides that no payment may be made by the company during the court protection period for the satisfaction or settlement either wholly or in part of any obligation that was created against the company prior to the filing of the examinership petition, unless:

- the report of the independent expert includes a recommendation that all or part of such an obligation is settled or satisfied; or
- if the examiner authorises such a payment.

The court may, following an application by the examiner or any other interested party, authorise the payment or settlement of an obligation, either partly or in full if it is satisfied that omitting such payment or

settlement substantially reduces the prospects of survival of the company or any part of its business as a going concern.

Utility service providers, including those that provide electricity, telephone services, water, internet services, continue the provision of their services to the company provided they are paid for any expenses that are incurred during the protection period. The company during the examinership period continues with business as usual, under the restrictions and provisions contained in the law that will allow the examiner to assess and reorganise the financials of the company.

23 Post-filing credit

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

According to section 117 of the Bankruptcy Law, when a bankrupt person who has not been restored obtains from a person credit of €650 or more, without informing him that he or she is bankrupt; or trades or conducts business with a different name than the one he or she has been declared bankrupt with, without disclosing to all the persons he or she is trading with professionally his or her real name, then he or she is guilty of an offence and upon conviction is subject to imprisonment.

Insolvent companies cannot enter into further transactions after a liquidation order.

With regard to examinership, no payment can be made from a company during the court protection period for the satisfaction or redemption of an obligation that was created against the company before the date of submission of the application in relation to the company.

However, by way of exception, the examiner has the ability to certify certain new expenses as 'expenses which have been duly incurred'. These expenses result under circumstances whereby otherwise, in the opinion of the examiner, the company's survival as a going concern during the protection period would be negatively affected. Moreover, service providers (water, internet, electricity, telecommunications) continue the provision of services to the company, provided they are paid for any expenses incurred during the protection period.

Lastly, it is possible under an arrangement as per the provisions of section 198 for further credit to be obtained and depending on whether the new money is vital for the continuation of the company and settlement of existing obligations, the creditors may agree to give priority to such new creditor in terms of security and have their security interests subordinated to such new creditor's interest.

24 Sale of assets

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 liquidation proceedings, the liquidator has the power to sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company or to sell the same in parcels.

Following an application by the liquidator, if the court is convinced that the disposal of any company assets that are subject to security, for the benefit of a secured creditor, would lead to a more favourable liquidation of the company assets than another course of liquidation, the court can by order authorise the liquidator to take possession of the secured assets for the purpose of disposing them or exercising powers on them, depending on the case, as if they were not subject to a security (section 233A of the Companies Law).

Potential purchasers acquire the assets 'free and clear' of claims.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

There are no provisions restricting the use of 'stalking horse' bids. The sale process is at the discretion of the liquidator or examiner. Credit bidding is permitted as no restrictions exist under the law.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 court can make any order to amend contracts in order to facilitate the process of reorganisation. In addition, an examiner has a wide range of powers to amend existing contracts.

The consequences of a debtor breaching a contract after the insolvency case is opened depend on the terms of the contract; any claims under such contracts would be ranked as unsecured.

Section 304 of the Companies Law states that where any part of the property of a company that is being wound up consists of immovable property burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the liquidator of the company, notwithstanding that he or she has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto, may with the leave of the court and subject to the provisions of this section, by writing signed by him or her, at any time within 12 months of the commencement of the winding up or such extended period as may be allowed by the court, disclaim the property.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The laws on insolvency and IP do not clarify this issue. Therefore, one has to resort to the specific licence agreement between the IP licensor and the debtor to find the answer.

Normally, a company liquidator should be able to continue using IP rights for the benefit of liquidation, unless the licence agreement provided otherwise.

28 Personal data

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

With the coming into force of Regulation (EU) 2016/679 (GDPR) any data controller or processor in the EU must respect the rules relating to the protection of natural persons with regard to the processing of personal data. Processed data must be processed lawfully, fairly and in a transparent manner in relation to the data subject. Moreover, data must be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes.

Personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed and processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisation measures.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

A liquidation order cannot not be issued by an arbitration tribunal or body, except, for example, in cases of shareholder disputes that lead to an application for liquidation before a court. In these cases, it may be

possible to resort to arbitration if all parties consent, prior to the court ordering the liquidation of the company.

According to the Companies Law, the courts have jurisdiction over corporate and individual insolvencies, and only the courts may order liquidations. An insolvency process is a public process that affects the rights of several third parties that have contractual relations with the company or individual. Therefore, these rights cannot be enforced through an arbitration process that requires consent and is usually private.

Creditor remedies

30 Creditors' enforcement

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?

Assets of a company may be seized out of court when a receiver is appointed in a company under a contractual obligation, in order to seize assets and then resign once these assets have been sold for the benefit of the other party.

In addition, assets may be seized with out-of-court pledge enforcement, where the company is obliged to deliver the pledged assets to the pledgor in the event of default.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Any creditor can bring actions at individuals' and companies' place of residence or registered office in order to recover debt.

If the creditor has reasons to believe that the debtor may dispose of assets to avoid debt recovery, an injunction may be sought from the district court to freeze assets. No other pre-judgment procedures exist.

Once the creditor has obtained a judgment against the debtor, a number of enforcement tools exist for the creditor to recover the debt. Some examples include writ of execution for the sale of movables, charges over immovable property, orders for the delivery or possession of goods and bankruptcy proceedings, garnishee proceedings, writ of delivery of goods, possession of land and writ of sequestration.

During an examinership procedure, unsecured creditors are prohibited from bringing an action.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

According to section 219 of the Companies Law, on the making of a liquidation order, a copy of the order must be forwarded by the company to the registrar of companies, who will make a minute thereof in the books relating to the company. When a company is liquidated by its creditors, creditors and contributors may in their meetings appoint a person as liquidator. If different persons are indicated, any creditor or contributor can request from the court to appoint two liquidators. The liquidator of the company must ensure publication of his or her appointment in the Official Gazette within 21 days from his or her appointment.

The liquidator must keep proper books in which he or she must enter minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the court, personally or by his or her agent inspect any such books. In addition, the liquidator must at such times as may be prescribed, but not less than twice in each year during his or her tenure of office, send to the official receiver an account of his or her receipts and payments as liquidator. Printed copies of audited accounts must be sent to every creditor and contributory.

The official receiver may at any time require any liquidator of a company to answer any inquiry in relation to any winding up in which

he or she is engaged, and may, if the official receiver thinks fit, apply to the court to examine him or her or any other person on oath concerning the winding up.

The creditors who may have formed a committee to appoint the liquidator have the authority and powers to aid the liquidator in his or her role as well as to supervise his or her functions. Such committees have the power to initiate claims on behalf of the company against third parties along with the liquidator.

33 Creditor representation

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?

When a winding-up order is made by the court, creditors and contributors summoned for the purpose of determining whether or not an application should be made to the court for appointing a liquidator in place of the official receiver must aid the liquidator and supervise the exercise of his or her functions. The powers and duties of the supervision committee are the following, among others:

- the definition of the liquidator's remuneration;
- the approval for the continuation of the company's business and the submission of a related report on a three-month basis;
- the approval for bringing actions or defending the company in judicial proceedings;
- demanding that the liquidator submit to the supervision committee a report of the liquidation proceedings and accounts of the liquidation in such times as it sees fit; and
- demanding the accounts of the liquidator be audited from independent auditors.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

The creditors may pursue the estate's remedies, although in normal circumstances the claim would be pursued at the expense of the company. It is for the liquidator and the creditors to decide whether it is worth pursuing a claim and how this will be best handled. Assignment of a cause of action to one of the creditors may occur if the rights of other creditors are not violated; alternatively, the cause of action may be assigned to the creditors as a class, in both instances the claim will still be pursued in the name of the company. The company will not be liquidated until the remedies from the claim have been received.

There is a variety of case law on this matter under Cyprus and English law; although it has not yet been clarified whether assignment to a third party of a bare cause of action (non-tortious) that is being promoted before the courts by a company placed under liquidation is permissible or not.

35 Claims

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

Any person who claims he or she is a creditor of a company under liquidation and wishes to regain his or her credit, must submit to the liquidator within 35 days from the publishing of the liquidation order, a proof of claim.

Their proof must be verified, in the form of a court-sworn affidavit, and attaching a detailed statement of accounts and vouchers to verify the claim. All proofs will be open to other creditors who have submitted claims. The administrator has the right to redeem the security of the secured creditor or has the option to apply to the court to realise the property comprising the security.

36 Set-off and netting

To what extent may creditors 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 may exercise their rights of set-off when submitting their claims as provided above. They would not be allowed to exercise this right if at the time of giving the credit the persons entitled to claim the benefit of any set-off against the property of a debtor, had notice of an act of bankruptcy committed by the debtor, and available against him or her.

37 Modifying creditors' rights

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

According to section 301 of the Companies Law, any conveyance, charge, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company within six months before the commencement of its winding up that, had it been made or done by or against an individual within six months before the presentation of a bankruptcy petition on which he is adjudged bankrupt, would be deemed in his or her bankruptcy a fraudulent preference, shall in the event of the company being wound up be deemed a fraudulent preference of its creditors and be invalid accordingly.

When anything is void as a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debt, the person preferred must be subject to the same liabilities, and must have the same rights, as if he or she had undertaken to be personally liable as surety for the debt to the extent of the charge on the property or the value of his or her interest, whichever is the less.

38 Priority claims

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

The order of distribution of assets in all forms of winding-up and in receivership is as follows:

- the costs of the winding-up; and
- the preferential debts, which include the following:
 - all government and local taxes and duties due at the date of liquidation and having become due and payable within 12 months before that date and, in the case of assessed taxes, not exceeding one year's assessment; and
 - all sums due to employees, including wages, up to one year's accrued holiday pay, deductions from wages (such as provident fund contributions) and compensation for injury.

Claims of employees who are shareholders or directors may not rank as preferential depending on the nature of the shareholding or directorship:

- any amount secured by a floating charge;
- the unsecured ordinary creditors;
- any deferred debts such as sums due to members in respect of dividends declared but not paid; and
- any share capital of the company; where there are different classes of share capital, such as preference shares, their respective rankings will be determined by the terms on which they were issued.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

During liquidation, employees' contracts are terminated and in such cases, employees will have claims under their employment contracts and under the employment legislation.

Employees' wages and other benefits are protected by means of higher ranking in priority over other creditors. During examinership,

the examiner must safeguard as many employee positions as possible, which will enable the company to have a sustainable future. The contractual and legal duties of the company towards the employees in relation to remuneration as well as compensation in the event of dismissal will apply.

40 Pension claims

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

Commonly in Cyprus, pension fund arrangements are made through provident funds, whereas the employee and the employer will have defined contributions for the duration of the employment. Unpaid contributions to the employees' provident fund by the company will rank as a preferential claim.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

As an assumption, if there is an environmental concern, the court will most likely issue an order for the control of the environmental problem that will be binding on the company. Normally, the liquidator is responsible for handling all matters relating to the company as he or she will effectively take over the management of the company. Therefore, any environmental obligations will be dealt with as they arise.

42 Liabilities that survive insolvency or reorganisation proceedings

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

In a successful examinership, the company will be able to continue business as normal and hence liabilities will continue to exist.

In liquidation, no liabilities of the debtor will survive, as the company will eventually be dissolved.

43 Distributions

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

Distributions are made to creditors after the liquidator and examiner have processed all claims and have valued and sold, reorganised or realised all assets of the company, including any possible set-offs and nettings that are applicable. Creditors will then receive compensation from the company, according to the priority of claims and according to the percentage that each creditor will receive given the capabilities of the company to make such payments.

Security**44 Secured lending and credit (immovables)**

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

The principal type of security over immovable property is the mortgage. It can be legal or equitable:

- a legal mortgage gives the lender a legal interest in the mortgaged property until full repayment of the loan or the performance of some other obligation. A mortgage does not constitute an estate in land but rather a contractual right for the benefit of the mortgagee and a charge on the immovable property; and
- an equitable mortgage transfers an equitable interest in the property to the lender until full payment of the debt or the performance of some other obligation.

A charge is generally considered as a type of mortgage, although there is a difference between the two: a mortgage is a conveyance of property

subject to a right of redemption, whereas a charge conveys nothing and simply gives certain rights to the chargee over the property in question as a security.

Although registration is not compulsory, mortgages, charges and other rights over immovable property should be registered with the Department of Lands and Surveys to have legal effect.

A charge that is not registered in the prescribed manner will be void against the liquidator and any creditor of the company.

45 Secured lending and credit (movables)

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

The principal types of security over movable property are the following:

- A lien, which may be legal under common law or equitable; the common law lien is the right to retain possession of property belonging to another person until a debt has been paid. This type of lien merely gives the holder the right to retain the debtor's property until payment, not a right to sell or otherwise deal with the property, and it is extinguished if the creditor gives possession to the debtor or his agent.
- A pledge, which is the loan of money in return for the delivery of possession to the lender. The lender has the power to sell in the event of default by the borrower, but the general ownership of the goods remains with the borrower.
- A floating charge, which is a security interest, generally over all of the company's assets, which 'floats' until an event of default occurs or until the company goes into insolvent liquidation, at which time the floating charge crystallises and attaches to all the relevant assets. It gives the secured creditor two key remedies in the event of default:
 - firstly, the creditor may crystallise the charge, and then realise any assets subject to the charge as if it was a fixed charge; and
 - alternatively, if the floating charge encompasses substantially all of the assets and undertaking of the company, the charge holder may appoint a receiver to take control of the business with a view to discharging the debt out of income or selling off the entire business as a going concern.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

The following transaction can be annulled or set aside in liquidations and reorganisations:

- a charge that has not been properly registered; it will be void against the liquidator and any creditor of the company;
- any transaction that the company enters into within six months before the commencement of its liquidation may be deemed a fraudulent preference against its creditors; it will therefore be invalid, unless there is full consideration for the company having entered into it. In determining whether there was a fraudulent preference, the court looks at the dominant or real intention and not at the result. The onus is on those who claim to avoid the transaction to establish that the dominant intention was to prefer (section 301 of the Companies Law); and
- a floating charge on the undertaking or property of the company created within 12 months of the commencement of winding-up is valid only to the extent of any cash paid to the company at the time of, or subsequently to, the creation of and in consideration of the charge. This is unless it is proved that immediately after the creation of the charge the company was solvent. The onus of proving the company's solvency is on the holder of the floating charge. Solvency requires not only an excess of assets over liabilities, but also the ability to pay debts as they become due.

Update and trends

The hot topic in Cyprus is the use of insolvency processes in dealing with non-performing loans. Credit institutions are using the relevant legislation to put a company with non-performing loan facilities under administration, using the debt to asset swaps extensively and at the same time pressing for more regulatory and legislative provisions to allow for the quicker liquidation of immovable and movable property. In Cyprus, there are also two instances of major Special Resolutions of a Credit Institution pending, which were initiated in 2013 before the relevant EU resolution directive was enacted. A lot of practical issues have arisen since Cyprus elected to utilise the Irish mode of examinership and at the moment all of the above are in front of courts in one way or the other, whose interim and final judgments would formulate the legal approach on all the aforementioned issues and also the level of more legislative and regulatory measures that would need to be enacted.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There is no rule that restricts related parties or non-arm's length creditors in their claims, unless they fall under preferential treatment of creditors or fraudulent transactions. Therefore, they will rank *pari passu* with other unsecured creditors.

Groups of companies

48 Groups of companies

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

Every company is a separate legal entity and is subject to separate procedures. Accordingly, there is no provision for the combination of proceedings against the parent company and its subsidiaries for administrative purposes, or for the aggregation of assets and liabilities.

With regard to partnerships, Cyprus law recognises general and limited partnerships. In the former, every partner is liable severally and jointly with the other partners, without limit, for all the debts and obligations of the partnership incurred while he or she is a partner. After a partner's death, his estate is severally liable for these debts and obligations, subject to prior payment of his or her separate debts. A limited partnership consists of at least one general partner with unlimited liability for all the debts and obligations of the partnership, together with one or more limited partners who at the time of joining the partnership must contribute a stated amount to its capital. Beyond this contributed amount, a limited partner is not liable for the debts and obligations of the partnership.

49 Combining parent and subsidiary proceedings

In 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?

See question 48.

International cases

50 Recognition of foreign judgments

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?

Cyprus has not entered into any agreements in relation to insolvency. However, Regulation (EU) 2015/848 (Insolvency Regulation) has direct effect, as Cyprus has been a member state of the European Union since 2004. In addition, Cyprus is bound by Regulation No. 1215/2012 on

jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Furthermore, Cyprus is a party to The Hague Convention on Foreign Judgments in Civil and Commercial Matters and the following conventions:

- the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
- the European Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and
- the European Convention on the Recognition and Enforcement on Certain International Aspects of Bankruptcy.

Finally, Cyprus is a party to a number of bilateral treaties (eg, Egypt, Serbia, Bulgaria, Belarus) for the recognition and enforcement of foreign judgments that allow under the terms thereof for foreign judgments to be recognised and enforced in Cyprus.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model Law on Cross-Border Insolvency has not been adopted in Cyprus, nor is it under consideration.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors may prove their claim in a Cypriot liquidation under the normal procedure. In the event of concurrent liquidation of the same company in the foreign jurisdiction, a creditor who proved his or her claim in Cyprus will only receive a share in any distribution after any amount received in the foreign proceedings has been taken into account.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Assets could be transferred to an administration in another country where the administrator determined that they did not form part of the company's property. An administrator would normally not consent to the transfer of such assets without strong evidence that this was the case or there was a sale of the assets for value, given his or her duty to ensure the best return to creditors.

54 COMI

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?

According to article 3 of Regulation 2015/848, the COMI is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

In the case of a company or legal person, the place of the registered office is presumed to be the COMI in the absence of proof to the contrary. That presumption only applies if the registered office has not been moved to another member state within the three-month period prior to the request for the opening of insolvency proceedings.

55 Cross-border cooperation

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?

Although Cyprus courts have not yet been involved in cross-border insolvency arrangements or cooperation with other jurisdictions, there is no domestic legislation that prevents recognition of insolvency proceedings in another jurisdiction. The appointment of a foreign insolvency officeholder will also be recognised and there is no need for the officeholder to apply for formal recognition.

56 Cross-border insolvency protocols and joint court hearings

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 above, Cyprus courts have not yet been involved in cross-border insolvency arrangements.

As an EU member state, Cyprus applies the provisions of Regulation (EU) 2015/848 on insolvency proceedings that aims to create a framework for the commencement of proceedings and for automatic recognition and cooperation between the different member states when it comes to insolvency proceedings, hybrid and pre-insolvency proceedings, as applicable.



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

Law 141-15 on Restructuring and Liquidation of Companies and Business Persons is the principal legislation that governs insolvencies and restructuring procedures in the Dominican Republic. The Law was enacted in August 2015; however, it entered into effect on 7 February 2017, after an 18-month transitory period. Furthermore, the rules of application of the Law 141-15 were also signed into law by Decree No. 20-17, on 13 February 2017.

2 Excluded entities and excluded assets

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

The scope of application of Law 141-15 is defined in article 2, which establishes that it is applicable to all national or foreign companies and businesspersons with domicile or permanent presence in the country, but expressly excludes commercial entities that have a majority stake belonging to the state or controlled by it; financial entities are governed by the Monetary and Financial Law 183-02, dated November 2002, and its modifications; securities intermediaries, investment funds management companies, centralised security deposits, stock exchanges, securitisation companies and any other entity considered to be a stock market participant, with the exception of publicly traded companies and companies governed by Law 19-00 on Securities. Electrical, insurance, trustees and other regulated entities are also excluded and subject to their governing laws.

According to article 64 of the above-mentioned Law, the following assets are excluded from the customary insolvency proceedings:

- those that might be claimed by third parties in accordance with the law;
- purchases of real property that remain unpaid and were not registered in the corresponding public records;
- amounts recovered or withheld by the debtor on behalf of the tax authorities;
- third-party assets and property rights in possession of the debtor; and
- in the case that the debtor is a businessperson, all assets essential for the debtor's subsistence and work tools required for the ordinary course of business.

Furthermore, pursuant to article 55 of the Dominican Constitution, all real estate declared as 'homestead' as per the provisions of Law 1024 of 1928, is inalienable and un-attachable, thus would not be affected by insolvency proceedings.

3 Public enterprises

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

Government-owned or controlled enterprises are expressly excluded from the customary insolvency proceedings of the Law 141-15. In that regard, article 54 of the Public Administration Organic Law 247-12, dated 14 August 2012, indicates that the suppression of functionally decentralised government entities may only be determined by law, which will establish the basic rules that will govern its dissolution, as well as grant the required authority to the entity responsible for the liquidation.

4 Protection for large financial institutions

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

There are no references to the concept of 'too big to fail' in Dominican law. However, the Monetary and Financial Law 183-02 establishes special procedures for the cases of bankruptcy of financial institutions, which are under the supervision of the Superintendency of Banks and the Monetary Board. The law indicates that the regularisation could be initiated voluntarily by the financial institution or involuntarily by the Superintendency of Banks, whenever the occurrence of any of the following situations is verified:

- a decrease of 10 to 50 per cent of the value of their net equity within a period of 12 months;
- if the institution's solvency ratio falls below the coefficient required by law;
- deficiencies in the legal reserve during a number of established periods;
- frequent use of the facilities of the Central Bank as an ultimate lender;
- submission of false financial information or fraudulent documentation to the Superintendence of Banks or the Central Bank;
- for continuous non-compliance of the instructive issued by the Central Bank or the Superintendency of Banks, or the administrative acts of the Monetary and Financial administration;
- performance of transactions that seriously endanger public deposits or the institution's liquidity or solvency; and
- when the external auditors issue an opinion regarding the regulatory solvency of the financial institution or the publication of incomplete audited financial statements, among others.

The regularisation plan must refer to the necessary measures to overcome the situations that originated the need for regularisation. The Superintendency of Banks must deliver a decision in relation to the approval or rejection of the plan within five days following its presentation. The entire regularisation period may not exceed six months.

If the financial institution does not present its regularisation plan or if the plan is rejected, the financial institution will be dissolved. Moreover, the financial institution could be dissolved for any of the following causes:

- a cessation of payments;

- a decrease of the solvency ratio 50 per cent below the coefficient required by law;
- the performance of operations during the execution of the regularisation plan that turn it unfeasible;
- failure to remedy the causes of the regularisation plan before the deadline; and
- the revocation of the institution's authorisation to operate.

Additionally, the law provides for the creation of a contingency fund administrated by the Central Bank for the exclusive use during the dissolution process. The fund consists of mandatory contributions from all financial institutions to guarantee deposits up to a certain amount and may also be used to assist financial institutions facing economic difficulties in certain circumstances.

On the other hand, the Social Security Law 87-01 provides that insurers and reinsurers operating in the local market may be subject to both voluntary and involuntary liquidation procedures. The procedure established by Law 141-15 for companies and business persons would apply in these cases.

Moreover, Law 183-02 establishes that the Superintendency of Banks may employ the securitisation regime conceived in the Securities Law to implement the dissolution procedure. This regime entails structures similar to investment funds, which will issue shares of several categories, granting a variety of rights to its holders. After the enactment of our Trust Law 189-11, debt securities for construction and house financing were included as privileged obligations in the event of a dissolution procedure of a banking entity.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Law 141-15 of 2015 created a new specialised jurisdiction for restructuring and liquidation proceedings, composed of First Instance Courts and Courts of Appeals in Santo Domingo and Santiago. These courts are the only ones with jurisdiction to rule these proceedings, as well as all possible measures to safeguard the debtor's assets, including petitions for precautionary measures and protective actions. However, any legal action that arises regarding a non-compliance of the law, as civil and criminal actions, would be the jurisdiction of the ordinary courts or could be resolved in arbitration.

The Law conceives diverse appeals mechanisms that could be delivered during the course of the process. In that regard, the law establishes that at any time during the process the parties may challenge the designation of the verifier, conciliator or liquidator. In such case, the court will hold a public hearing, after which it will issue a decision. This decision may be appealed. This does not suspend the restructuring process and if the request is admitted a new verifier will be designated. Additionally, the decision that admits or dismisses the restructuring request can also be challenged.

In the case of the liquidation process, the judgments whereby the court approves or rejects the credits, approves or rejects the liquidation plan or declares the expiry of the recognition of credits may also be appealed.

The initiation of any of the appeals does not automatically suspend the conciliation and negotiations process, neither the judicial liquidation process, nor the obligations of the officials. However, the interested party could demand the provisional suspension of the process to the court.

The parties have an automatic right to appeal the decisions delivered by the courts during the process and do not require a special permission granted to that end. In that sense, it is important to mention that any party that proves to have a legitimate interest in the process could appeal the decisions issued by the courts. There is no requirement to post security to proceed with an appeal.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

The debtor may request to the court its voluntary liquidation at any time, whenever any of the following conditions are verified:

- failure to pay claims regarded as certain, due and payable under Dominican law for a period of more than 90 days, after formal notice to pay;
- when the debtor's current liabilities exceed the current assets for a period of more than six months;
- failure to pay withheld taxes to the authorities for a period of more than six quotas;
- failure to pay two consecutive salaries to employees on the corresponding payment date, with the exception of payments made in the hands of a third party when required by a court order, and the economic assistance or severance package set out by the labour code for businesses unable to produce funds;
- when the administration of the company hides or remains vacant for a reasonable period of time and no officer is designated to comply with its obligations, suggesting the intention to deceive the creditors;
- when the closure of the business is ordered because of the absence of the administrators, as well as the transfer – partial or total – of its assets to a third party for distribution to all or some creditors;
- the use of deceitful or fraudulent practices, criminal association, breach of trust, falsehood, simulation or fraud to default creditors;
- the notification to creditors of the suspension of payments by the debtor, or the intent to do so;
- the commencement of a foreign insolvency proceeding in the jurisdiction of the debtor's parent company or of its main place of business;
- the foreclosure of more than 50 per cent of the debtor's total assets; and
- the existence of enforcement procedures that may affect more than 50 per cent of the debtor's total assets.

The voluntary liquidation request must be filed at the court accompanied by the documents that allow the confirmation of the reasons that justify the liquidation. Furthermore, if the debtor is a company the request must be filed along with a resolution issued by the board of directors.

The judgment that orders the initiation of the judicial liquidation process leaves without effect the suspensions caused by the beginning of a reorganisation procedure, therefore all the processes, judicial, administrative or arbitral decisions that affect the assets of the debtor will recommence in the procedural stage where they were suspended.

Also, the judgment implies the removal of the debtor from the administration, the designation of the liquidator as administrator and the prohibition for the debtor of disposing of any of its assets until the liquidation is concluded.

The court must designate a liquidator who assumes all management functions and powers of the debtor.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

The debtor may request voluntary reorganisation at any time when any of the conditions described in the previous question are verified. The petition must be filed in a written document at the court, indicating the debtor's name and main business address. The request must be presented along with:

- the financial statements of the last three fiscal years;
- a report on the debtor's economic condition;
- a list of all its creditors, detailing the type of credit, amounts involved, date of approval and expiry, description of collaterals, if any;
- a detailed inventory of all the assets of the debtor;
- a report with the status of all its claims, liabilities and open judicial processes;
- a list of all the active contracts at the time of the request;

- a copy of the mercantile registry, in the case of companies, and a resolution issued by the board of directors or management body of the company authorising the reorganisation request;
- a tax compliance certification issued by the tax authority;
- bank account statements; and
- a list of all the pending bills, indicating those that are essential for the ordinary course of business, among other documents.

However, article 55 of the rules of application of Law 141-15 establishes the possibility for the court to approve the petition and order the initiation of the reorganisation process even if some of the documents are missing, as long as such documents are not essential to achieve the expected results of the process or if they could be substituted by other documents.

The approval of the restructuring request formally opens the process of conciliation and negotiation. During this process, all judicial, administrative or arbitral decisions that affect the assets of the debtor, any enforcement or eviction procedures regarding the debtor's movable and immovable property, calculation of interest under loans and other credit documents, among others, are suspended until the reorganisation plan is approved or the judicial liquidation is ordered.

The decision that approves the restructuring request will designate the conciliator, who will perform all necessary studies, investigations and appraisals that are required to determine the current debts, contracts in force, as well as the assets that are available to satisfy the credits and prepare the restructuring proposal or recommend the judicial liquidation of the debtor.

The debtor has the obligation to file before the court a list of the providers or suppliers that are essential for the ordinary course of business. Such providers or suppliers are required to maintain the provision facilities during the restructuring of the debtor and the credit originated after the start of the restructuring process will be considered preferential for payment. During the negotiation phase, the debtor remains in possession of the business and may dispose of the necessary assets for the ordinary course of business, under the supervision of the conciliator.

Upon a proposal of the conciliator and considering the position of the majority of creditors, the court must decide on the termination of existing contracts and the approval of new debt, the constitution of new collateral, the sale of assets and the disposal of assets that are not required for the ordinary course of business. Moreover, the court can approve the sale of assets that are perishable when abstaining from their sale would be harmful to the creditors of the bankrupt debtor.

Additionally, the conciliator may initiate, unilaterally or upon request of the creditors, an annulment action against acts that have constituted an unjustified dissipation of the debtor's assets and have caused damage to the creditors.

Furthermore, Law 141-15 establishes the invalidity of contracts which within 60 days prior to the commencement of the negotiation phase or after the initiation of the proceedings, aggravate the situation of the debtor or accelerate the enforceability of claims not due. Under the terms of the law, no legal provision or contractual clause could give rise to the division, termination, resolution or annulment of the contract solely because of the acceptance of a reorganisation request or designation of the conciliator.

The Law 141-15 also provides for the possibility of 'pre-pack insolvency agreements', which may be submitted to the court for approval if the debtor and the majority of its creditors reach a restructuring agreement prior to the commencement of the restructuring process. The approval of this agreement would produce the same legal effects as a reorganisation plan.

8 Successful reorganisations

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

Pursuant to article 128 of Law 141-15, creditors are classified as secured, unsecured and subordinated. The following credits are considered to be subordinated according to the law:

- credits contractually defined as such;
- interest claims, excluding those payable under secured credit;
- credits originated from fines and penalties;

- claims owed to a related entity of the debtor; and
- claims resulting from cancelled transactions.

Moreover, some credits originated after the reorganisation process, when duly authorised by the court, will be considered as privileged credits, with higher priority over other existing credits, such as: credit originated for the costs of the restructuring process, including fees of officials and auxiliaries involved in the process; loans agreed to by financial intermediation entities or third parties that will contribute to the financing of the debtor; debts owed to essential providers and public service; debts that result from the execution of agreements that remain in force after the beginning of the restructuring process.

The plan shall contain at least:

- the debtor's background;
- a summary of the restructuring plan, with a clear description of its main characteristics;
- information concerning the financial situation of the debtor and non-financial information of the debtor that may impact its future activity;
- a description of the future operations of the debtor and the effects of the restructuring;
- potential financial needs and the costs related to the proceedings; and
- a payment plan for the company's liabilities and the company's business plan for at least the following five years.

The Law does not conceive the possibility of releasing non-debtor parties from liability.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

According to the provisions of Law 141-15, creditors cannot request the involuntary liquidation of the debtor before attempting a reorganisation. However, upon a reorganisation request, the verifier and the conciliator may recommend the immediate liquidation of the debtor under specific circumstances, such as lack of cooperation of the debtor during the verification or negotiation phase; when a reorganisation plan is not feasible under the particular circumstances of the debtor; or to avoid the increase of the debt and the diminishing of the debtors' assets. Likewise, the debtor, the conciliator or any recognised creditor could demand the judicial liquidation of the debtor because of failure to comply with the restructuring plan. There are no material differences to proceedings opened voluntarily.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Any creditor with credits that represent at least 50 minimum wages (approximately US\$13,550) can file a restructuring request against the debtor. This request would be justified under several circumstances established in article 29 of the law, indicated in question 6 above. There are no material differences to proceedings opened voluntarily.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Law No. 141-15 establishes expedited reorganisation procedures for the cases where the total liabilities of the debtor do not exceed 10 million Dominican Republic pesos. A creditor could only benefit from this procedure if it has credits for at least 15 minimum monthly wages. This abbreviated procedure reduces by half most of the time frames established in the law for the ordinary reorganisation procedure and exempts the requirement of appointing a credit adviser, as well as the designation of experts and advisers for the conciliator.

12 Unsuccessful reorganisations

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?

The reorganisation plan must be approved by the debtor and the creditors with a minimum of 60 per cent of favourable votes before submitting it for the approval of the court. The plan must be approved within 120 days after the designation of the conciliator or within 180 days if an extension (maximum 60 days) is granted. If the plan is expressly rejected or if it is not approved within this delay, the conciliator must present to the court the request for the termination of the process and the beginning of the judicial liquidation of the debtor.

The judgment that orders the initiation of the judicial liquidation process leaves without effect the suspensions caused by the reorganisation procedure, therefore all the processes, judicial, administrative or arbitral decisions that affect the assets of the debtor, any enforcement or eviction procedures regarding the debtor's movable and immovable property, calculation of interest under loans and other credit documents, among others, will recommence in the procedural stage where they were suspended.

On top of that, the judgment implies the removal of the debtor from the administration, the designation of the liquidator as administrator and the prohibition for the debtor of disposing of any of its assets until the judicial liquidation is concluded.

13 Corporate procedures

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

Corporate Law 479-08 establishes an extrajudicial process for the dissolution and liquidation of a company or entity. The dissolution would proceed in any of these scenarios:

- agreement reached by the majority (two-thirds) of the shareholders;
- arrival of the term of the company established in the articles of incorporation;
- the impossibility of carrying out the corporate purpose of the company;
- losses that reduce the social capital to less than half of the paid-in capital, unless it is adjusted;
- the reduction of the share capital below the legal minimum;
- the merger or spin-off of the company;
- if the number of shareholders is reduced below the minimum for each type of company; or
- any other cause established in the articles of incorporation of the company.

The dissolution of the company is followed by a liquidation process.

The dissolution process set forth in Law 479-08 differs from that established in Law 141-15 in several aspects - principally it originates from an agreement between shareholders and it does not require that the company is experiencing financial difficulties. Furthermore, in Law 479-08 unpaid claims could survive the liquidation proceeding and thus the creditors could pursue the payment of debt after the liquidation of the company. On the contrary, in Law 141-15 debts could not survive the liquidation process, which could only be collected after the liquidation process, in the event that new assets are identified.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

As per the reorganisation procedure, it is formally concluded with the approval and fulfilment of the reorganisation plan. During the enforcement of the plan, the conciliator must inform the court on a quarterly basis of the plan compliance and the debtor must inform the conciliator on a monthly basis about the execution and evolution of the measures conceived in the plan and the expectations regarding its compliance. The law does not establish a maximum term for the enforcement of the plan. Non-compliance would entail the beginning of the liquidation procedure.

As per the judicial liquidation, the court may pronounce the termination of the process when all debts have been paid or the liquidator has enough assets to set off the debts, or if the continuation of the liquidation proceedings is impossible because of the insufficiency of assets. In any case, the liquidator must render accounts before the court.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

The main criterion used in Law 141-15 is the verification of a situation of default or cessation of payments. The complete list of the conditions established in the law to initiate an insolvency proceeding is indicated in question 6.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Law 141-15 does not establish a mandatory filing. However, article 225 defines the crime of bankruptcy and conceives criminal sanctions and fines for all persons who intentionally undertake any of the following:

- delay the commencement of the reorganisation procedure;
- carry out fraudulent transactions with the purpose of perceiving personal gains;
- deviate or conceal the assets of the debtor;
- deceitfully increase the debt of the debtor;
- falsify accounting records or separate bookkeeping;
- disappear accounting documents of the debtor; or
- carry out any incomplete or irregular accounting.

Directors and officers

17 Directors' liability - failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Law 141-15 establishes the crime of bankruptcy, which has a criminal sanction of up to three years of prison and a fine between 2,500 and 3,500 minimum wages, for any person who intentionally undertakes the actions described in question 16. This applies to any person or representative of the company who directly or indirectly administers, manages or liquidates a company; as well as to partners in the bankruptcy crime, even when they are not business persons or are considered to be direct or indirect administrators or managers of the company.

18 Directors' liabilities - other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

According to Law 479-08, directors have both civil and criminal liability for their actions during their tenure as company executives. The liability will be conditioned to their involvement and the proof of malicious intent. Also, corporate officers and directors may be liable for labour claims and tax claims. Additionally, both officers and directors that are negligent in the insolvency proceedings or during the operation of the business will compromise their criminal liability.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

No. During the negotiation phase, the debtor remains in possession of the business and may dispose of the necessary assets for the ordinary course of business, under the supervision of the conciliator. However, upon recommendation of the conciliator, the court could remove the

administration of the company and could order the conciliator to assume the function of manager on a provisional basis. Also, the court order that initiates a judicial liquidation process implies the removal of the debtor from the administration and the designation of the liquidator as administrator until the judicial liquidation is concluded.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

After the reorganisation request is filed and during the negotiation phase, the administration of the company will remain in possession of its managers or board of directors, who may only dispose of the necessary assets for the ordinary course of business under the supervision of the conciliator. The directors may continue transactions with the essential providers and suppliers of the company. Moreover, the directors will continue with the payment of labour credits and any other payment necessary to maintain the operations of the company. On the contrary, the commencement of the liquidation implies the removal of the debtor from the administration and the designation of the liquidator as administrator until the judicial liquidation is concluded.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

During the 30 days following the request for the approval of pre-pack insolvency agreements, the court will reject any restructuring petition filed with respect to the debtor.

Moreover, once the decision approving the reorganisation request becomes irrevocable and the conciliation and negotiation process commences, all judicial, administrative or arbitral decisions that affect the assets of the debtor, any enforcement or eviction procedures regarding the debtor's movable and immovable property, calculation of interest under loans and other credit documents, among others, are suspended until the reorganisation plan is approved or the judicial liquidation is ordered. This stay of proceedings will stand during all the negotiation and conciliation process and will be overturned with the approval of the reorganisation plan or with the judgment that orders the initiation of the judicial liquidation process.

The law expressly exempts from the suspension certain payments as: child or family support, if the debtor is a physical person; labour credits and any other payment necessary for the ordinary course of business, as long as they are determined and justified in an exceptional manner before the conciliator. In addition, article 127 of Law 141-15 establishes that if there are any labour processes in course at the moment of submission of the reorganisation request, the employees' adviser and the conciliator must be under subpoena to participate in the proceedings.

Pursuant to article 56 of Law 141-15, all legal actions intended for the collection of moneys that were filed before the submission of the reorganisation request and subsequently suspended for the approval of such request, could be reinitiated, upon request of the creditors, once their credits have been declared and recognised by the court. However, such actions may only be reinitiated for the verification or liquidation of the credit.

In the event that the judicial liquidation process is terminated because of insufficiency of funds, the creditors may be able to initiate individual actions against the debtor, but merely in the case of a criminal indictment or for rights related to the person of the creditor. Only if there has been fraud against such creditors or personal bankruptcy or interdiction to manage the company, the creditors will recover the right to initiate individual prosecutions against the debtor.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

During the negotiation phase, the debtor remains in possession of the business and may dispose of the necessary assets for the ordinary course of business, under the supervision of the conciliator. The conciliator may initiate, unilaterally or upon request of the creditors, an annulment action against acts that have constituted an unjustified disposition of the debtor's assets and have caused damage to the creditors.

Law 141-15 establishes the invalidity of contracts that within 60 days prior to the commencement of the negotiation phase or after the initiation of the proceedings aggravate the situation of the debtor or accelerate the enforceability of claims not due. Under the terms of the law, no legal provision or contractual clause could give rise to the division, termination, resolution or annulment of the contract solely because of the acceptance of a reorganisation request or designation of the conciliator.

Essential suppliers are required to maintain the provision facilities during the reorganisation of the debtor and the credit originated after the start of the reorganisation process will be considered preferential for payment.

23 Post-filing credit

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

According to article 87 of Law 141-15, upon request of the conciliator and if the creditors do not oppose the request, the court may authorise the debtor to obtain secured and unsecured loans or credits after the commencement of the negotiation and conciliation process. These credits will be preferential for payment over other credits.

In the case of secured loans, the court may authorise new securities over the assets of the debtor to secure the payment of the credits, including securities over already encumbered assets. In the latter scenario, the new security could only obtain a higher priority over other registered securities if the conciliator obtains authorisation from the secured creditors.

24 Sale of assets

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?

During the negotiation and conciliation process, upon a proposal of the conciliator and considering the position of the majority of creditors, the court must decide on the sale of assets and the disposal of assets that are not required for the ordinary course of business. Encumbered assets could also be sold with the approval of the secured creditor, who may be granted an equal security over other assets of the debtor.

When the sale entails the disposition of substantial assets of the debtor or the approval of new securities, the conciliator must inform the court, the creditors and the employees' adviser, who may present their opposition to the sale. However, the court can approve the immediate sale of assets that are perishable when abstaining from their sale would be harmful to the creditors of the bankrupt debtor, without giving prior notice to the creditors.

If the sale regards an asset affected by a privilege, pledge or mortgage, the proportional price that corresponds to the creditors over such security will be deposited in a bank account opened for the purposes of the reorganisation process and the sums received for the sale will be distributed according to the reorganisation plan, if approved, or in a proportional basis in the case of liquidation.

Articles 60 and 107 of Decree No. 20-17 conceive the possibility of selling a group of assets or the entire business of the debtor. Whenever the sale of assets is approved by the court, all existing mortgages and privileges will be cancelled; the new owner is only obliged to

pay for the sale price and the assets are transferred free of any liens or encumbrances.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

There is no specific legislation that either prohibits or encourages 'stalking horse' bids or 'credit bidding' in sale procedures. The admission of such procedures would be at the discretion of the conciliator and liquidator, who would have to evaluate the proposals and submit their decision to the court for approval. A credit bidder shall be permitted to bid in the sales of the debtor assets, as long as he or she would not be considered a subordinate creditor under the terms of the law, and this credit has been recognised by the court.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 debtor must comply with existing contracts, unless the court, after consulting the conciliator, opposes its continuation to protect the interests of the creditors. In the cases where the debtor is a public service provider, the court may not object to the execution of the contract. Article 91 of Law 141-15 establishes the obligation for the conciliator to notify the court with a report of all existing contracts with his or her recommendation on its continuity or termination.

The creditor must also comply with the contract, in spite of the prior non-compliance of the debtor. In the case of non-compliance of the other party, the conciliator could request the termination of the contract to the court and it may be subject to a claim of damages.

However, the law establishes the invalidity of any contractual agreement entered into by the debtor within 60 days prior or after the commencement of the conciliation or negotiation process or the designation of the conciliator, which aggravates the contractual terms in the debtor detriment or that turn enforceable claims not due.

Under the terms of Law 151-15, no legal provision or contractual clause could give rise to the division, termination, resolution or annulment of a contract solely because of the acceptance of a reorganisation request or designation of the conciliator.

Conversely, the commencement of the conciliation and negotiation process does not entail the termination of the lease contracts where the debtor is the lessee. However, the court could opt for the termination of the contract, upon recommendation of the conciliator, in which case all fees due must be paid to the landlord, as well as the penalty for early termination.

Similarly, in the case that the labour conditions of the employees must be modified to achieve the objective of the reorganisation, such modifications must be performed in compliance with the labour legislation and protecting the employees' rights.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The same legal provisions explained in question 26 would be applicable. The IP licensor or owner could not terminate the licence agreement solely because of the acceptance of a reorganisation request or the designation of the conciliator. Likewise, the debtor shall comply with existing contracts, unless the court, after consulting the conciliator, opposes its continuation to protect the interests of the creditors.

28 Personal data

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

The law recognises ample powers to the officers involved in the insolvency proceedings to collect information in relation to the debtor, including its accounting books, registries, bank statements, operations, interviews with the members of the board of directors or the administrators in general, including financial, tax, legal and accounting advisers.

The Law 141-15 expressly establishes an obligation of confidentiality for the verifiers, conciliators and liquidators in relation to industrial secrets, internal procedures, patents and trademarks, as well as any other information collected during the process. Also, it indicates that all information collected in the performance of their duties as officers must be used exclusively for the purposes of the insolvency proceedings and they may be held liable for any damage caused by the disclosure of confidential information to third parties not related to the process.

Additionally, Law 172-13 on data protection must be respected during the course of the proceedings.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Given that the law was just recently entered into force, there have not been many liquidation or reorganisation proceedings yet. However, the law allows for any controversy or interpretation disagreement originated in the course of the insolvency proceedings or in a reorganisation plan to be submitted to an arbitral process subject to the agreement reached by the parties to that end. However, any administrative action or any other related to the insolvency proceedings per se may only be submitted through the specialised jurisdiction created by the law.

Creditor remedies

30 Creditors' enforcement

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?

Aside from movable or chattel pledges procedures recognised by Law 6186, the law does not conceive of the possibility of seizing assets of a business outside of a court proceeding, except for those assets that were already awarded to a creditor by a court judgment prior to the commencement of the insolvency proceedings.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

After the approval of the reorganisation request and during the conciliation and negotiation process, the options available to unsecured creditors are limited, as a statutory moratorium and stay in proceedings will apply until the reorganisation restructuring plan is approved or the judicial liquidation is ordered to any proceedings initiated, including all judicial, administrative or arbitral decisions that affect the assets of the debtor, any enforcement or eviction procedures regarding the debtor's movable and immovable property, calculation of interest under loans and other credit documents, among others.

Article 188 of Law 141-15 establishes that the remaining value of the debtor's assets, after deducting the legal fees and expenses incurred in the liquidation process, as well as the sums paid to the preferential and secured creditors, will be distributed on a pro rata basis between all other creditors.

Nonetheless, a creditor may commence proceedings through the ordinary courts to recover outstanding amounts before the initiation of the insolvency proceedings. The Civil Procedure Code conceives

different mechanisms for unsecured creditors to obtain pre-judgment attachments.

In some cases there must be a valid and justified credit and evidence of the imminent insolvency of the debtor. The creditor could obtain an order attaching personal property owned by the debtor, through an *ex parte* proceeding before a judge. Also, a creditor may obtain a provisional judicial mortgage over the real property of the debtor.

Furthermore, an unsecured creditor who has a determinate or liquidated credit could oppose the payment of the sums owed to the debtor by serving a notice to a third party holding assets of the debtor – this is often used as a cautionary measure.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

The creditors could hold meetings freely and privately every time they deem it appropriate, without the intervention of the officers or the court. The conciliator, the verifier, the liquidator, the creditor advisers or the creditors who represent at least 30 per cent of the total credits of the debtor, could request that the court call to a meeting whenever there is a reasonable and justified reason. These meetings could be held with the presence of the parties or using electronic means to participate; in such cases the call to the meeting would indicate the available means of communication, such as videoconferences.

The creditors participate in the insolvency process from the initial reorganisation request through to the culmination of the liquidation proceedings and they could act personally or in groups, or be represented through a creditors' adviser, employees' adviser or representative of publicly issued securities, depending on the type of creditors. See question 33 for more information on the designation of the advisers.

As for the liquidator reporting information, pursuant to article 174 of Law 141-15, after the approval of the liquidation plan, the liquidator has the obligation to inform on a monthly basis to the court and the creditors, either directly or through the creditors' adviser, if existent, the compliance of the plan.

33 Creditor representation

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 law establishes the designation of a creditors' adviser, an employees' adviser and the representative of publicly traded securities. These advisers will represent the collective interests of the creditors including the debtor employees, during the insolvency proceedings and will:

- inform them on the developments of the process;
- supervise the proceedings;
- advise on the approval or rejection of the reorganisation plans proposals, new credits, disposal of assets, incorporation or substitution of securities;
- propose to the court the removal of the administration of the company;
- request to the court the review of certain records or documents; and
- request to the officers information regarding the administration of the debtor assets, among others.

In the cases where these advisers are not appointed or they are removed, their obligations will remain in the creditors and employees, who could perform all the above indicated duties personally or in groups. In such scenario, the articles of application of the law indicate that the creditors could personally or in groups:

- request to the insolvency proceedings officers information regarding the development of the process and any other topic of the interest of the petitioner;

- propose to the officers cautionary measures, as well as the conservation or liquidation of the debtors assets;
- inform the court about any action of the officers or third parties that could risk the debtor estate or the interests of the creditors, and request the adoption of appropriate measures to avoid such damages; and
- request any other action to protect their rights.

The law indicates that the employees and creditors' advisers could act upon remuneration or not, and in any case the creditors or employees would cover such expenses.

The law refers to the designation of expert advisers for the verifiers, conciliators and liquidators, but does not make any reference to expert advisers for the creditors or the employees. Nevertheless, as there is no prohibition to that end, the creditors or employees could always designate an expert to act as their advisers or to assist them during the process. The creditors or employees would fund any expense originated for these services.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

The law establishes the possibility of claiming all movable assets whose sale has been resolved prior to the commencement of the insolvency proceedings, be it for a judicial judgment, arbitral award or for the application of a cancellation clause contractually agreed by the parties. The claim will also proceed in the cases where the resolution of the sale has been declared by judicial judgment after the commencement of the insolvency proceedings or when it has been attempted before the commencement of the process by the seller, for a cause other than non-payment of the price. The assets that remain unpaid could also be recovered, as long as they have not been legally resold.

Moreover, the conciliator has the obligation of identifying all assets belonging to the debtor that are in the possession of third parties and claim their reincorporation. Upon inaction of the conciliator to that end, the creditors that hold at least 30 per cent of the debtor credits could request the reincorporation directly to the court. All recovered sums will belong to the insolvency estate and will be used for the payment of the creditors.

Furthermore, the law establishes a process for the annulment of transactions, as explained in question 46. The judgment that approves the annulment of transactions will order the restitution of the assets or rights to the insolvency estate. In accordance with article 63 of Law 141-15, the assets and rights claimed or recovered through the legal existing proceedings would be part of the insolvency estate. Any recovered asset or right could be assigned to a third party.

35 Claims

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

In the case of reorganisation procedures initiated by the creditors, they are required to present before the court the following documentation with their restructuring petition:

- a list of the creditors filing the request;
- identification of the debtor and a list of its offices or installations;
- a precise indication of the facts giving rise to the request;
- a copy of the documents that verify the creditor's rights or assets;
- a copy of the last financial statements (in the case of legal entities);
- a certification issued by the tax authorities confirming that the claimants are up to date with their fiscal obligations; and
- a copy of the power granted on behalf of the creditors' representatives.

In the case of foreign creditors, a local representative shall be designated.

The creditors must declare to the conciliator all the credits they may hold against the debtor that were originated prior to the commencement of the insolvency proceedings. In such period the conciliator must present to the court a provisional list of the existing creditors. After filing such report, the court will publish a provisional list with the recognised creditors in a newspaper and will notify it to the creditors and the debtor. The court must decide on unliquidated credits as well, based on the information provided by the debtor and the creditors, even in the cases where the creditors have not requested the recognition of the credit.

All credits not declared in this period may participate in the reorganisation process through a late declaration process. The costs involved in such process will be borne by the creditor, except when the delay is caused by an act of God or fortuitous event. On the other hand, the secured creditors who were not informed about the commencement of the proceedings or of the designation of the conciliator may declare their credits at any time. Lack of declaration within the time frames conceived in the law will entail the disallowance of the creditors in the distributions, unless the court unveils the prescription.

The insolvency legislation does not have any special provision regarding claims trading. However, it indicates that whenever there is a transfer of a credit from a person or entity related to the creditor, such credit will be considered to be subordinated. The new creditor would have to disclose the transfer in order to ask for the recognition of his or her credit. Given that the discount is a private matter between the selling creditor and the acquirer, the latter would be entitled to receive the full face value of the claim.

A creditor could claim the interests that accrued after the opening of an insolvency proceeding; however, the credit for these interests would be considered subordinated. Therefore, the creditor would only be paid after all other creditors are paid, as well as the fees of the officers and other expenses originated by the insolvency proceedings. In any case, the creditor could only claim the interests accrued after the moratorium is terminated.

36 Set-off and netting

To what extent may creditors 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 law permits the set-off and netting of debts during the insolvency proceedings, even during the stay of proceedings. There are no provisions regarding the deprivation of set off for creditors, neither temporarily nor permanently.

37 Modifying creditors' rights

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

There is an automatic change in the priority of the credits because of the provisions of the law, which establishes that credits originated after the commencement of the insolvency proceedings, when approved by the court, have a higher priority in relation to all other secured and unsecured claims, other than those owed to the tax authorities, employees or originated by the insolvency proceedings. See question 33 for more information on the priority of claims.

The court could invalidate the collateral consented during the moratorium. Also, the court may change the priority of a creditors' claim in the case of authorisation of new secured loans. See questions 46 and 23 for further information regarding annulment of claims and post-filing credit.

38 Priority claims

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

Credits originated after the commencement of the insolvency proceedings, when approved by the court, have a higher priority in relation to all other secured and unsecured claims other than those owed

to the tax authorities, to the employees or originated by the insolvency proceedings.

Article 86 of Law 141-15 establishes that the payment of debts must be performed in the order indicated below:

- labour liabilities, whenever they have not been advanced in accordance with the provisions of the labour code or any other laws regarding social security or employees' health;
- the costs and expenses originated by the reorganisation process, including the fees of the officials and auxiliaries involved;
- the loans approved by the court and granted by financial intermediation entities or third parties for the financing of the debtor;
- the credits of essential and public service providers or suppliers, duly authorised by the court;
- the debts resulting from the execution of contracts that remain in force after the commencement of the reorganisation process, when approved by the court and the corresponding creditor agrees to deferred payment; and
- other liabilities, according to their priority (secured credits will prevail).

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

The termination of employment contracts because of a court decision must be executed in accordance with the provisions of the labour code, which establishes the concession of an economic assistance for the employees. As indicated in question 38, labour liabilities have the highest priority of claims and pursuant to article 169 of Law 141-15 they must be paid within 10 days after the judgment that orders the liquidation if the liquidator has enough funds to cover the debts. On the contrary, if there are not enough funds, employees will be partially liquidated in a proportional basis according to the available funds until fully liquidated.

40 Pension claims

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

The insolvency legislation does not specifically refer to pension-related claims. However, pension claims are considered to be included in the social security claims that have the highest priority, just as the labour liabilities, as indicated in questions 38 and 39.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The insolvency legislation in the Dominican Republic does not regulate this matter, however, depending on the environmental infractions they could follow both the company and the managers or representatives.

42 Liabilities that survive insolvency or reorganisation proceedings

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

Only if there has been fraud against the creditors or personal bankruptcy or interdiction to administrate the company, will the creditors recover the right to initiate individual prosecutions against the debtor after the termination of the liquidation process. In addition, the creditors may initiate individual actions against the debtor in case of a criminal indictment or for rights related to the person of the creditor.

Moreover, there is a possibility of resuming the judicial liquidation process within two years after the closure for insufficiency of assets in

the case that the creditors identify some other assets of the debtor that were not considered in the initial process. In this case, the interested creditor will request the recommencement of the process and will have to advance the legal fees involved in the process subject to refund. After the expiry of this term, the judicial liquidation process would definitely conclude without the requirement of any other judicial or extrajudicial action.

43 Distributions

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

Distributions will be made following the priority indicated in question 38 and on a pro rata basis, subsequent to the deduction of the costs of the proceedings and the amounts paid to preferential creditors from the realisation value of the assets. If encumbered assets are sold, the secured creditors shall receive a proportion of the selling price.

Security

44 Secured lending and credit (immovables)

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

Under Dominican law, security interests, such as mortgages, liens, privileges, encumbrances, pledges or endorsement may be granted on the following assets:

- real estate properties (collateral may cover the land and the improvements built thereon);
- movable assets (motor vehicles, boats, aircraft, machinery, equipment, inventory, present and future agricultural crops, goods, etc);
- intellectual and industrial property rights (patents, industrial designs, trademarks, trade names, etc);
- contractual rights (credits, receivables, concessions, licences, promissory notes, insurance policies, etc) as long as such rights are transferrable; and
- financial instruments and securities (bank accounts, investments, certificates of deposit, shares, bonds, income derived from securities, etc).

Nevertheless, with the enactment of Dominican Trust Law 189-11, single collateral instrument-denominated warranty trusts can now be created, comprising all or some of the assets listed above.

45 Secured lending and credit (movables)

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

See question 44.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Ex officio or upon petition of any creditor, the conciliator may request to the court the nullity of any transaction that took place two years prior to the reorganisation request, when they constitute an unjustified dissipation of the debtor's assets. Transactions regarding public offering securities originated prior to the reorganisation request and with subsequent payment date are not subject to the nullity action.

Transactions involving the free transfer of assets or any other entered into by the debtor after the commencement of the insolvency proceedings may be annulled. Some transactions are expressly considered to be null and void, such as:

- transfers of assets free of charge or at a price below market value;
- when the compensation given to the debtor or the creditor is notoriously superior or inferior than the compensation given or the obligation performed by the other party;
- the partial or full compensations made by the debtor;
- payment of obligations not due by the debtor;

Update and trends

The Dominican Republic legislation on restructuring and insolvency is relatively new and must overcome a steep learning curve to properly enforce the law in a country with no history of debt reorganisation, but the laws and restructuring practices are already playing a critical role in driving the economic recovery of companies in distress, and will restore the competitiveness of important industries for the country.

Guzmán Ariza is currently assisting in the first major bankruptcy and mercantile restructuring proceeding to be tackled in the Dominican courts under the new Mercantile Restructuring Law 141-15, which will represent a precedent in the country in this matter.

- grant of new securities or increase of existing securities for debts originated prior to the reorganisation request with no justification;
- transfers of property in favour of creditors that results in the payment of a higher amount to that received as a result of the liquidation; or
- transactions with related entities or companies where the debtor or any of the creditors serve as an administrator or are members of the board of administrators, among others.

Furthermore, Law 141-15 establishes the invalidity of any contractual clause that, within 60 days prior to the commencement of the negotiation phase or after the initiation of the proceedings, aggravates the situation of the debtor or accelerates the enforceability of claims not due. Under the terms of the law, no legal provision or contractual clause could give rise to the division, termination, resolution or annulment of the contract solely because of the acceptance of a reorganisation request or designation of the conciliator.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Claims by related parties or non-arm's length creditors will be considered subordinated. Additionally, some transactions with related entities or companies are considered null and void.

Groups of companies

48 Groups of companies

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

In the event of international insolvency proceedings it would be possible to involve parent or affiliated corporations in the cooperation procedure.

49 Combining parent and subsidiary proceedings

In 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?

It would depend if it is considered an economic group. It would also apply in cases involving international insolvency proceedings.

International cases

50 Recognition of foreign judgments

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?

Foreign judgments and orders may be recognised and enforced in the Dominican Republic by obtaining an exequatur, which is granted by a Dominican court pursuant to Law 544-14 on private international law. To that end, the court will verify that the foreign judgment:

- complies with all formalities required for its enforceability according to the law of origin;
- it's written or translated into Spanish;
- satisfies the authentication requirements provided in Dominican law;
- it was enacted by a court with jurisdiction over the matter, following due process and preserving the right of defence of the defendant;
- it has become irrevocable; and
- it does not contradict Dominican public order.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Yes. Law 141-15 was developed in accordance with the UNCITRAL Model Law on Cross-Border Insolvency.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors benefit from the same rights and remedies recognised by national foreigners in relation to liquidations and reorganisations.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

In the event of international insolvency proceedings, it would be possible to submit precautionary measures to safeguard the administration of the assets involved in the procedure.

54 COMI

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 law establishes that, for companies, the COMI is the social domicile or COMI of the debtor or the place where the administration of its interests is conducted on a regular basis, as accepted and recognised by third parties, while for individuals it is their main residence. On the other hand, the Dominican tax code stipulates that whenever a company's COMI or its main operational and management centre is located in the Dominican Republic, the company will be considered to be domiciled in the country.

55 Cross-border cooperation

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 insolvency legislation expressly provide for the cooperation and coordination between domestic and foreign courts and administrators in cross-border insolvencies and reorganisations proceedings.

For the recognition of foreign insolvency proceedings, the foreign representative must submit to the court a request for the recognition of the foreign process, which must be accompanied by a certificate issued by the foreign court certifying the existence of the process and the designation of the foreign representative; a declaration indicating the information regarding all foreign processes opened against the debtor, which the foreign representative may be aware of; and the domicile of the debtor for notice purposes.

The approval of the request will have similar effects to a reorganisation request filed at the national courts, especially in relation to the stay of proceedings. See questions 6, 7, 9 and 10 for further information regarding the effects of the reorganisation and liquidation processes.

We are not aware of any refusal of the recognition of foreign proceedings or to cooperate with foreign courts for insolvency matters, as our insolvency law is fairly new.

56 Cross-border insolvency protocols and joint court hearings

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 insolvency legislation conceives the possibility of simultaneous insolvency proceedings in the national and foreign courts. We are not aware of any joint hearings with courts in other countries in cross-border cases, as our insolvency law is fairly new.

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

Insolvency

The legislation principally applicable to the insolvency of companies incorporated in England and Wales is the Insolvency Act 1986 (the Insolvency Act) as amended. The Insolvency Act is supplemented by subordinate legislation, the most important of which are the Insolvency (England and Wales) Rules 2016 (the Insolvency Rules). The Company Directors Disqualification Act 1986 deals with the position of directors of insolvent companies.

Reorganisation

In relation to reorganisations, the Companies Act 2006 is relevant, setting out the provisions concerning schemes of arrangement.

2 Excluded entities and excluded assets

What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or 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. Certain insolvency procedures are also available to foreign companies that have a sufficient connection (but not their COMI) in the UK. Within the Insolvency Act there are separate provisions regarding the winding up of unregistered companies also applying 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 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. 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 designed to protect the financial markets from the insolvency of a market participant. This is a highly complex and deeply regulated area. Key legislation governing the issue is article VII of the Companies Act 1989 and Part XXIV of the Financial Services and Markets Act 2000 (as amended).

Regulated entities, such as financial institutions, are supervised and regulated by two regulatory bodies, the Prudential Regulation Authority 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).

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 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.

3 Public enterprises

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. There are special insolvency proceedings regarding 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 also as provided in the respective insolvency proceeding.

4 Protection for large financial institutions

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), 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 with tools to deal with banks that get into financial difficulties.

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

The two insolvency options 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 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 where the investment bank is not an authorised deposit-taking institution. This situation is governed by the Investment Bank Special Administration Regulations 2011 (SI 2011/245) (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).

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The High Court can wind up any company incorporated in England and Wales (and in some cases, foreign companies – see question 2). Any criminal matters must be dealt with by the relevant criminal court.

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.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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, but not necessarily, 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 (50+ per cent). 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 decide on a liquidator, the powers of the shareholder-appointed liquidator are limited. The directors must seek a decision from the creditors within 14 days. If the creditors' choice of liquidator differs from that of the shareholders, the creditors' choice will prevail.

Both types of voluntary liquidation

On the liquidator's appointment, the directors' powers will cease. There is no automatic moratorium on proceedings against the company in a voluntary liquidation. The liquidator or any creditor or shareholder may, however, apply to the court for a stay on any proceedings.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

There are three main processes set out by legislation that a debtor can use to commence a voluntary reorganisation. These 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 of the company 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 seek a decision by the creditors. While the nominee's report is filed at court, there is no court hearing or judicial examination on the matter.

If the nominee recommends that the creditors and members should consider the proposal, a meeting of the company's shareholders is called and creditors are asked to approve the proposal by way of a decision procedure (various types of decision procedures are available, such as virtual meeting, electronic voting or correspondence). Shareholders must approve the proposal by 50+ per cent (in value). Creditors must approve by 75 per cent (in value) of those who respond to the decision procedure. In addition, a resolution will be invalid if more than half of the total value of 'unconnected' creditors vote against it. The definition of 'connected' is set out in the Insolvency Act and is very broad, most importantly including the company's shareholders.

Where the requisite approvals have been obtained, the CVA will bind every creditor who was entitled to vote in the decision procedure except for preferential and secured creditors, who are not bound by the CVA unless they agree to be. Where the meeting of shareholders and the creditors' decision 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 decision process. 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. It is possible to combine a CVA with a scheme (see below) or an administration, or both (see below).

Schemes of arrangement (schemes)

Schemes are governed by the Companies Act 2006. A scheme provides 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. 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 who are affected by the scheme (regardless of whether they voted in favour, against or abstained).

A company is able 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. The English courts have 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, however, 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 relevant jurisdictions. During the scheme process there is no statutory moratorium – however, see question 21 for further detail.

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

Administration

Administration is an insolvency procedure that allows a (normally insolvent) company to continue to trade with protection from its creditors by way of a moratorium. 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 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.

8 Successful reorganisations

How are creditors classified for purposes of a reorganisation 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 7), 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). An explanatory statement 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. Other information that will be relevant to a creditor when deciding how to vote should also be included. The process is commenced by a court application 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 have no 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.

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 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 the legislation sets out the matters that need to be dealt with in the proposal). 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 in question 7. No court sanction is required. A creditor or shareholder can bring a challenge to the CVA in court (see question 12).

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Compulsory liquidation

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.

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 that 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).

The material differences to voluntary liquidation proceedings outlined in question 6 are:

- 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; and
- once the winding-up order has been made, no action may be started or proceeded with against the company without the court's permission. In addition, the business of the company ceases except to the extent necessary for it to be wound up.

Administrative receivership

A secured creditor holding a qualifying floating charge can, in limited circumstances (eg, if there is a capital markets arrangement) appoint an administrative receiver. An administrative receiver realises the secured debt for the benefit of the debenture holder who appoints the administrative receiver.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

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. There are no material differences to a scheme proposed by the company, see question 7.

A creditor may apply for the company to be put into administration and subsequently the administrator may propose either a CVA or a scheme.

Once an administration is under way (or the administrator proposes a scheme or CVA), there are no material differences to proceedings opened voluntarily.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

There are no express provisions for the expedition of CVAs or schemes, and the implementation time will depend on the complexity, although the majority of the time spent on a reorganisation is in negotiation with the creditors and in preparation of the settlement documentation.

In relation to schemes, 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 (see question 24).

12 Unsuccessful reorganisations

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?

Consensual reorganisation

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 in a reorganisation plan will depend on the terms of the plan but will usually result in the creditor having all its previous rights restored.

CVA or scheme of arrangement

A proposed CVA or scheme can be defeated if it does not get the statutory majorities of creditors voting in its favour.

Assuming that the requisite majorities vote in favour, a scheme will be defeated if the court refuses to sanction it 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, shareholder or contributory brings a successful challenge on the grounds of unfair prejudice or material irregularity. A CVA may also be defeated if there is a mismatch between the decisions taken at the shareholders' meeting and the creditors' decision procedure, and a shareholder successfully applies to court to challenge the decision taken by the creditors.

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.

13 Corporate procedures

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

In addition to a members' voluntary liquidation, which is an Insolvency Act procedure for solvent companies described in question 6, 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.

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 and therefore it will need to be restored.

14 Conclusion of case

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 prepare a final account and send this to the company's creditors. The liquidator then sends a copy of the final account to the court and the Registrar of Companies. 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.

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 (see question 6) or the company could be dissolved.

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

Insolvency tests and filing requirements**15 Conditions for insolvency**

What is the test to determine if 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'. The Insolvency Act deems a company 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 with a written demand (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 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.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

No. 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. This may involve filing for an insolvency procedure.

Directors and officers

17 Directors’ liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

A consequence of carrying on business when insolvent can be that the court finds a director guilty of wrongful trading under section 214 (see question 16) where the other requirements for that offence are met. 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.

A further consequence of carrying on business when insolvent can be that the court finds a director guilty of fraudulent trading under section 213 of the Insolvency Act. 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. Lastly, a director could be disqualified under the Company Directors Disqualification Act 1986 (see question 18).

18 Directors’ liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation’s obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? 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; wrongful trading (see question 16); and fraudulent trading (see question 16).

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. The court can also make a compensation order where a director has been disqualified. A director can also be disqualified in Great Britain if he or she has been convicted of (among 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.

19 Shift in directors’ duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

When a company’s financial position has deteriorated to the point where its solvency is in question, the focus of the directors’ attention must shift away from the shareholders and towards protecting the interests of creditors. The Insolvency Act underscores this shift by exposing directors to the possibility of personal liability for wrongful trading (see question 16). The Companies Act 2006 also recognises this shift (in section 172(3) of the Companies Act 2006). Directors must consider the interests of creditors as a whole, and not just the interests of any individual creditor or class of creditors. A director is subject to these duties irrespective of whether they are an executive or non-executive director and even if appointed as a nominee of a particular creditor or shareholder.

20 Directors’ powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

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

In a CVA, the directors remain in control with the assistance and supervision of the nominee and supervisor of the CVA.

In a liquidation, the directors’ powers will cease unless (for a voluntary liquidation) the creditors’ committee and the creditors (in a creditors’ voluntary liquidation), or the shareholders in general meeting (in a members’ voluntary liquidation) or, in both cases, the liquidator, agrees otherwise. In administration, 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.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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 (see question 9). 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 MVL is commenced, there is no automatic moratorium on proceedings against the company (see question 6). The liquidator or any creditor or shareholder 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 shareholder resolution.

Reorganisations

The vast majority of reorganisations take place outside of formal insolvency proceedings. It will be up to the company and its creditors to negotiate a stay where required. This will be a purely contractual negotiation.

If the restructuring is implemented by way of a scheme and if it has the support of the majority of creditors and so has a reasonable chance of success, the court has granted a temporary stay of proceedings against the company (*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. 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 (*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 7). 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 re-entry 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 quasi-judicial 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 7). 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.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

Out-of-court reorganisations and schemes

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. 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.

Administration

A reorganisation could also be implemented via an administration of the debtor (or the debtor's holding company), see also question 7. An 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. 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.

Liquidation

Typically, a debtor does not carry on business activities during a liquidation process – although this has happened recently in the high-profile compulsory liquidation case of *Carillion*.

23 Post-filing credit

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

Liquidation and administration

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. 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.

Reorganisation

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).

24 Sale of assets

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?

Reorganisations and schemes

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

Liquidations and administrations

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 2). 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 the charge holder (or the court) in order to sell assets subject to fixed charge security. Where consent of the charge holder 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.

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 Retention of Title clause or are secured by a fixed charge, permission of the court 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. 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 'pre-pack pool' (a panel of insolvency experts). The pre-pack pool is to provide an opinion on the sale. Although it is not a legal requirement to comply with SIP16, failure to comply could result in an administrator facing disciplinary action from his or her professional body.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

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 office holder (as applicable), but regard needs to be shown to the duties owed to creditors, and procedural guidance such as SIP16 (see question 24).

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.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

Reorganisation and schemes

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

Liquidation and administration

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.

A liquidator cannot disclaim a completed contract. In addition, there are various specific types of contract in relation to financial markets that the liquidator cannot disclaim. 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 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.

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.

If a liquidator does not disclaim a pre-insolvency contract (where, for example, disclaimer is not available) but then breaches the terms of the contract, the counterparty will be entitled to damages for breach, which will rank as a provable debt.

An administrator does not ordinarily have the power to disclaim onerous property. The exception to this is that in certain special administration regimes, such as bank administration, an administrator 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 a 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).

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

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, in which case the supplier's ability to terminate the contract or the supply will be severally restricted). An insolvency office holder 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.

28 Personal data

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

When processing any personal data, a data controller is required to comply with the data protection principles set out in the General Data Protection Regulation 2016/679 (GDPR) which is supplemented by the Data Protection Act 2018 (the DPA) when processing any personal data. The first data protection principle is that personal data must be processed lawfully, fairly and in a transparent manner. If valuable customer data has been 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 GDPR and the DPA will apply, and it is usual for an office holder to require a buyer of the data to comply with its obligations under the GDPR and 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 that the buyer will be required to send to each customer to inform them that the buyer is now the controller and of any new purposes for which the customer's personal data will be processed by the buyer. The GDPR expands the amount of information that must be provided in a fair processing notice. Guidance from the Information Commissioner's Office takes the view that, in the case of insolvency, a customer database can potentially be sold without obtaining the customers' prior consent. However, any use of the data by the buyer should be within the reasonable expectations of the individuals concerned, so its use post-sale should remain the same or similar to pre-sale. If the buyer wants to use the information for a new purpose, the buyer will need to get consent from each customer. A post-GDPR update to that guidance also states that if the customer database is 'consented', the original consent request must have named the buyer specifically, otherwise the buyer will not have a valid informed consent for the purposes of the GDPR. It is not clear whether this updated guidance applies to insolvency situations.

In *Re Southern Pacific Personal Loans* [2014] Ch 426 (decided under the pre-GDPR data protection regime), the English court held that liquidators are not 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, though the court did not address whether liquidators may in some circumstances act as processors of the company. The GDPR introduces direct obligations on processors, including in relation to the security of personal data.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

When a company is in administration, the statutory moratorium will apply and will prevent any legal process from being initiated or continued (see question 21). Similarly, a moratorium is in place in a compulsory liquidation. 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 21) 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 him 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.

Creditor remedies**30 Creditors' enforcement**

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 by the appointment of a receiver or, in limited circumstances, 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. Accordingly, an administrative receiver has wider powers to run the company, although his or her primary duty will be to the secured creditor (see question 9). 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 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 (the FCA Regulations), the parties may agree that, should the security subject to the arrangement become enforceable, 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). See question 31 for potential remedies for unsecured creditors.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Certain creditors may have the benefit of a lien imposed by statute over the assets in their possession. A supplier of goods may protect him 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 have been paid for or, more usually, until all monies outstanding from the debtor have been paid. Where the ROT clause is effective, the creditor is 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. 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 apply to court for the appointment of an administrator.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

The Insolvency Rules set out much of the process relating to each insolvency process. Generally, the Insolvency Act provides for early notification of all creditors by advertisement of the appointment. The Insolvency Act further provides that creditors are provided with a report on the conclusion of the winding up (a 'final report').

Administrators must seek a decision of creditors on proposals for the conduct of the administration of the company. The administrator is required to send a progress report to the creditors, the courts and the registrar of companies every six months.

In a CVL, the directors must deliver a notice to creditors seeking their decision on the nomination of the liquidator by deemed consent or a virtual meeting. The decision date must be no earlier than three business days after the notice is delivered and no later than 14 days after the resolution is passed to wind up the company.

A liquidator must also provide creditors with an annual progress report.

33 Creditor representation

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?

Out-of-court reorganisation and schemes

In restructurings outside of a formal insolvency process, traditionally the lenders have formed coordinating committees. These 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 meet the costs of their advisers). More recently, there has been a shift from establishing formal coordination committees to creating groups of ad hoc lender committees to drive a restructuring.

Liquidation and administration

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 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.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

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.

Further, a 'victim' of a transaction defrauding creditors may commence proceedings under section 423 of the Insolvency Act.

35 Claims

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

Generally, unsecured creditors' claims are not submitted until the company is in liquidation or administration. Court approval is 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 the claim has been proved. Once the office holder has realised all the company's assets, he or she will give notice of 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.

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 they are triggered. Therefore, where set off applies (see question 37), a party will only be able to sell its net balance. In large and complex insolvencies, the office holder may propose a protocol for notifying him or her of trades.

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.

36 Set-off and netting

To what extent may creditors 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 or insolvency set-off becoming operative (whatever is the later), 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. Once applicable, set-off is mandatory, automatic and self-executing. Insolvency set-off is triggered immediately upon the commencement of a liquidation but in administration it is only triggered once the administrator has given a notice of intention to make a distribution in administration.

There are special provisions that apply to certain contracts in the financial markets.

Pursuant to the terms of the FCA Regulations (see question 30), 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.

37 Modifying creditors' rights

May the court change the rank (priority) 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 or ring-fenced fund, see question 38 below) for distribution to unsecured creditors who would otherwise have ranked in priority below the holder of the floating charge.

The court has held that it has no jurisdiction to either extinguish statutory rights or promote lower ranking creditors to a higher order in the statutory order of priority (see *Re Nortel GmbH (Bloom v Pensions Regulator)* [2013] UKSC 52 and *Re Lehman Brothers International (Europe) (in administration)* [2017] UKSC 38).

38 Priority claims

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 split into two categories: ordinary preferential debts and secondary preferential debts. Ordinary preferential debts include contributions to occupational and state pension schemes, certain employment-related claims (see question 39), European Union levies or surcharges for coal or steel production. They also include debts owed to the Financial Services Compensation Scheme (FSCS) and eligible deposits whose amount is protected under the 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 among themselves before secondary preferential debts, which also rank equally among themselves. Debts due to the government (such as taxes) 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). 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.

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.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Reorganisation and scheme

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

Liquidation

In a compulsory liquidation, the historically accepted position has been that contracts of employment will automatically terminate with immediate effect on the date of publication of the court order. The precise rationale for this is not clear and it is not certain that a court would now follow the historically accepted position where, for example, the liquidator decides to trade the company in liquidation.

Any termination of employment on a compulsory liquidation will usually involve a breach of contract by the company (as notice of termination will not have been given in accordance with the employment contract) – the employee will be able to claim for this non-payment of notice by means of a proof of debt in the liquidation.

In a voluntary liquidation, the liquidation does not automatically terminate contracts of employment. But, because a liquidator only has limited powers to carry on the business of the company, it is likely that the liquidator will terminate the employment contracts shortly after appointment.

Administration

Administration does not automatically terminate employment contracts. Following appointment, administrators have 14 days to decide whether the company should continue to employ individual employees. Failure to take positive action to dismiss will result in the automatic 'adoption' of employment contracts on the expiry of the 14-day period. 'Adopted' employees are then entitled to a priority for the payment of 'qualifying liabilities'. 'Qualifying liabilities' are wages and salary arising out of the employment contract after the start of the administration include holiday pay, sick pay, payments in lieu of holiday and contributions to occupational pension schemes. Qualifying liabilities are administration expenses and therefore payable out of the assets of the company in priority to most other claims, including the administrator's fees and expenses.

Preferential debts

The following employee debts will be preferential debts:

- accrued holiday pay in respect of the period before the insolvency proceedings if the employment has terminated (no cap);
- certain unpaid contributions into occupational pension schemes in respect of a prescribed period before the start of the insolvency proceedings (no cap);
- certain unpaid remuneration amounts owed for the four-month period before the start of the insolvency proceedings, capped at £800 (see question 38). Any amounts in excess of £800 will rank as an unsecured debt in the insolvency, although the employee should be able to claim certain amounts from the National Insurance Fund.

Payments made by the National Insurance Fund

Where a company is in formal insolvency proceedings and the employment is terminated, the employee will be able to apply to the Insolvency Service to have certain debts paid out of the National Insurance Fund, including unpaid statutory notice pay, arrears of pay (up to a maximum of eight weeks), holiday pay (up to a maximum of six weeks), statutory redundancy pay (if the employee has two or more years' service), and certain unpaid or deducted pension contributions. The statutory cap on a week's pay applies to these payments (£508 for 2018/19). The employee will need to claim the balance of any amounts owed (if these are not 'qualifying liabilities' or preferential debts) by means of a proof of debt in the insolvency, ranking as an ordinary unsecured claim. Any payment from the National Insurance Fund extinguishes the employee's claim against the company for that amount, with the secretary of state then having a subrogated claim for that amount in the insolvency.

Unfair dismissal

In a compulsory liquidation, if the contracts of employment terminate by operation of law on the date of the court order there should, in principle, be no claims for unfair dismissal. In a voluntary liquidation or an administration, an employee could potentially bring a claim for unfair dismissal if the liquidator or administrator fails to follow a fair process in relation to the dismissal (eg, because the selection process was flawed). The claim would, however, often be for procedural unfairness only, not substantive unfairness (as the dismissal should be by reason of redundancy and therefore substantively fair), which could result in limited compensation being awarded. The compensatory element of any unfair dismissal damages award would rank as an ordinary unsecured claim in the insolvency (the basic award is recoverable from the National Insurance Fund if the employee succeeds in his or her unfair dismissal claim in tribunal).

Sale of the business

When an insolvency office holder sells part or all of the business of an insolvent company, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) will determine which of the employees transfers automatically to the purchaser of the business and what liabilities transfer with them. The usual position under TUPE is that employees assigned to the target business transfer to the purchaser together with the liabilities under or in connection with their employment contracts (other than certain liabilities under occupational pension schemes). In an insolvency context, the position differs from this depending on the type of insolvency proceedings. For example, where the transferor is in administration, certain debts will not transfer but will be payable by the National Insurance Fund. In a liquidation, TUPE is significantly modified and employees will not transfer automatically to a purchaser.

If an employee is dismissed who would have otherwise transferred to the purchaser, both the purchaser and the seller company (in administration) could potentially be liable for the resulting unfair or wrongful dismissal claims. In addition, on a TUPE transfer there is an obligation to inform and consult representatives of affected employees about the transfer. Failure to comply with this obligation can result in the Employment Tribunal making a 'protective award', of up to 13 weeks' pay (uncapped) per employee. The purchaser and seller will bear joint and several liability for any failure to comply, but the administrator will typically seek an indemnity from the purchaser in respect of any consultation liabilities arising.

Collective redundancies

If there is a proposal to dismiss 20 or more employees within a 90-day period at one establishment, collective redundancy consultation will be required with employee representatives and the secretary of state must be notified. This consultation must start at least 30 days before the first dismissal if 20–99 dismissals are proposed or 45 days before the first dismissal if 100 or more dismissals are proposed (notification to the secretary of state is required to be made within the same time frame). If the company fails to comply with these requirements then a 'protective award' can be made of up to 90 days' pay (uncapped) per employee, unless a 'special circumstances' defence applies (but insolvency is not, of itself, a special circumstance). This protective award can qualify for preferential status (subject to the £800 cap) and may be payable (in part) by the National Insurance Fund. Failure to notify the secretary of state is a criminal offence with an unlimited fine (which can also apply to a director or insolvency practitioner in default).

40 Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation 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 (see question 38). 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 (calculating the cost of benefits based on an estimate of the

cost of buying-out equivalent benefits with an insurance company), then a section 75 debt (named after section 75 of the Pensions Act 1995) is triggered and deemed to arise 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 39 above), liabilities under those contracts incurred after adoption will be paid as an administration expense. Such liabilities can include contributions to occupational pension schemes (but these will probably be frozen by the insolvency) and (probably) to personal pensions.

The statutory Pension Protection Fund 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 has statutory powers under the Pensions Act 2004 to be able, if it considers it to be reasonable, to issue a contribution notice to an employer, or a person 'associated' or 'connected' with an employer. If within a relevant period, transactions or reorganisations are structured with the main purpose of avoiding or reducing pension liabilities or result in an act or failure to act that has in the Pensions Regulator's opinion, detrimentally affected in a material way the likelihood of accrued scheme benefits being received, then (in either case) those involved (including those knowingly assisting) are potentially at risk of being required to make a contribution into the scheme of an amount up to the section 75 debt that would otherwise have been payable. The Pensions Regulator can also, if it considers it to be reasonable, 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 an 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 'insufficiently resourced' (did not have sufficient assets to meet 50 per cent of the section 75 debt in relation to the scheme, and at that time there was a connected or associated person who did have sufficient resources to make up the difference). 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 *Re Nortel GmbH (Bloom v Pensions Regulator)* [2013] UKSC 52 the Supreme Court held that an FSD issued against a company that is already in administration was a provable debt (and not an expense of the administration) as essentially, the relevant facts making the company susceptible to becoming the target of such direction had arisen prior to the insolvency and provable debt status was thus consistent with the underlying regime imposing the liability.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Liability for environmental problems in insolvency proceedings can potentially involve criminal liability, civil liability or administrative liability (ie, liability 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. Significant legislative controls aimed at environmental protection in the UK include:

- the contaminated land regime (under Part IIA of the Environmental Protection Act 1990);
- the environmental permitting regime (under the Environmental Permitting (England and Wales) Regulations 2010); and

- the water pollution regime (also contained principally in the Environmental Permitting (England and Wales) Regulations 2010: regulations 38(1) and 12(1)).

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 can potentially be liable under environmental legislation that governs the respective debtor's business (for example, where the commission of a pollution related offence by the company occurs with the consent or connivance or is attributable to any neglect on the part of such persons). Depending on the legislation, liability can attach to the debtor company and to directors and officers personally.

Ordinarily, an insolvency office holder 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) that 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 26) and will be able to disclaim contaminated land and therefore avoid liability following the disclaimer becoming effective.

A secured creditor could potentially become liable for environmental contamination 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 incur environmental liabilities where, for example, it caused the environmental damage following the principle that the polluter pays.

42 Liabilities that survive insolvency or reorganisation proceedings

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 39).

43 Distributions

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

permission 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 plan, the scheme or in the CVA proposals.

Security

44 Secured lending and credit (immovables)

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

The principal type of security granted over immovable 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.

45 Secured lending and credit (movables)

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

The principal types of security relating to moveable property are mortgages and fixed charges, 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 FCA Regulations (see question 30) 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 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 validly made under the European Communities Act 1972 (see *The United States of America v Nolan* [2015] UKSC 63).

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

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 presumed 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 or making the preference, 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).

In a compulsory liquidation, 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 (see question 9).

Note further that where directors have made a distribution to shareholders that is unlawful under the companies legislation, any shareholder who knows or has reasonable grounds to believe that a distribution contravenes the statutory rules will be liable to repay it.

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).

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There are no equitable subordination rules in English insolvency law. 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 secured and unsecured creditors have been satisfied in full. Related parties or 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. The recent case of *Re Lehman Brothers International (Europe) (the administration)* [2017]

UKSC 38 dealt with complex questions of priorities and contractual subordination, Lehman Brothers being in the unusual position of having surplus funds.

Groups of companies

48 Groups of companies

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 40) or in relation to certain environmental, health and safety or anti-trust 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 only be lifted in cases of fraud or where there is a deliberate intention to put assets beyond the reach of creditors.

49 Combining parent and subsidiary proceedings

In 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?

English law treats each member of a corporate group as a distinct entity from any of its members, other than in very specific and rare circumstances. Accordingly, unless there are very exceptional circumstances, the assets and liabilities of companies are not combined into one pool for distribution in an insolvency process. The case of *Re Bank of Credit and Commerce International SA (No. 3)* [1993] B.C.L.C. 1490 is an example of such a rare situation where it was held that the assets and liabilities of the different companies in a group were so intermingled that it was impracticable to separate them. 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. For further details on the concept of the group coordinator under the EU Insolvency Regulation (as defined below) please refer to the chapter on the European Union.

Update and trends

On 23 June 2016 the UK held a referendum on its membership of the European Union. The majority of people voted for the UK to leave the EU. The UK and EU are currently negotiating the terms of the withdrawal agreement, which contains provisions for the UK's withdrawal from the EU.

Following two large-scale insolvencies that were household names in the UK, the UK government has launched a number of consultations to assess what lessons can be learned. In response the UK government then issued a statement in August 2018 announcing major changes to the corporate insolvency regime. These changes will include the following:

- the introduction of a moratorium to help business rescue;
- the prohibition of enforcement by a supplier of termination clauses in contracts for the supply of goods and services on the grounds that a party has entered formal insolvency proceedings; and
- the creation of a new restructuring plan that will include the ability to enforce a cross-class cram down.

The government has also announced that it will enact measures to ensure that directors of holding companies will need to consider whether a distressed subsidiary's stakeholders would be better off in an insolvency proceeding rather than by a sale of the business. The UK government wishes to take the reform forward as soon as parliamentary time permits.

International cases

50 Recognition of foreign judgments

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?

There are a number of tools available to obtain recognition of a judgment: the EU Regulation on Insolvency Proceedings Recast (2015/848) (the EU Insolvency Regulation); the common law; and the Brussels Regulation Recast (1215/2012). In addition, regard should be shown 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).

Under the EU Insolvency 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). See further the chapter on the European Union.

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) on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies to litigation commenced on or after 10 January 2015, and judgments given in proceedings commenced on or after 10 January 2015. The Brussels Regulation Recast provides rules for the recognition and enforcement of foreign judgments of contracting states. The Brussels Regulation recast does not apply to bankruptcy proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. The English courts have not conclusively decided whether the Brussels Regulation recast applies to schemes of arrangements under the Companies Act 2006 but currently proceed in judgments on the assumption that it does.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UK is party to the EU Insolvency Regulation (see question 50) and has adopted the UNCITRAL Model Law on Cross-Border Insolvency. The Cross-Border Insolvency Regulations (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. As in the EU Insolvency 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 EU Insolvency Regulation and a provision in the CBIR, the relevant provision of the EU Insolvency Regulation will prevail.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

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 and the Insolvency Rules.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Assets would only properly transfer to an insolvency proceeding in another country where the office holder determined that the assets were not in fact assets of the company. In this case, the entity rightfully entitled to the assets would be entitled to claim these. Given the office holder's duty to ensure the best return to creditors, he or she 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.

54 COMI

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 EU Insolvency Regulation provides that main insolvency proceedings are to be opened in the member state in which that company has its COMI. There is a rebuttable presumption that a company's COMI is where its registered office is located – unless the debtor has moved its registered office in the three months preceding the application to open main proceedings – a new qualification introduced by the EU Insolvency Regulation recast to prevent abusive forum shopping. 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. The EU Insolvency Regulation further codified existing case law on the interpretation of COMI, for example, the recitals to the EU Insolvency Regulation now specifically refer

to the fact that ‘When determining whether the centre of the debtor’s main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests’ (see Recital 28).

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. However, in *Re Nortel Networks* [2009] the English courts made administration orders over a number of companies in the Nortel group finding that each company’s COMI was in fact in England.

The Model Law, as applied in the United Kingdom by virtue of the CBIR (see above at question 51) also uses the concept of COMI. The Model Law does not define COMI but notes that the concept derives from the EU Insolvency Regulation. In *Re Stanford International Bank Ltd (in liquidation)* [2010] EWCA Civ 137 the Court of Appeal held that there was nothing in the Model Law or the EU Insolvency Regulation that required a different meaning to be given to COMI in both of the regimes. Indeed, it was essential that they should be interpreted consistently. Where there was a difference in the US courts’ interpretation of COMI for the purposes of the Model Law, the English courts would follow the interpretation dictated by the EU Insolvency Regulation.

55 Cross-border cooperation

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?

There are various tools available to a foreign office holder to obtain recognition of foreign insolvency proceedings in England, depending on the circumstances of the foreign proceeding. Under the EU Insolvency Regulation (see question 54), the CBIR (see question 51), under the common law and under section 426 of the Insolvency Act. The latter 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. The assistance is wide-ranging and can include the making of an administration order.

Courts have, however, also refused to recognise foreign proceedings, for example, in *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 EU Insolvency Regulation). Instead, the court recognised the appointment of an Antiguan liquidator as foreign main proceedings.

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 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 (see the case of *Rubin*, referred to in question 50), even where this could not be founded on specific legislation (such as section 426 or the CBIR). The court also recently held that it does not have jurisdiction under the CBIR to grant a permanent stay on legal enforcement in respect of English law debt owed by a foreign company. This would infringe the common law rule in *Anthony Gibbs (1890)* 25 QBD 399 which stipulates that English law governed legal obligations can only be discharged under English law (unless the creditor agrees otherwise) (see *Bakshiyeva v Sberbank* (2018) EWTIC 59 (Ch)).

56 Cross-border insolvency protocols and joint court hearings

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 between the two countries, for example in 1991 in the *Maxwell Communications Corporation* case. In the *Lehman Brothers* case, it was clear that because of the volume and size of the claims involved, and the international dimension of the business, international cooperation would be of paramount importance. 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 EU Insolvency 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 (for more detail please refer to the European Union chapter).



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

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, 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 EU level, there are a number of different legislative frameworks in operation in the insolvency context, but by far the most important is the Recast Regulation on Insolvency Proceedings (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015) (the Recast Regulation). This came into force on 25 June 2015 and became effective on 26 June 2017. The Recast Regulation replaced the EC Regulation on Insolvency Proceedings (Council Regulation (EC) No. 1346/2000) (the EC Regulation) for insolvency proceedings opened after 26 June 2017. There is separate legislation for more niche subject matters, such as insurance and credit institutions, which together complement the Recast Regulation.

The Recast Regulation applies to those insolvency proceedings commenced in a member state of the EU (except for Denmark) on or after 26 June 2017 that are listed in Annex A to the Recast Regulation. The EC Regulation continues to apply to proceedings that commenced before that date. The Recast 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 Recast Regulation defines COMI as the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. The Recast Regulation contains a rebuttable presumption that a company’s COMI will be the place of its registered office, in the absence of proof to the contrary. Where a company’s central administration is in a different member state to that of its registered office, and where a comprehensive assessment of all relevant factors establishes, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests, are located in that other member state, it should be possible to rebut the registered

office presumption. Under the Recast Regulation, 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 the company’s COMI is located. In the case of *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.

The Recast Regulation sets the date on which a debtor’s COMI is decided as the date when the request to open the proceedings is made (article 3(1)).

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 Recast Regulation as a place of operations where the debtor carries out, or has carried out in the three-month period prior to the request to open main insolvency proceedings, a non-transitory economic activity with human means and assets. Secondary proceedings can only be opened once main proceedings have already been opened. Territorial proceedings can be opened where main proceedings have not yet been opened. 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 whose claim arises from a debtor’s establishment in that member state or by a public authority which, under the law of that member state, has the right to request the opening of insolvency proceedings. 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 Recast Regulation also includes the concept of ‘synthetic’ secondary proceedings whereby local creditors can be protected without the need for secondary proceedings to be commenced.

The Recast 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 Recast Regulation and the Brussels Regulation are designed to complement each other – with insolvency proceedings being specifically excluded from the ambit of the Brussels Regulation.

2 Excluded entities and excluded assets

What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or 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 Recast Regulation does cater for certain specific exclusions under EU-level directives, as 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 EU level

As mentioned in question 1, the Recast 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 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), which entered into force on 6 January 2010, with the rules becoming applicable on 31 March 2015.

The Credit Institutions Directive

The aim of this directive is to facilitate reorganisations of or, if not possible, 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 under the Recast Regulation, there is no scope for any independent or secondary proceedings.

Solvency II

Similar to the Credit Institutions Directive, the aim of this directive is to ensure that there is a single set of common rules to facilitate the activities of insurance companies throughout the member states, to ensure that these companies can survive in difficult periods and to protect policyholders. Insurance companies have to comply with capital requirements in relation to their risk profiles to guarantee that they have sufficient financial resources to withstand financial difficulties. The rules on reorganising and winding up insurance companies are set out in Title IV of Solvency II. If an insurance company becomes insolvent, the decision to reorganise or wind up the company is made by the relevant authorities in the EU country where the insurance company is registered. The supervisory authorities must inform their counterparts in all other member states about the decision, including any practical implications. Winding-up proceedings apply to all EU branches of the insurance company.

3 Public enterprises

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, 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 Recast 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.

4 Protection for large financial institutions

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 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 complete the picture (for example, rules on capital requirements).

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.

In July 2017, the Council published a working paper reviewing the Financial Conglomerates Directive. The working paper stated that the analysis was not a full evaluation, but nevertheless concluded (among other things) that overall the Financial Conglomerates Directive was a useful tool and in general there remained value in having a framework for supervision of mixed-activity financial groups.

The Single Supervisory Mechanism and the Single Resolution Mechanism

In response to the Eurozone debt crisis, the EU institutions agreed to establish a Single Supervisory Mechanism (SSM) and a Single Resolution Mechanism (SRM) 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 regulation), which establishes uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms and Regulation (EU) 1024/2013 (the SSM 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). 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). 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 (which can be used, among others, to fund the resolution of failing banks, or the compensation of shareholders and creditors). On 7 June 2017, following a decision by the European Central Bank that Popular Español SA (Banco Popular) was 'failing or likely to fail', the SRB transferred all of the shares and capital instruments of Banco Popular to Banco Santander SA (Santander). The SRB and the Spanish National Resolution Authority decided that the sale was in the public interest as it protected all depositors of Banco Popular and ensured financial stability, and the sale was endorsed by the European Commission. Several other banks have been declared 'failing or likely to fail' by the European Central Bank including ABLV Bank Luxembourg, Veneto Banca SpA and Banco Popolare Società Cooperativa. For each, the SRB decided that it would not be in the public interest to pursue resolution action and therefore winding up was to take place under the insolvency laws of the relevant member state.

The Bank Recovery and Resolution Directive

The EU has put in place 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 2014/59/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 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 write down 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.

Recovery and resolution for non-banks

The EU Commission adopted a legislative proposal for a regulation on the recovery and resolution of central counterparties on 28 November 2016. In response, the Council published its first Presidency Compromise proposal on the draft regulation on 28 April 2017, and its second Presidency Compromise proposal in December 2017. These set out the amendments that the Council required to be made to the proposal. The European Parliament published a draft report on the proposed regulation and the relevant committee, the Economic and Monetary Affairs Committee (ECON Committee), accepted this

position formally on 24 January 2018 with the adoption of the report. The report includes amendments to the text of the regulation by way of a legislative resolution. On 1 February 2018, the ECON Committee published its final report on the regulation. As at the time of writing, discussions remained ongoing among EU member states on the draft legislative text. Once an agreed position is reached, negotiations will begin between the EU Commission, Council and European Parliament.

Banking sector structural reform

On 29 January 2014, the EU Commission adopted a legislative proposal for a regulation on the structural reform of the banking sector. The regulation was 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. The proposal was debated both in the ECON Committee and the Council and was heavily criticised. The European Commission withdrew the legislative proposal in its 2018 Working Programme, citing (i) lack of progress since 2015 and (ii) the fact that the financial stability concerns driving the proposal had been addressed in the meantime by other regulatory measures.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The rules in this context vary between member states. Under the Recast 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.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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 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.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Voluntary reorganisations can be classified as 'insolvency proceedings' under the Recast Regulation, provided that the particular type of reorganisation is specified in Annex A to the Recast Regulation (for example, the *sauvegarde* procedure in France is included in Annex A to the Recast 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 Recast Regulation.

The Recast Regulation applies to collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation, either the debtor is totally or partially divested of its assets and an insolvency office holder is appointed, 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 Recast Regulation if no agreement is reached. Each member state has designated which procedures fall within the scope of the Recast Regulation.

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.

8 Successful reorganisations

How are creditors classified for purposes of a reorganisation 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 7.

Generally, the different classifications of preferential, secured and unsecured creditors are 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.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

The requirements for, and effects of, the involuntary liquidation process vary between member states. Generally, in order for a creditor to make a successful application 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.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

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 9) 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.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' 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).

12 Unsuccessful reorganisations

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.

13 Corporate procedures

Are there corporate procedures for the 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 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.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In nearly all jurisdictions, liquidation proceedings will end with a court hearing or meeting or creditor decision process 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.

The Recast Regulation formally recognises the concept of 'synthetic secondary proceedings' and sets out the right of an office holder in main proceedings to give an undertaking to recognise priority and distribution rights that local creditors would have had if secondary proceedings had been opened (article 36). Any such undertaking requires

the approval of local creditors and must comply with any requirements as to form and approval requirements in the member state presiding over the main proceedings. Once given, such an undertaking is binding on the estate, and local creditors are entitled to apply to the courts to ensure compliance with the undertaking.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

There is no single criterion to apply to determine if a debtor is insolvent, 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, and some have both.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

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. For example, there is no statutory requirement in England to commence insolvency proceedings (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.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

The position on liabilities for directors and officers 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 (for example, Germany) a failure to file for insolvency when the relevant insolvency test is met may result in criminal liability.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? 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 the company's COMI is different to its place of incorporation, the directors will need to be aware of potential liabilities in both jurisdictions. In the 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 fell within the scope of article 4 of the EC Regulation. This meant that the directors of an English incorporated company with its COMI in Germany and which 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 liability, 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 in 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 period of time or indefinitely.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Whether or not directors' duties shift to creditors varies between member states. In England, for example, where there is a risk that some creditors may not be paid in full or according to the existing terms of their debt, the directors' duties shift and start being owed to the creditors. When insolvent liquidation or administration is inevitable and creditors will lose money, effectively the directors' duties become fully owed to creditors. In Germany, however, the directors' duties remain with the shareholders even when insolvency or reorganisation is likely or inevitable, although once it is established that a debtor cannot pay its debts as they fall due or is over-indebted, its managing directors are required by law to apply for the commencement of insolvency proceedings without undue delay.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

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. On the other hand, in a French *sauvegarde* proceeding, the directors retain management and control of the company.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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 Recast 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. Arbitration proceedings are specifically included within this exception.

The court's ability to grant a stay may vary between member states, but typical examples include 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 by which creditors may obtain relief from such prohibitions varies between member states.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

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.

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.

23 Post-filing credit

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

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

24 Sale of assets

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?

The procedure for the sale of assets during reorganisations or liquidations varies between member states. However, the Recast Regulation provides that a disposal of an immovable 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 are, or the whole of the business is, 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. In 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. It is now understood that the proposed consolidation will not be going ahead.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

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

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 for 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).

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Where the IP right is a right that has been registered (or is pending registration) at EU level, rather than on a national level, the Recast 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). This applies to a European patent with unitary effect, a Community trademark or any other similar right established by EU law. 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.

Under the Recast Regulation, 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.

The rules in some jurisdictions (Italy 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 heavily 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.

28 Personal data

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

New EU rules on data protection came into force on 25 May 2018 under the General Data Protection Regulation 2016/679 (the GDPR). The GDPR repealed the previous Data Protection Directive 95/46/EC. The GDPR leaves some matters to the discretion of member states, so each member state has also introduced its own national legislation that supplements the GDPR's rules.

A controller is required to comply with the data protection principles set out in the GDPR when processing any personal data. The first principle is that personal data must be processed lawfully, fairly and in a transparent manner. Where valuable customer data is collected or held 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 GDPR (as supplemented by relevant member state national law) will apply, and an office holder may require a buyer of the data to comply with its 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 them that the buyer is now the controller and of any new purposes for which the customer's personal data will be processed by the buyer. The GDPR expands the amount of information that must be provided in a fair processing notice.

Among other things, the GDPR introduces stricter rules on obtaining consent to use a person's data; this means that a business that buys an insolvent company's personal data may be unable to use it for new purposes without obtaining new consents.

Unlike the previous Data Protection Directive, the GDPR introduces direct obligations on 'processors' as well as 'controllers' – so the classification of an office holder as a controller or processor might be less relevant than it previously has been.

National sector-specific data protection laws may also apply.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

The Recast Regulation 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 arbitration may not be available.

The rules governing whether arbitration proceedings can be continued differ between member states. 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. By contrast, in Germany, the commencement of insolvency proceedings does not lead to automatic cessation of arbitration proceedings (although the insolvency administrator will be party to the arbitration proceedings, rather than the insolvent company).

Creditor remedies**30 Creditors' enforcement**

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 that secured creditor.

Creditors may also be able to avail themselves of certain 'self-help' remedies against the assets of the debtor, 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 31 and 45.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

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 from 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 became effective on 18 January 2017 in those member states that had not opted out (all member states other than the UK and Denmark).

Creditor involvement and proving claims**32 Creditor participation**

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

The procedural requirements of the various types of insolvency proceedings that exist in different member states (including, for example, 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 Recast 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 Recast Regulation. The Recast Regulation also provides for a standard notice form to be introduced across the EU. The notice form is contained in Commission Implementing Regulation (EU) 2017/1105 of 12 June 2017 establishing the forms referred to in Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings (the Recast Forms Regulation).

Once insolvency proceedings have been commenced, the office holder or the court must inform all known creditors in all member states, and include in such notice the 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 or creditor decision procedure 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 or creditor decision procedure may be convened in order to discuss the plan and vote on it.

Further protection will be afforded to creditors with the introduction of national insolvency registers. By 26 June 2018, each member state was obliged to create a national insolvency register that contained 'mandatory information' for main, secondary and territorial proceedings. The intention is that by mid-2019 all national registers will be searchable by a single portal providing easy access to a uniform set of mandatory information, such information to include (among other things): the date the insolvency proceedings open; the court and case reference number; the type and sub-type of proceedings opened (with reference to Annex A of the Recast Regulation); the article that the jurisdiction for opening the proceedings is based upon; key company information; and any time limit for lodging claims or the criteria to calculate the time limits.

33 Creditor representation

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 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.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

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.

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 the creditors 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.

35 Claims

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? 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 Recast Regulation introduced a single EU-wide standardised claim form. 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. The claim form indicates, 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 may be lodged in any of the official languages of the EU, although the creditor may be required to provide a translation into any official language of the member 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 member state of opening of the proceedings. The standard claims form is contained in the Recast Forms Regulation.

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 being 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. Under the Recast Regulation, 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.

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

Under the Recast 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 Recast Regulation does not address this point. In England, for example, post-insolvency interest is subordinated until provable debts have been paid.

36 Set-off and netting

To what extent may creditors 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 Recast Regulation states that the conditions under which set-off 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 Recast 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'. Recital 70 to the Recast Regulation states that in this way, 'set-off would acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises'.

Contractual netting is not specifically addressed under the Recast Regulation.

37 Modifying creditors' rights

May the court change the rank (priority) 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.

38 Priority claims

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 Recast 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.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Guarantee institutions

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 for employee claims to be given a preferential claim on the insolvent estate. Whether the employees' preferential claims rank ahead, or behind, secured creditors varies from jurisdiction to jurisdiction.

Sale of the business

The Acquired Rights Directive (Directive 2001/23/EC) 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 24). This can mean that the employee claims (even for back pay) transfer to the (presumably solvent) transferee or purchaser and so are (presumably) reflected in a lower price paid for the relevant business. 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, for example, in relation to payments that would otherwise be made from the National Insurance Fund.

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. The ECJ has held that an administration in the Netherlands is not a proceeding within this provision: *Federatie Nederlandse Vakvereniging v Smallsteps BV* (C-126/16).

Collective redundancies

If a large number of workers are to be dismissed, a consultation obligation may apply. Under the Directive on the approximation of the laws of member states relating to collective redundancies (98/59/EC) (the Collective Redundancies Directive) national laws of member states need to provide for consultation 'in good time' with workers' representatives where it is contemplated that a relevant number of workers may be dismissed (for reasons not related to the individual workers concerned) within a relevant period. Member states can choose which qualifying period can apply as either:

- the dismissal, over a period of 30 days, of at least 10 workers in establishments with 21–99 workers, 10 per cent of the number of workers in establishments with 100–299 workers and 30 workers in establishments of 300 or more; or
- the dismissal, over a period of 90 days, of at least 20 workers, whatever the number of workers normally employed in the establishments in question.

For example, Spain adopted the first of these two definitions, the UK adopted the second.

The Collective Redundancies Directive also requires that national law provides for employers to notify the competent public authority in writing of any projected collective redundancies and that the relevant redundancies do not normally take effect earlier than 30 days after this notification.

Member states need to specify appropriate judicial and administrative procedures for the enforcement of the obligations under the Collective Redundancies Directive.

40 Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation 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 and the UK). 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 (in article 8) 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 Directive does not expressly allow member states to include any limit on this protection. 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. In 2016, the Court of Appeal in England 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). The ECJ is expected to deliver its judgment later in 2018, but in the Advocate General's opinion (in April 2018), article 8 of the Employment Insolvency Directive should be interpreted to the effect that every individual employee is entitled to compensation of at least 50 per cent of the total value of their accrued old-age benefits in the event of the insolvency of their employer, rather than interpreted as meaning that, on average, all employees (but not individual employees) should receive compensation of at least 50 per cent of the value of their old-age benefits.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

A large amount 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.

Certain key 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'. An operator is any natural or legal person who operates or controls the installation, or where national

legislation so provides, a person to whom decisive economic power over the technical functioning of the installation has been delegated will also be an 'operator'. Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control), which includes provisions aimed at limiting emissions of volatile organic compounds because of the use of organic solvents in certain activities and installations, Directive 2012/18/EU 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, as amended, provision is made for administrative/civil liability to attach to operators for clean-up costs associated with environmental damage. 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.

The Recast 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 among member states differ and often also vary depending on the type of insolvency process or the identity of the person whose actions caused the environmental liability for example, 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.

42 Liabilities that survive insolvency or reorganisation proceedings

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 formal 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 of the Acquired Rights Directive (see question 24).

43 Distributions

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 Recast Regulation and 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 Recast

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 (article 49).

Security

44 Secured lending and credit (immovables)

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

Each member state 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 member state it is possible to take a mortgage or fixed charge over immovable (real) property and such security will usually cover fixtures and fittings relating to the immovable (real) property. There is usually a registration requirement for the security to be effective.

45 Secured lending and credit (movables)

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

As noted in question 44, 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 Recast Regulation specifically addresses third parties' rights in rem and states 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, movable or immovable 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, the ECJ ruled that:

- 'cash' for the purpose of a financial collateral arrangement is not limited to collateral provided in securities payment and settlement systems and can extend to collateral in the form of monies deposited in a bank account;
- the proper interpretation of the requirement for control is that the collateral taker should have the legal right to limit the borrower's use of the collateral; and
- the collateral taker can realise financial collateral notwithstanding the commencement or continuation of winding-up proceedings, thereby essentially overriding *pari passu* distribution to creditors.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

The rules relating to the validity or unenforceability of legal acts detrimental to creditors, including the timing for challenging a transaction, 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.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

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 made by lenders holding more than 10 per cent of the company's shares, 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.

Groups of companies

48 Groups of companies

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) [1992] B.C.C. 715 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, 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.

49 Combining parent and subsidiary proceedings

In 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?

Under the Recast Regulation, it is possible to open main proceedings in relation to each individual company. 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 *In the matter of Nortel Networks* [2009] EWHC 206 (Ch) (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] EWHC 15 (Ch) 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. To avoid the difficulty of claims having different priorities in different jurisdictions, office holders have (in certain instances) given creditors in another jurisdiction the benefit of an undertaking to treat their claims with the same priority as if such a claim had opened in their local jurisdiction. These arrangements are sometimes referred to as 'synthetic secondary proceedings', the benefits of which have now been formally recognised under article 36 of the Recast Regulation (see question 14). 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 Recast Regulation includes 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 Regulation encourages 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 that 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 dictates the approval requirements

Update and trends

On 23 June 2016, the UK held a referendum on its membership of the European Union. The majority of people voted for the UK to leave the EU. The UK and the EU are currently negotiating the UK's exit from the EU and the nature of their future relationship. To date, negotiations have been protracted. The European Union (Withdrawal) Act 2019 (the Withdrawal Act) received Royal Assent on 26 June 2018, which repeals the European Communities Act 1972 and makes other provisions for the UK's withdrawal. One key provision of the Withdrawal Act allows English courts to avoid considering the ECJ's jurisprudence after Brexit has taken place. At the time of writing, the UK government had recently published a White Paper setting out its vision on the future relationship between the UK and the EU, with the intention of reaching agreement on a withdrawal agreement by autumn of 2018. The White Paper also aims to explore bilateral agreement on civil judicial cooperation, including on insolvency matters.

The main impact of the current EU law relates to the mutual recognition of insolvency or restructuring proceedings that take place within a member state. If no free trade agreement is reached between the UK and the EU, the UK would lose the benefits of the automatic recognition of English insolvency proceedings, requiring applications in the court of each member state where recognition is required. The results of the negotiations will clearly therefore have an effect on the UK's current restructuring and insolvency regime, some of which is derived from EU law. At this stage it is too early to speculate what the final outcome will be.

(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, it 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 it is not following the plan). As at the date of writing, no group coordinator has yet been appointed in any insolvency proceedings.

International cases

50 Recognition of foreign judgments

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?

Under the Recast Regulation, judgments that concern the course and closure of insolvency proceedings and compositions approved by that court shall be recognised without further formalities (article 32). 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) (article 32). The Recast 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 does 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 Recast Regulation so does not fall within the scope of the Recast Regulation, and therefore 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.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

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.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

The Recast 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 a member state) has the right to lodge claims in the insolvency proceedings (article 2(12)). The treatment of foreign creditors outside the scope of the Recast Regulation depends on the laws in each member state.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

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

54 COMI

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 Recast Regulation defines COMI as the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (article 3(1)). The Recast Regulation applies the concept of COMI to each individual debtor and not to a group of companies, which can all have individual COMIs, 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.

The Recast Regulation contains a rebuttable presumption that a company's COMI will be the place of its registered office, in the absence of proof to the contrary. Where a company's central administration is in a different member state to that of its registered office, and where a comprehensive assessment of all relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests, are located in that other member state, it should be possible to rebut the registered office presumption. To address concerns over 'bankruptcy tourism', the Recast Regulation 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.

55 Cross-border cooperation

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 Recast 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 49), 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. The Recast Regulation provides for a national and an interlinked EU-wide database of insolvency proceedings to assist such cooperation.

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 Regulation addresses these points and provides for enhanced cooperation and formalises the use of protocols (see question 49).

56 Cross-border insolvency protocols and joint court hearings

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, and the Recast Regulation in its place, were 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] EWHC 206 (Ch) before the English courts, referred to in question 49. 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 Regulation addresses this point and formalises the use of protocols (see question 49).



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The provisions relating to French insolvency proceedings are codified under articles L610-1 to L680-7 and article L811.1 et seq of the French Commercial Code and have been reformed on several occasions, including by Law No. 2015-990 of 6 August 2015 for the growth, activity and equality of economic chances (also known as the Macron Law) and Law No. 2016-1547 of 18 November 2016 on the modernisation of twenty-first century justice. Aspects relating to cross-border insolvencies are governed by the EU Regulations Nos 1346/2000 and 2015/848 on insolvency proceedings (the EU Insolvency Regulations) and Ordinance No. 2017-1519 of 2 November 2017 and Decree No. 2018-452 of 5 June 2018 issued in relation to EU Regulation No. 2015/848.

2 Excluded entities and excluded assets

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

Insolvency proceedings provided for in the French Commercial Code apply to:

- self-employed individuals;
- corporate entities, whether of a commercial or civil nature;
- merchants; and
- farmers and craftsmen (ie, 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 that are not subject to any specific insolvency proceedings because of their particular status;
- entities that 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 French company entitled *société de libre partenariat* created by the Macron Law.

Out-of-court proceedings (*mandat ad hoc* and conciliation) are available to corporate entities, merchants and craftsmen only, to the exclusion of farmers or self-employed individuals who may be subject to specific preventive measures.

3 Public enterprises

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 private law. Although with respect to some enterprises

there can be uncertainty as to whether they are governed by public or private law, it is generally established that: government-owned entities taking the form of industrial and commercial bodies (EPICs) are governed by public law and 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 standard insolvency proceedings applicable to private law companies and French law does not provide for any equivalent insolvency proceedings for these types of enterprises. 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 standard insolvency proceedings like any 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). However, the implementation of these proceedings can differ from other commercial companies, in particular regarding semi-public companies and local public companies (see article L1531-1 of the General Local Authorities Code). Article L1523-4 of the General Local Authorities Code provides for the automatic termination of concessions and public service delegation contracts and the free return to the local authorities of the assets they contributed in the case of insolvency proceedings. The aim is to ensure the principle of continuity of the public service and the right of unilateral termination granted to the public contracting party.

4 Protection for large financial institutions

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 (EBRRD). 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 this plan to the French banking regulator, the *Autorité de contrôle prudentiel et de résolution* (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:

- the 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 from the financial and banking sector.

This legislation aims to strengthen the framework for financial crisis management and prioritise the restructuring of institutions facing financial problems, prior to any grant of public aid.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The courts that have 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. Specialised commercial courts have jurisdiction over insolvency proceedings opened against companies that meet the following criteria:

- companies with a number of employees exceeding 250 and a turnover exceeding €20 million;
- companies whose turnover exceeds €40 million;
- companies that hold or control other entities where the total combined number of employees is 250 or more and where they have a combined total turnover of at least €20 million; or
- companies that hold or control other entities, irrespective of the number of employees and where the combined turnover is at least €40 million.

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

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 COMI set out in article 3 of the 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 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.

The debtor that is the subject of insolvency proceedings has the right to appeal a judgment, within 10 days of 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 challenge 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 proceedings. The appellant has an automatic right of appeal: he or she does not have to request.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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 cash-flow insolvent, 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 demonstrate that it is cash-flow 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 (three months renewable once at the request of the public prosecutor). In large cases, a judicial administrator will be appointed by the court in addition to the liquidator. The 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, 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 (BODACC). The time allocated to creditors to declare their claims is extended to four months for creditors residing outside mainland France. Within eight days of the opening judgment, the debtor is also required to file a list of its known creditors and is deemed to act as its creditors' proxy, filing their claims on their behalf, subject to the creditors' own declaration of claims to rectify or adjust the debtor's list.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Out-of-court proceedings

When a debtor company finds itself in financial difficulties but is not yet insolvent according to the French cash-flow insolvency test, it can request the presiding judge of the relevant 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 investors 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 presiding judge of 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 presiding judge of 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 or 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 presiding judge of 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 investors. 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 or 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 1343-5 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 presiding judge of 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 arrangements 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 presiding judge of 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 (otherwise than through subscribing to a share capital increase) during a conciliation that ended with a formally approved conciliation agreement may 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 various implementation steps of the conciliation agreement, including security documents, entered into or taken on the date of the judgment will not, in the event of subsequent insolvency proceedings, be void or voidable on the grounds of suspect period rules; 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 presiding judge of the court (for a certified conciliation agreement) or the court (for an approved conciliation agreement) to terminate it. Likewise, the opening of safeguard, reorganisation or liquidation proceedings against the debtor company results in the automatic 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 null and void.

Safeguard proceedings

The legal representatives of a company that experiences difficulties that it cannot overcome but which is not yet cash-flow insolvent may apply to the court for the opening of solvent reorganisation proceedings, known as safeguard proceedings. The judgment commencing safeguard proceedings opens a six-month period called an '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. The safeguard plan is drawn up and possibly approved as set out in question 8. Expedited safeguard proceedings (accelerated safeguard proceedings or financial accelerated safeguard proceedings) may also be opened following conciliation proceedings, as described in question 11.

Reorganisation proceedings

A debtor company that is insolvent must apply for the opening of insolvency proceedings within 45 days of the occurrence of cash-flow insolvency, unless it has requested the appointment of a conciliator or the opening of liquidation proceedings. 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 (i) 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), (ii) the sale to a third-party purchaser of its assets as a going concern by way of a sale plan or (iii) failing (i) or (ii) above, the liquidation of the debtor company. The reorganisation plan is prepared and possibly approved as set out under question 8. Features of a sale plan are set out in question 24.

8 Successful reorganisations

How are creditors classified for purposes of a reorganisation 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 committee of the holders of bank debt, 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 or 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' committees 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' committees 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, rescheduling of debts over a period of up to 10 years, change of control, 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' committees and of the bondholder's general meeting 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 the relevant members of the creditors' committees and the bondholder's general meeting the method for the computation of their 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 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, if applicable, of the bondholder's general meeting, 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. 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, save for creditors benefiting from a 'new money' priority with respect to finance provided in the context of a conciliation agreement that has been formally approved by the court.

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

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

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.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

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 cash-flow insolvency test. 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.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' 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 and be supported by a sufficiently large group of creditors to make it likely that it will be adopted by the creditor's committees representing a two-thirds majority of the debtor's total indebtedness (either secured or unsecured) in subsequent safeguard proceedings;
- the criteria for a debtor to be eligible for accelerated safeguard and for accelerated financial safeguard proceedings are: either to issue 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 debtor's request for the 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 committees of holders of bank debt and main suppliers (which have to be formed regardless of whether the debtor meets the criteria specified in question 8 that apply to committees in 'ordinary' safeguard proceedings) in the case of accelerated safeguard;
 - the committees of holders of bank debt only in the case of accelerated financial safeguard; and
 - the bondholders' general meeting (if 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).

12 Unsuccessful reorganisations

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 cash-flow insolvency test is met. Accelerated safeguard or financial accelerated safeguard may also be opened by the debtor after conciliation proceedings, if the conditions specified in question 11 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. 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, the judicial administrator, the creditors' representative, 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 cash-flow 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, the judicial administrator, the creditors' representative, a controlling creditor or the public prosecutor may request the opening of liquidation proceedings or the court itself can decide to do so. 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.

13 Corporate procedures

Are there corporate procedures for the 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 has completed. In this event, the liquidator will request that the company be removed from the Trade and Companies' Registry.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Out-of-court restructurings are formally concluded when:

- parties agree 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; 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.

Safeguard and reorganisation proceedings are formally concluded upon the court approving the safeguard or reorganisation plan. In addition, once the safeguard or reorganisation plan is 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 are repaid or the liquidator is able to obtain sufficient proceeds in order to repay all debts or when the continuation of the liquidation proceedings is impossible because of a shortfall of assets or the continuation of liquidation proceedings is considered to be no longer justified because of 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.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

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.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Insolvency proceedings must be commenced if the debtor is cash-flow insolvent. The managers 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 presiding judge of the court to appoint a conciliator.

Directors and officers

17 Directors' liability - failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

If the managers 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, as 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.

18 Directors' liabilities - other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Managers (whether officially appointed or de facto managers) 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 managers in certain circumstances.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

There is no shift of fiduciary duties whereby duties owed by directors of a French company would, post opening of proceedings, become owed

to the company's creditors and directors keep their duty of promoting the corporate interest of the company as a whole.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Out-of-court restructuring

There are no specific provisions relating to supervision of the business of the debtor during *mandat ad hoc* or conciliation proceeds as well as 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.

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 21);
- 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.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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 started before the court decision ordering the start of the safeguard or reorganisation proceedings, are stayed. They may continue during the safeguard or reorganisation proceedings only for the purposes of fixing the amount of the creditor's claim. Proceedings may 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. Creditors whose claims are secured by a pledge may enforce their security interests subject to certain conditions.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

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.

Please refer to question 23 with respect to the 'new money' priority under conciliation proceedings.

Safeguard and reorganisation proceedings

Please refer to question 20.

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.

23 Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be 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) during a conciliation that ended with the execution of a conciliation agreement formally approved by the court, 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, 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 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 takes priority over most or 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 immovable property as well as special security interests over movable property that entail a retention right for the creditor.

24 Sale of assets

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?

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, 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 judge in charge of supervising the safeguard proceedings. 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, 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 supervisory judge. At the end of the observation period, when the debtor company proves unable to present 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 employments of the debtor company. By law, the sale plan must achieve three objectives: the continued operations of the transferred business, the preservation of employment 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. 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 and the company is dissolved.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

There are no 'stalking horse' bids in the sale plan process. Also, there is no possibility of implementing a proper credit bid, as 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.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 protect 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 automatically terminate only 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.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

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 26 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.

28 Personal data

Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information 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 General Data Protection Regulation (GDPR) provisions and in particular with the principles of lawfulness, fairness, transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity, confidentiality and accountability.

**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 allowed, as long as the data subjects have been informed about the category of recipients of their personal data (subcontractors, partners, subsidiaries, etc).

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 or appropriate guarantees have been provided for the said transfer. Appropriate guarantees are, for instance, Standard Data Protection Clauses adopted by the European Commission, Binding Corporate Rules for transfers within a group of companies, etc. Moreover, the data subjects shall be informed about the characteristics of the transfer (recipient countries, purpose of the transfer, category of data transferred, etc).

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

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 be commenced during safeguard or insolvency proceedings only 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.

Creditor remedies**30 Creditors' enforcement**

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 (as 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.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

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. The enforcement judge or the presiding judge of the commercial court can also grant a preliminary freezing order in connection with assets located in France, where the order is necessary to cover a risk of non-recovery of the applicant's debt. The preliminary freezing order is not intended to be a permanent measure and must be converted into an enforcement measure once the creditor is awarded an enforcement order. 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. No special procedures apply to foreign creditors in this respect.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

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 BODACC. 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. Meetings are held during the safeguard or reorganisation proceedings as part of the consultation process involving creditors' committees and the bondholders' general meeting.

33 Creditor representation

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?

Please refer to questions 8 and 11. 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. 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.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

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. Claims and remedies that may be brought on behalf of the debtor company against third parties are not assignable.

35 Claims

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? 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 are located outside mainland France) from the publication of the opening judgment in the BODACC. 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 known creditors and the amount of their claims) in which case the debtor is deemed to have acted on behalf of its creditor. The 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 judge in charge of supervising the safeguard or insolvency proceedings 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 all known creditors mentioned on the debtor's list, including 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 will learn about the start of the safeguard or insolvency proceedings from the notice published in the BODACC.

The creditors' representative will then verify the filed statements of claims with the assistance of the debtor. If the creditors' representative or the debtor intend to challenge the claim, the creditors' representative will send a letter to the creditor indicating that the claim has been challenged (in whole or in part) on grounds also mentioned in the letter and the creditors' representative therefore intends to suggest to the supervisory judge to reject the claim. In the absence of a reply by the creditor within 30 days from the receipt of the challenge letter, such creditor loses the right to appeal the decision of the supervisory judge that would follow the creditors' representative's position, thus rejecting the claim. Challenges of claims are brought before the supervisory judge, who 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 from the opening judgment.

36 Set-off and netting

To what extent may creditors 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 occurs in respect of receivables that are both certain, liquid and due. Set-off may occur post-filing only if the two receivables are unquestionable, of a fixed amount, due and are connected. Receivables are connected 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).

37 Modifying creditors' rights

May the court change the rank (priority) 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. In the framework of a sale plan or liquidation proceedings, the rank of a creditor's claim is determined by law.

38 Priority claims

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);
- claims secured through security interests over immovable property;
- 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.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

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 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 reorganisation proceedings, where the proceedings end with the court approving the debtor's restructuring plan, the judicial

administrator must terminate employment contracts mentioned in the restructuring plan within one month of the judgment approving the restructuring plan. Severance payments are advanced by the AGS and repaid by the debtor to the AGS.

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 of employment contracts 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.

40 Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation 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.

41 Environmental problems and liabilities

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 personally, 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 managers (if they are still in charge of the management of the company) and the judicial administrator, if it has been granted power to oversee or assist with the management of the company (in safeguard or reorganisation proceedings) or by the insolvency administrator or liquidator if it has taken over the management of the company (in reorganisation or liquidation proceedings). The insolvency administrator must also request an environmental audit during safeguard proceedings or 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 managers, 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 judicial 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 that 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 that 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.

42 Liabilities that survive insolvency or reorganisation proceedings

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 because of the insufficiency of the debtor's assets to settle liabilities. In contrast, pre-insolvency claims that were not acknowledged in the insolvency proceedings survive in the case where liquidation proceedings are closed because of the full repayment of the debtor's liabilities. 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.

43 Distributions

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. 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, 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, such termination may result either in the start of reorganisation proceedings or liquidation of the debtor if there are no prospects of recovery.

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. 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 as sale proceeds are collected and after the statements of all claims have been verified and are final.

Security

44 Secured lending and credit (immovables)

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

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

45 Secured lending and credit (movables)

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

The most common type of security taken over movable 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 *Daily assignments*), cash collateral and, more recently, trusts (*fiducies*).

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

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. 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 *Daily* 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 movable or immovable 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 or payment as well as debt attachments if the two following conditions are met:

- the transaction or debt attachment took place during the suspect period; and
- the other party knew that the debtor was already insolvent when it made the payment or entered into the transaction or proceeded with the debt attachment.

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.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

French law does not recognise any concept of equity subordination. Monetary claims of related parties, including shareholders, are therefore considered as actual monetary claims and not as equity. Related parties are required to declare their claims in the safeguard or insolvency proceedings.

Certain commercial courts may make the approval of a reorganisation plan conditional upon the conversion of shareholders' monetary claims into equity.

In addition, 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 46 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 entered into the transaction.

Groups of companies

48 Groups of companies

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 grounds 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.

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 grounds that the company is a fictitious legal entity.

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-91/10*), 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 grounds of the French rule mentioned above to a company having its registered office (and its COMI) in another EU state. Please refer to question 41 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.

In addition, if a shareholder acted as a de facto manager of its subsidiary, it may be liable to bear all or part of the subsidiary's shortage of assets if it is established that it mismanaged the subsidiary and thus contributed to the shortage of assets.

49 Combining parent and subsidiary proceedings

In 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?

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.

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 same judicial administrator or creditors' representative may be appointed with respect to insolvency proceedings opened against companies of the same group.

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. See question 48 in relation to restrictions to such extension of insolvency proceedings in relation to foreign companies.

International cases

50 Recognition of foreign judgments

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?

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 European Union 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.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

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.

52 Foreign creditors**How are foreign creditors dealt with in liquidations and reorganisations?**

Foreign creditors, are, in general, not treated differently from creditors that are incorporated or resident in France, subject to additional time granted to them for certain steps of the safeguard or insolvency proceedings. For instance, the two-month period to file a creditor's statement of claim from the publication of the opening judgment in the BODACC is extended by a further two-month period for creditors residing outside France.

53 Cross-border transfers of assets under administration**May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?**

Cross-border cooperation between insolvency practitioners within the EU (see question 55), and insolvency protocols they may enter into, do not apply to transfer of assets.

54 COMI**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.

55 Cross-border cooperation**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?**

Please refer to question 50 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 (other than Denmark) and an insolvency practitioner appointed in secondary proceedings opened in another EU member state (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* case, where administrators were 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 (please refer to question 50 with respect to the exequatur of foreign insolvency judgments). However, there are very rare cases where foreign judgments have not been recognised.



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56 Cross-border insolvency protocols and joint court hearings

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?

Please refer to question 55.

Germany

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

In principle, the 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 and the German Act on the Recovery and Resolution of Credit Institutions (see questions 2 and 4). There are also 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 event of (threatened) insolvency of a financial institution. For example, the FSA can impose a temporary moratorium.

2 Excluded entities and excluded assets

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

In principle, insolvency or reorganisation 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 (see also question 3).

Furthermore, the Law on Bank Restructuring and the German Act on the Recovery and Resolution of Credit Institutions (see questions 1 and 4) provide 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.

3 Public enterprises

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 Insolvency Act also apply to 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 2).

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 31).

4 Protection for large financial institutions

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

Following 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, its shareholders and creditors in particular). The German Federal Financial Supervisory Agency (FSA) may only consider an intervention 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 management of a distressed bank can initiate the recovery procedure far in advance of a potential insolvency. The management may commence the recovery procedure after it gives notice of its need for recovery and presents a recovery plan to the FSA. Such a 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 8), 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.

Similar restructuring procedures are stipulated in the German Act and Resolution of Credit Institutions, which came into effect on 1 January 2015, in connection with the implementation of the European Recovery and Resolution Directive (2014/59/EU). Because this directive only provides for minimum harmonisation and allows the member states to maintain their national resolution procedures, the procedures of the Law on Bank Restructuring have remained unaffected and thus are still available for the FSA. In addition to the aforementioned restructuring procedures, the FSA also has the following set of resolution tools at its disposal: DAC28093581/1 PENDING-103249:

- (i) sale of the business or shares of the institution;
- (ii) transfer to a 'bridge institution';
- (iii) transfer to an asset management company; and
- (iv) bail-in of shareholders and creditors (ie, converting specific loan receivables into equity by way of a debt-to-equity swap).

These tools are primarily provided by the German Act on the Recovery and Resolution of Credit Institutions.

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 311 and following 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.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

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

If the debtor's centre of 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.

Generally speaking, the competent insolvency court has jurisdiction to deal with all matters connected with the insolvency proceeding.

Orders or decisions of the insolvency court can only be appealed where the Insolvency Act expressly provides for an immediate appeal (ie, where 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 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 relevant insolvency court, which will decide if it wants to grant intermediate relief.

Pursuant to section 4 of the Insolvency Act in connection with section 574 and following of the Civil Procedure Code, an appeal on points of law can be used to challenge decisions resulting from an immediate appeal. However, such an appeal is only admissible if the appeal court has permitted the appeal on the point of law in its order following the immediate appeal. The appeal court will grant permission to file a complaint on points of law 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 if applicable), 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 (see question 32); 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 insolvency plan if it 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. This is to be determined in a separate proceeding.

Furthermore, at the request of the insolvency administrator (or the debtor in self-administration proceedings), the district 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 result from the delayed 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.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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 (see also question 13).

Under the Insolvency Act, the debtor may (voluntarily) initiate insolvency proceedings under the Insolvency Act when illiquidity is threatened, as defined in the Insolvency Act (see question 15).

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 insolvency 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 7 and 22).

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary 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 15)), under German law the managing directors of the debtor must apply to commence 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 is threatened, as defined in the Insolvency Act (see question 15). In the event of both insolvency (ie, illiquidity or over-indebtedness) or threatened illiquidity, the debtor can combine the application for the commencement of insolvency proceedings with an application for self-administration proceedings and the submission of a reorganisation plan. Such a plan is called an 'insolvency plan'. Furthermore, if over-indebtedness or threatened illiquidity (or both) has occurred, as defined in the Insolvency Act (see question 15), section 270b of the Insolvency Act provides for an early self-administration procedure – the 'protective shield procedure' – which establishes a three-month moratorium. This provides the debtor with protection from creditor enforcement action and enables it to establish a reorganisation plan (see question 20).

Aside from the debtor, only the insolvency administrator is authorised to submit a reorganisation plan (ie, an insolvency 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 – see question 33), 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.

8 Successful reorganisations

How are creditors classified for purposes of a reorganisation 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 a plan is called an 'insolvency plan'). 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 (and shareholders if applicable – see below). 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 advantages, whether financial or otherwise, of a reorganisation by way of an insolvency plan.

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 creditors. A class of creditors accepts the plan if a majority in number and in value in that class vote in favour of the plan. It is then up to the court to decide whether to confirm that plan (see also question 12).

Furthermore, creditors who have not filed their claims with the insolvency administrator and had them included on the official table are also bound by the measures approved in 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 42).

Under the Insolvency Act, an insolvency plan cannot provide for a release of liabilities owed by third parties to creditors.

Moreover, it is explicitly regulated that an insolvency plan may not affect creditors' rights against the debtor's co-obligors and guarantors (section 254(2) of the 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.

As the plan can provide for the disposition of the debtor's assets, an insolvency plan may, however, 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 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-to-equity swap is planned, the shareholders need to vote on the insolvency plan in addition to the creditors. Shareholders will form (at least) one 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 corporate law, this majority is sufficient here even without a majority in number (see also question 12).

As regards a debt-to-equity swap, each creditor who is to receive 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).

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Insolvency proceedings can only be commenced when an application is presented. 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 15)). If the creditor's application is well founded, the insolvency court will then give the debtor an opportunity to be heard.

Once the proceedings are commenced, there are no material differences to proceedings opened voluntarily.

Upon the commencement of the insolvency proceedings, the insolvency administrator immediately takes possession of and administers all assets the insolvency estate comprises. 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, stating the value of each object. The administrator must also prepare a list of all creditors whose names appear in the debtor's books and papers, 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.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

As described above (see question 9), insolvency proceedings may be commenced by a creditor on presentation of an application if it can demonstrate that the debtor is insolvent. Once the proceedings are

commenced, there are no material differences to proceedings opened voluntarily. An individual creditor does not have authority to submit a reorganisation plan. However, the creditors' meeting 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 (see question 8).

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

The Insolvency Act does not explicitly provide for any specific procedure on expedited reorganisations such as 'pre-packaged' reorganisations.

However, in practice, an insolvency administrator may sell the debtor's business or key assets (see question 24) a few weeks after the insolvency proceedings are commenced. Additionally, and as stated above, the debtor is entitled to file an application for the opening of insolvency proceedings when illiquidity is threatened (see question 15). At the same time, the debtor can apply for self-administration, which would allow the debtor to continue to manage the insolvency estate under supervision, and also submit an insolvency plan for a reorganisation of the business as a 'pre-packaged' plan. 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.

12 Unsuccessful reorganisations

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 (ie, reorganisation plan) must first be considered by the insolvency court. The insolvency court will reject the plan if:

- the formalities regarding the authority to submit the plan and regarding 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 involved participants (ie, creditors and, if involved, shareholders) or confirmed by the insolvency 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' (and shareholders') voting rights can be discussed and the plan will be voted on (the 'hearing for discussion and voting'). Each class of creditors (and shareholders) will vote separately on the plan. A majority in number and value of each class of creditors is required for a plan to be accepted. 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 insolvency 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 has consented to the plan.

Once the creditors (and shareholders where their rights are concerned) accept the plan, it must be ratified by the insolvency court. The insolvency court will not ratify the plan if, inter alia, the acceptance of the plan by the creditors (and shareholders where their rights are concerned) is obtained in a wrongful manner, including, but not limited to, acceptance as a result of preferential treatment of a creditor.

The court may also refuse to ratify the plan if a creditor (or shareholder where its rights are concerned) successfully objects to or appeals the plan (see question 5).

Generally, a debtor's default in performing an approved plan does not affect the validity of the plan. However, in the event that creditors' claims 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 liability due, despite the creditor making a written demand and setting a minimum period of two weeks for payment.

13 Corporate procedures

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

German corporate law contains different procedures for the dissolution and liquidation of a corporation. 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 can resolve to dissolve the company with a qualified majority of usually 75 per cent of the votes cast.

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 (i) terminate its current business transactions, (ii) discharge its obligations, (iii) collect its receivables, (iv) convert its assets into cash, and (v) 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.

14 Conclusion of case

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 – for example, registration of the debt-to-equity swap with the competent commercial register.

If the performance of the plan is to be supervised, the court will make an order to that effect, 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.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

In general, the Insolvency Act specifies two different criteria for establishing insolvency: illiquidity and, if the debtor is a legal entity (such as a 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:

- the debtor is not considered illiquid if it can reasonably be expected that it will meet its due payment obligations within no more than three weeks from their due date (including any 'new' obligations

becoming due during the three-week period: cf German Federal Supreme Court decision of 19 December 2017 (II ZR88/16)):

- where 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
- where 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, then the company was permitted to have its assets evaluated on a going-concern basis, rather than on a liquidation basis. Notwithstanding the predominant probability of the continuation of its business, if a company's valuation on a going-concern basis (considering hidden reserves) still resulted in a negative net asset value, the company had to file for insolvency. As a consequence of the financial crisis, from 18 October 2008, 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.

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 7 and 11). 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 with illiquidity is usually also over-indebted.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

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 15)). 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 the over-indebtedness cannot be remedied. This is mandatorily deemed to be the case after the three weeks have lapsed.

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.

Each shareholder of a limited liability company is also obliged to file for insolvency proceedings if: the company has become illiquid 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.

For the consequences resulting from non-compliance with the obligation to apply for insolvency proceedings, see question 17.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

If the managing directors of a German limited liability company and the members of the management board of a stock corporation do not comply with the obligation to apply for insolvency proceedings (as described under question 16), 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 under German criminal law. 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.

If a shareholder of a limited liability company or a member of the supervisory board of a stock corporation does not comply with the obligation to apply for insolvency proceedings (as described under question 16), they may be liable for a fine or prison sentence of up to three years under German criminal law, unless the shareholder or member is not aware of the company's illiquidity, over-indebtedness or that the company is without management.

It is important to note that the aforementioned liabilities do not only apply in case of not filing an application for the commencement of insolvency proceedings (in due course), but also in case of an incorrect filing (eg, by missing required information).

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 46).

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

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. 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 businessperson 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 businessperson 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 must 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 businessperson. This may be the case particularly 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 businessperson. However, such damage claims are to be asserted by the insolvency administrator in favour of the insolvency estate and, consequently, 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.

In principle, these offences are only actionable if the company has stopped its payments, or if insolvency proceedings have been commenced, or if the application for the commencement 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).

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

German insolvency law does not provide for a shift of director's duties to the creditors when an insolvency or reorganisation proceeding is likely. Instead, German law provides for:

- a duty to apply for the opening of insolvency proceedings if the company is insolvent (illiquid or over-indebted (see question 16));
- potential directors' liabilities in case of non-compliance thereof (see question 17); and
- rights for the insolvency administrator to contest transactions and payments of the insolvent company that prefer certain creditors (preferential transactions) (see question 46).

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

This depends on whether the insolvency court appoints an insolvency administrator or approves the self-administration.

If the insolvency court appoints an insolvency administrator, the right to manage and transfer the debtor's assets passes to the insolvency administrator after the opening of the insolvency proceedings. 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 insolvency administrator. Usually, a preliminary

insolvency administrator has fewer powers than an insolvency 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 insolvency administrator'). However, the preliminary administrator is not entitled to sell the entire enterprise or one of its businesses (see question 24). The preliminary insolvency administrator's primary role is to continue the business of the debtor and to examine whether or not the debtor is insolvent. 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 insolvency administrator, such as where they have 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.

In contrast, section 270 of the Insolvency Act provides for a process called 'self-administration', whereby the debtor may, under the supervision of a custodian (usually an insolvency practitioner), continue to manage the insolvency estate and dispose of assets (for more details see question 22).

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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 insolvency administrator, so that the debtor is generally prevented from selling assets already at an earlier stage (see question 20), then the stay of proceedings commences when the court appoints the preliminary insolvency administrator.

Once insolvency proceedings have been formally opened, the insolvency administrator is 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 actions before insolvency proceedings are formally opened. Note that, as regards pending enforcement actions over immovables, only the court seized with the claim has the right to suspend such actions.

Creditors cannot, in general, apply to the court to lift this moratorium on enforcement actions. 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.

For those financial institutions 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.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

As referred to in questions 7 and 20, section 270 of the Insolvency Act provides that the debtor may, under the supervision of a custodian (usually 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 that 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 33) 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 custodian.

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 over-indebtedness or threatened illiquidity (or both) has occurred (as defined in the Insolvency Act (see question 15)); and the intended restructuring has reasonable prospects of success.

If these requirements are met, the insolvency court may, without opening regular preliminary insolvency proceedings, order the moratorium on creditor enforcement for a maximum of three months, during which time the debtor must, under the supervision of a custodian (usually an insolvency practitioner), establish and present a reorganisation plan. A debtor cannot apply for the protective shield procedure if it is already illiquid.

As concerns the continued trading of the debtor's business after the opening of the insolvency proceedings, 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 insolvency 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 that the administrator has adopted.

In this context, it should be noted that, according to a recent judgment of the Federal Supreme Court (6 April 2018 – IX ZR238/17), the self-administering management shall be liable to the creditors for damages such as an insolvency administrator acting in a regular insolvency proceeding (ie, if the self-administering managers intentionally or negligently breach the duties incumbent upon insolvency administrators under the Insolvency Code or if a priority liability created as a result of a legal act by the self-administering debtor cannot be settled in full out of the insolvency estate, the self-administering management can be held personally liable). This judgment is in line with the prevailing opinion in practice that considers such liability to be necessary in order to professionalise the self-administration.

23 Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be 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 insolvency 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 (i) the costs of the insolvency proceedings, which are also priority liabilities, and (ii) the secured creditors have been satisfied. 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 if a debt is to be incurred that would significantly burden the insolvency estate.

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 those unsecured creditors who already exist, 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.

24 Sale of assets

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?

Upon the opening of insolvency proceedings, which include either a reorganisation or liquidation, the insolvency administrator is entitled to sell the debtor's assets. If the insolvency administrator intends to effect transactions of special significance to the insolvency proceedings, he or she requires the approval of the creditors' committee or the creditors' meeting. In particular, such approval is necessary if the entire enterprise, or one of its businesses, is to be transferred.

In practice, most insolvency administrators – in alignment with the major secured and unsecured creditors – aim to sell the business as a going concern as soon as possible by way of an asset sale in order 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 movable 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 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).

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Subject to approval at the creditors' meeting, the insolvency administrator is free to pursue 'stalking horse' bids in a sale procedure. In practice, however, such bids do not seem to be particularly relevant as the insolvency administrator will usually aim to dispose 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 could ultimately jeopardise the sale of the business as such. If the insolvency 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 unilaterally implement a 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 insolvency administrator and the acquirer of the debtor's business, who is also a secured creditor, to agree that the consideration owed by the acquirer is (partly) paid by way of a set-off or a similar type of settlement (subject to creditors' meeting approval) (as, for instance, in the insolvency proceedings of the German solar manufacturer SolarWorld (2017)). If the acquirer's claims against the debtor are only unsecured insolvency claims, these claims cannot be considered at nominal value; if at all, such claims could at best be valued at a percentage equalling the 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 often the case that this will be achieved by a debt-to-equity-swap as part of an insolvency plan (see question 8).

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 that have not 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 a contract can require the insolvency administrator to decide without delay whether to adopt the contract. If the insolvency administrator does not, after having received such request, the insolvency administrator's 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 proceedings. 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 32).

Where the insolvent company is tenant under contracts for the lease of real estate, 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 the 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 and following of the Insolvency Act (see questions 7 and 22)), 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 a custodian (usually 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 mutual contract mentioned above, the other party can claim the resulting damage. Such a damages claim would be an estate claim, which would take priority over insolvency claims (see question 35). 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).

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

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 26). 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 sub-licences) 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 insolvency 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 another 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. According to the Regional Court of Munich (9 February 2012 – 7 O 1906/11), this shall be the case where the parties agree on an irrevocable, perpetual licence that is not subject to any royalty fees or where royalty fees have already been paid at once or at least upon the opening of insolvency proceedings, so that the licence agreement is to be qualified as a sales contract. On the contrary, the continuation of contracts, where continuing rights and obligations are foreseen, are determined by section 103 of the German Insolvency Code (ie, they are subject to the disposition of the insolvency administrator (see question 26)). Regarding secondary obligations, the Regional Court of Munich (21 August 2014 – 7 O 11811/2) decided that only such obligations, which are manifestations of a functional reciprocity and are therefore agreed upon in the context of granting the licence may lead to the contract not being fulfilled by the parties in full.

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 sub-licence (ie, the loss of the main licence does not automatically end the sub-licence). In these judgments, the Federal Supreme Court also indicated a tendency to treat all intellectual property rights sub-licences in the same way. It remains unclear whether this will also apply to main licences.

28 Personal data

Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information 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 24 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) had been transferred unlawfully as part of an asset deal in violation of the Federal Data Protection Act, as the insolvency administrator and the purchaser failed either to obtain customer consent or, alternatively, give the customers an opportunity to object to the transfer of the personal data.

On 25 May 2018 the General Data Protection Regulation (Regulation (EU) 2016/679) of the European Parliament and of the Council of 27 April 2017 entered into force (together with a revised Federal Data Protection Act that also became effective on 25 May 2018). The Regulation raises some concerns among German insolvency practitioners, as it is questionable whether and under which condition and insolvency administrator is a controller pursuant to article 4, No. 7 of the Regulation and therefore can be held liable for non-compliance with data protection rules. Some insolvency experts reject a liability of the insolvency administrator, unless he or she has actual control over the data processing and has not released the data (carriers). However, it remains to be seen if future court decisions will follow this view and provide legal certainty.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

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 avoidance claims pursued by the insolvency administrator or proceedings related to the insolvency administrator's right to reject the fulfilment of a contract, for example. 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 he or she has agreed with the other party involved.

Apart from the exclusions mentioned above, in relation to the insolvency administrator's intrinsic rights, there are no types of insolvency disputes that may not be arbitrated. Where the insolvency administrator is willing to enter into an arbitration agreement in an insolvency proceeding, the consent of the creditors' committee or, if a creditors' committee has not been appointed, the consent of the creditors' meeting 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, they can file such a 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. This 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 courts.

Creditor remedies

30 Creditors' enforcement

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 (see also question 21). 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 insolvency 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 insolvency administrator are both equally and independently entitled to enforcement with respect to real estate.

Creditors with a security interest in movable property will mainly be prevented from enforcement, which may then only be initiated by the insolvency administrator. Movable assets that are subject to security held by creditors and receivables, which have been assigned for security purposes, will generally be sold by the insolvency 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 insolvency administrator is not entitled to enforcement if the creditor is still in possession of the movable asset. In this case the creditor's enforcement right remains unaffected by the opening of the insolvency proceedings.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

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.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

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 asset sale (to sell the business as a going concern) or an insolvency plan, the impacts on the satisfaction of creditors and on measures already taken by the insolvency 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 insolvency administrator, whether to continue or partially or completely shut down the debtor's business. The creditors also resolve whether a creditors' committee should be established (or, if applicable, the preliminary creditors' committee should be maintained), the approval of which would be required before certain measures can be taken by the insolvency 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' (and, if applicable, shareholders') voting rights are discussed and the plan is voted on; and
- final hearing – the purpose of this meeting is for a discussion of the insolvency 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.

33 Creditor representation

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 either 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 it also has the right to suspend an early self-administration procedure (see questions 7 and 22).

In the first creditors' meeting (ie, the information hearing – see question 32) 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 32), the largest insolvency claim holders, the minority creditors and the employees shall be represented. 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 or she requires 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.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

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.

Consequently, 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 38).

Generally, the insolvency administrator is entitled to assign a receivable belonging to the estate (eg, in order to continue the business of the debtor).

35 Claims

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? 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 insolvency 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 immovable 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 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 (see question 32) 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 that 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 or her 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, with 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 (see also question 47). 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 or by statutory law (eg, section 64, sentence 3 of the Limited Liability Companies Act – see also question 47).

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, which 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 or her 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 (see also question 36).

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 insolvency 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, (whether regulatory fines, coercive fines or administrative fines), claims to the debtor's gratuitous performance of a consideration and shareholder loans (subject to certain exceptions – see above).

36 Set-off and netting

To what extent may creditors 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 in the following circumstances: 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 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 acquires the right to set off by means of a voidable transaction (see question 46); or
- a creditor is a debtor of the insolvency estate and has a claim that has to be satisfied from the assets of the debtor that are not affected by insolvency.

These restrictions on a set-off may not affect financial services, in particular financial securities within the meaning of section 1(17) of the Banking Act.

It should also be noted that a decision of the Federal Court of Justice dated 9 June 2016 (IX ZR 314/14), raised doubts on the validity of 'netting arrangements' used throughout the financial industry. As a reaction to this decision, the German legislator has passed an amendment to section 104 of the Insolvency Act providing clarity on the status of netting arrangements. The new section 104(4) of the Insolvency Act allows counterparties to contractually agree on netting provisions that deviate from the statutory mechanism of termination and settlement of contracts regulated in article 104 InsO, as long as this is compatible with the basic principles of the legal provision. The new law entered into force on 29 December 2016, partly retroactively.

37 Modifying creditors' rights

May the court change the rank (priority) 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 rank (priority) of a creditor's claim.

38 Priority claims

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 the '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 insolvency administrator after the opening of the insolvency proceedings attract priority status (ie, they need to be paid prior to the satisfaction of unsecured creditors but after creditors with a right to separate satisfaction or a right to set-off (see also question 23)).

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

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 that 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 40.

There are no specific rules in case of terminations of large numbers of employees' contracts or where the business ceases operations.

40 Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation 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 each individual case and are thereby 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.

41 Environmental problems and liabilities

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 personally, 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 issues). Claims and costs arising from fulfilling such obligations attract priority status (see question 38).

However, the insolvency administrator is entitled to release objects from which public law obligations derive (such as land) from the insolvency estate so that they become part of the debtor's assets not affected by the insolvency proceedings. In this case, the government would engage a third party to solve the environmental issues. According to case law of the Federal Administrative Court, the resulting claims of the government are either to be treated as priority claims (see question 38) 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.

42 Liabilities that survive insolvency or reorganisation proceedings

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 that, they are specified in the insolvency plan. This also applies for creditors who have not filed their claims with the insolvency administrator and had them included in 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, whether 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 generally cease to exist and be removed from the commercial register.

43 Distributions

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 insolvency 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.

Security

44 Secured lending and credit (immovables)

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

The principal types of security devices that are taken on immovable (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 or her to transfer the *hypothek* externally to the register by means of written assignment and handing over the certificate.

Grundschild

A *Grundschild* (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 *Grundschild* will not be transferred back to the real property owner until all outstanding sums have been repaid.

45 Secured lending and credit (movables)

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

The principal types of security devices that are taken on movable (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.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

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 estate, are subject to avoidance rights of the insolvency administrator. These actions must also be 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 (however, see below on new rules effective as of 5 April 2017). 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.

Pursuant to section 142 of the Insolvency Act (cash transactions), payments on the part of a debtor in return for which its property benefited directly from an equitable consideration may (only) be contested under the conditions of section 133(1) of the Insolvency Act (see also below on new rules effective as of 5 April 2017).

On 5 April 2017, a long-discussed reform of the clawback rights in German insolvency proceedings became effective. At the core of the new legislation are amendments on the aforementioned sections 133 (legal acts wilfully disadvantaging the insolvency creditors), and 142 (cash transactions) of the Insolvency Act, as well as on the suspect periods for claw-back claims.

For insolvency proceedings that have been or will be commenced after 5 April 2017, the following main amendments apply:

- Pursuant to section 133(2) of the Insolvency Act, legal actions resulting in a satisfaction or in the provision of security are contestable

if the relevant legal action took place within four years prior to the insolvency filing. In case of congruent cover (see above), the legislator has introduced further privileges:

- the presumption of knowledge on the side of the counterparty does only apply in the event of existing (and no longer imminent) illiquidity; and
- in the event that the creditor enters into a payment agreement with the debtor or otherwise grants the debtor a payment accommodation with subsequent (congruent) payments, it shall be presumed that the creditor did not know about the debtor's illiquidity.
- Section 142(2) of the Insolvency Act provides for a privilege for employees' wages as it defines that wage payments qualify as cash transactions if made within three months after the performance of the work. The same is true if the wages are paid by a third party and it was not clear for the employee that the payment came from a party other than its employer.
- The default interest period starts only once the insolvency administrator has put the creditor in default or upon filing suit (section 143(1)). It should be noted that this new interest rule (also) applies to insolvency proceedings that had been commenced before 5 April 2017. Before the reform, the default interest period had already started once the insolvency proceedings had been opened.

In addition to the avoidance rights mentioned above, the insolvency 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 also question 47).

Furthermore, any security over the debtor's assets obtained by execution of a judgment in the month prior to the application for 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.

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.

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.

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.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

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 (see also question 35). Claims resulting from legal actions that are economically comparable to a shareholder loan will also be 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 or by statutory law (eg, section 64, sentence 3 of the Limited Liability Companies Act).

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, as 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 also turns the burden of proof partially around to their disadvantage (see sections 130(3), 131(2), 132(3), 133 (4) and 138 of the German Insolvency Act (see question 46)).

Insiders are, inter alia, the members of the body representing or supervising the debtor, as well as his or her 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.

Groups of companies

48 Groups of companies

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 is 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 parliament has passed an Act on the Facilitation of the Handling of Corporate Group Insolvencies that entered into force on 21 April 2018. This act addresses the former lack of coordination between parallel insolvency proceedings of group companies (see question 49). It does not, however, offer a consolidation of the individual insolvency proceedings. The act also contains an explicit rejection of the substantive consolidation of assets and liabilities of group companies.

In essence, the new act includes 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.

49 Combining parent and subsidiary proceedings

In 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?

There are not yet any provisions on group insolvencies. 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 the possibility of having 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.

As far as cross-border insolvencies of corporate groups within the EU are concerned, please see questions 54 and 55 for more details.

International cases

50 Recognition of foreign judgments

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?

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 to procedures that have been opened before 26 June 2017.

On 26 June 2015, the Regulation (EU) 2015/848 (the EU Recast Regulation), which replaced the EU Insolvency Regulation, entered into force in all member states, except Denmark (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.

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 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 assets, whether tangible or intangible, movable or immovable, 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.

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).

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Germany has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

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 (eg, for submitting an insolvency claim – see question 35). 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.

Update and trends

During recent years, a hot topic was the restructuring of Germany-based companies by using an English law scheme of arrangement. German companies used English law schemes of arrangements successfully to implement financial restructurings and to avoid going into German insolvency proceedings, for example: *Tele Columbus* (2010), *Rodenstock* (2011), *Primacom* (2012), *Apcoa* (2014) and *CBR Fashion GmbH* (2016).

In a number of cases, the (announced) intention of German companies to use 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 Further Facilitation of Restructuring Businesses Act (ESUG), 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 Brexit will make a difference to the number of German companies utilising an English law scheme of arrangement still needs to be seen. In this context, it should be noted that the UK government might include rules on cross-border insolvency in a new bilateral agreement with the EU on civil judicial cooperation post-Brexit to facilitate European companies to use schemes of arrangements for restructuring.

A further hot topic relates to the financial restructuring of outstanding bonds under the German Bond Act 2009. Over the past few years, a large number of *Mittelstandsanleihen* (mid cap-bonds), which had been increasingly used as an alternative to bank credits, had to be refinanced 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, *Ekotechnika* (2015) and *Singulus* (2016)).

Against the background of the European Commission's 'Proposal for a Directive on Insolvency, Restructuring and Second Chance' (see the European Union chapter), there is a broad discussion among German legislators and insolvency experts:

- whether a pre-insolvency proceeding has to be introduced to fulfil the requirements envisaged by the EU or whether the existing German insolvency proceedings that have been modified by the aforementioned ESUG in 2012 are already sufficient;
- how such pre-insolvency proceedings should be arranged; and
- whether the implementation of the directive will lead to the abolition of certain key elements of the German Insolvency Code.

In connection with this, the Federal Ministry of Justice issued a research project in April 2017 that has been awarded to a consortium of leading insolvency law professors to evaluate the experiences gained with the application of the ESUG five years after its entry into force. The results of the evaluation have been set out in a report that was released by the Federal Ministry of Justice in October 2018. Generally, the report comes to the conclusion that the changes introduced by the ESUG have been largely well received in the market and that no corrections to the orientation of the ESUG are necessary. The main findings of the report can be summarised as follows:

- the creditors' rights to participate in the selection of insolvency administrators has not led to any impairment of their independence;
- as regards the possibility of influencing shareholder rights by way of an insolvency plan, no significant impairments were found, but there is still room for improvement or clarification in some specific areas of the insolvency plan proceeding;
- the 'protective shield procedure' (in the meaning of section 270b of the Insolvency Act) is rarely used, and it is not very advantageous compared to the regular 'early self-administration procedure'; and
- the statutory allocation of duties between judges and judicial officers has essentially proved effective.

The federal government plans to examine the results of the evaluation report in more detail to decide whether concrete legislative action is necessary. The results shall especially be considered for the implementation of the aforementioned Directive on Insolvency, Restructuring and Second Chance. At this stage, it seems likely that a

new pre-insolvency proceeding will be introduced, especially because, according to the aforementioned report, such pre-insolvency could be a further option beside the existing proceedings, and a large number of insolvency experts hold the view that there is a need for such a proceeding (as shown, for example, by the aforementioned German companies that used English law schemes of arrangements (even) after the introduction of the ESUG). However, so far, no legislative Act has been drafted by the Ministry of Justice (in particular because of its intention to assess first the outcome of the aforementioned report) and it is not expected that there will be one before 2019 or 2020, also in view of the potential innovations in connection with the implementation of the European directive.

In the course of the ongoing reform of German Insolvency law, the German parliament has passed an Act on the Facilitation of the Handling of Corporate Group Insolvencies that came into force on 21 April 2018. This act addresses the current lack of coordination between parallel insolvency proceedings of group companies (see question 49). However, it does not offer a consolidation of the individual group insolvency proceedings. Actually, the act contains an explicit rejection of the substantive consolidation of assets and liabilities of group companies.

In essence, the new act includes the following provisions:

- an optional common place of jurisdiction for the different insolvency proceedings;
- the obligation of 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.

New developments in the area of the tax treatment of restructuring measures are also notable. On 28 November 2016, the German Federal Tax Court (GrS 1/15) dismissed the application of the 'restructuring decree' (*Sanierungserlass*) that had been issued by the German tax administration in 2003 to allow for a suspension and subsequent waiver of corporate income tax on cancellation of debt income resulting from loan waivers or a debt-to-equity swap (for example as part of an insolvency plan). The German Federal Tax Court held that the restructuring decree violates the rule of law in article 20 of the German Constitution, which requires that generalising rules have to be established by the legislator itself (instead of the tax administration by issuing a restructuring decree). Interestingly, the German Supreme Tax Court did, however, not comment on the controversial question whether the restructuring decree violates the prohibition of state aid under EU law.

Following the aforementioned decision of the German Federal Tax Court, which caused significant concerns to the restructuring practice because of increasing legal uncertainty in terms of the tax treatment of restructuring measures, the German tax administration issued an interim application letter (dated 27 April 2017) according to which the restructuring decree should be applied for 'old' cases (ie, waivers completed before 8 February 2017). However, such interim application letter was also considered to be illegal by the German Federal Tax Court in a decision dated 23 August 2017 (I R 52/14).

In the meantime, a non-application decree of the German tax administration, dated 29 March 2018, pursuant to which the principles of the aforementioned judgments are not to be applied beyond the decided cases, is supposed to create legal certainty in terms of 'old' cases, in particular since the German legislator approved this non-application decree.

In addition, on 27 June 2017, the German legislator already introduced a bill that intends to establish a firm legal basis for the exemption of restructuring measures from taxation, and, therefore, to provide legal certainty in respect of the tax treatment of restructuring measures. However, the bill provides for that, the new provision will not come into force until the European Commission grants - by way of a formal decision - its approval under state aid law. In August 2018, the European Commission granted its approval, but merely by way of a comfort letter (rather than a formal decision). Therefore, it is concluded that the new provision cannot come into force automatically, but only through the introduction of a second bill by the German legislator, since the comfort letter does not constitute a formal decision as requested by the introduced (first) bill. Against this background, on 21 September 2018, the German legislator passed an official legislative draft bill, pursuant to which, the aforementioned new provision shall come into

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force without condition. It is expected that this bill will come into force shortly.

With regard to another restructuring tax provision, however, legal certainty has now been obtained. The European Court of Justice has ruled that the 'restructuring clause' provided for in section 8c, paragraph 1a of the Corporation Income Tax Act, according to which loss carry-forwards are not forfeited in the event of a change of control for restructuring purposes, did not contravene European state aid law. Thus, the European Court of Justice rejected the European Commission's decision of 2011 that qualified the provision as illegal state aid. Before the aforementioned restructuring clause is formally reinstated, however, it is necessary to publish the ruling in the Federal Law Gazette, which is expected to be done in 2018. Nonetheless, the current decision is a welcome ray of hope for the German restructuring market as a whole and for the companies concerned specifically.

With regard to cross-border restructuring, the insolvency of the Air Berlin group in 2017 to 2018 became the first test for the EU Recast Regulation. Concerning Air Berlin's subsidiary NIKI Luftfahrt GmbH (NIKI), the lack of clarification of the term COMI has caused a conflict of competence between German and Austrian courts.

On 13 December 2017, the local court of Berlin-Charlottenburg (Germany) found it had international jurisdiction over the case and took measures (inter alia, the appointment of a German preliminary insolvency administrator) to safeguard the continuation of the business. Even though NIKI had its registered office in Vienna, the court was satisfied that the company's COMI was located in Berlin and that the presumption that a company's COMI is located where it has its registered office (see question 54) was therefore rebutted. In particular, the following considerations were highlighted by the local court:

- NIKI was part of the Air Berlin group and indirectly controlled by Air Berlin, which was already in insolvency proceedings in Germany at that time;
- NIKI's operational business was mainly driven from Berlin; and
- most of the flights conducted by Niki departed from Germany.

On 8 January 2018, the German Regional Court of Berlin overruled the decision of the local court that was appealed by a creditor pursuant to article 5 of the EU Recast Regulation. The Regional Court found that,

based on the following facts (among others), NIKI's COMI should be held to be in Austria:

- the fact that NIKI was part of the Air Berlin group could not rebut the COMI presumption;
- the seat of NIKI's management was irrelevant, as it has frequently travelled between Vienna and Berlin;
- the fact that most flights departed from Germany was irrelevant, as an entity could have a number of establishments; and
- NIKI's employment contracts are 80 per cent governed by Austrian law.

The decision was further appealed by the appointed German preliminary insolvency administrator before the German Federal Court. Nevertheless, even before a decision was made by the German Federal Court, on 13 January 2018, the Austrian Higher Court of Korneuburg opened a (second) main insolvency proceedings in Austria, and appointed an Austrian administrator. The Austrian court took the stance that it could open the main proceedings in Austria, as the first decision of the German local court was invalid following the decision on the appeal of the German Regional Court and therefore there were – despite the pending appeal before the German Federal Court – no longer any parallel main insolvency proceedings in Germany.

To continue and finalise the initiated sales process of NIKI's assets to a third party, (i) the German main insolvency proceeding was converted into a secondary insolvency proceeding, (ii) the German insolvency administrator dropped its appeal before the German Federal Court, and (iii) both the German and the Austrian administrator agreed to cooperate closely. Ultimately, NIKI's assets could be sold to Niki Lauda.

Consequently, the German Federal Court neither has provided further guidelines on the determination of the COMI nor made a judgment whether an insolvency proceeding continues until a pending appeal has been finally decided. There are, however, strong arguments in favour of the view that an insolvency proceeding continues until a pending appeal has been finally decided. Accordingly, most of the German insolvency practitioners are of the opinion that the Austrian court was not allowed to open a main insolvency proceeding in Austria before the German Federal Court had decided on the appeal.

53 Cross-border transfers of assets under administration**May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?**

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).

54 COMI**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 EU Insolvency Regulation defines COMI as the place where the debtor conducts the administration of its interests on a regular basis and that is ascertainable by third parties. For a full analysis of the test to determine COMI of a debtor under the EU Insolvency Regulation, please refer to the chapter on the European Union.

In the case of *Interedil (Interedil Srl v Fallimento Interedil Srl and Intese Gestione Crediti SpA (C-396/09))* the European Court of Justice 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 EU Insolvency 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 registered office 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 questions 48 and 49).

The insolvency of *NIKI Luftfahrt GmbH* (as part of the insolvency of the Air Berlin group in 2017 to 2018) brought up some interesting judgments dealing with the determination of the COMI (see 'Update and trends').

55 Cross-border cooperation

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 19 of the EU Recast Regulation, any judgment opening insolvency proceedings handed down by a court of a member state that has jurisdiction pursuant to article 3 of the EU Recast Regulation (see question 54) 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 Recast Regulation provides otherwise. However, according to article 33 of the EU Recast 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*). Recently, the opening of insolvency proceedings over the assets of *NIKI Luftfahrt GmbH* in Austria (as part of the insolvency of the Air Berlin group in 2017 to 2018) has raised questions about when exactly one jurisdiction has to recognise foreign openings of insolvency proceedings, as both the German insolvency court of Berlin Charlottenburg and the Austrian Higher Court of Korneuburg have assumed jurisdiction to open main insolvency proceedings (for more details, see 'Update and trends').

The concept of an automatic recognition is similarly 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.

There are only a few statutory provisions governing the cooperation between domestic and foreign courts and domestic and foreign insolvency administrators. According to article 41 of the EU Recast Regulation, the administrators of main and secondary proceedings shall exchange all relevant information and shall generally cooperate with each other. The concept of article 41 of the EU Recast Regulation is reflected in section 357 of the Insolvency Act governing international insolvency law for non-EU members. Under article 41 of the EU

Recast Regulation or section 357 of the Insolvency Act, the German insolvency 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 avoidance rights.

Although not expressly provided for in the EU Recast 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 Recast Regulation, there are now provisions governing the cooperation between domestic and foreign insolvency courts (for further information, please refer to the chapter on the European Union).

In contrast, the Insolvency Act does not contain any 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, however, have not been translated into 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, principally, 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.

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



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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').

56 Cross-border insolvency protocols and joint court hearings

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 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 55).

With regard to cross-border group insolvency procedures, cooperation and communication between courts might occur more frequently in the future. Article 57 of the EU Recast Regulation allows the involved courts to cooperate on issues such as the appointment of the insolvency administrators, the coordination of the administration and the supervision of the insolvency estate.

Greece

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The Bankruptcy Code (in its current state, Law No. 3588/2007 as amended by Law No. 3858/2010, Law No. 4013/2011, Law No. 4055/12, Law No. 4072/12, Law No. 4336/2015, Law No. 4446/2016, Law No. 4472/2017, Law No. 4491/2017 and Law No. 4512/2018) is applicable to bankruptcies and reorganisations in Greece. The Bankruptcy Code provides for reorganisation as an alternative to liquidation. Moreover, Greece, by virtue of Law No. 3858/2010, adopted the UNCITRAL Model Law on Cross-Border Insolvency. Finally, because Greece is an EU member state, the EU Regulation on Insolvency Proceedings also applies.

2 Excluded entities and excluded assets

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

Bankruptcy proceedings may be initiated by or against any merchant (individual or legal entity) or any for-profit legal entity.

Public entities and local authorities cannot be declared bankrupt.

Regulated entities are governed as follows:

- insurance companies can be declared bankrupt but not prior to the conclusion of a special winding-up process as provided by Law No. 4364/2016 that adopted the provisions of Directive 2009/138/EC;
- any credit institution whose licence is revoked by the Bank of Greece is placed into special liquidation. Greece adopted the provisions of the banking resolution directive; and
- investment services companies can be declared bankrupt, although any bankruptcy proceedings may be suspended by virtue of article 22 of Law No. 3606/2007, as amended by Law No. 4474/2017, if the Hellenic Capital Markets Committee revokes such a company's licence, thus leading to an initial stage of distribution of segregated client assets (named 'special liquidation') and, thereafter, to liquidation or bankruptcy.

Non-merchant individuals are excluded from general bankruptcy proceedings, but Law No. 3869/2010, as amended by Law No. 3996/2011, Law No. 4019/2011, Law No. 4161/2013, Law No. 4336/2015 and Law No. 4549/2018, has introduced certain protective measures for individuals facing financial distress; such measures are of a temporary nature and subject to various conditions that severely limit their application. While the law may eventually develop into a fully fledged insolvency regime for non-merchants, in its current form it remains focused on softening the impact on individuals of the current economic crisis.

All assets of the debtor are included in bankruptcy proceedings in which all creditors are entitled to participate. Exceptions are provided for individuals such as certain household goods (clothing, food for up to three months, essential furniture, books, musical instruments, etc) and work tools.

Secured creditors can elect to exercise their security, thus seeking satisfaction from the proceeds of the secured asset's sale irrespective of the bankruptcy proceedings, unless the assets are closely connected to the debtor's business or production unit or enterprise, in which case such option is suspended until a reorganisation plan is approved or until the creditors' meeting decides on the bankruptcy proceedings to be followed. In any case, the aforementioned suspension cannot last more than 10 months commencing from the date the debtor was declared bankrupt. Secured creditors cannot exercise their security if liquidation proceedings have been initiated.

3 Public enterprises

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

All commercial undertakings regardless of public or private ownership are subject to the Bankruptcy Code. Specific regulated sectors are subject to special rules as set out in response to question 2.

4 Protection for large financial institutions

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

There is no specific legislation for institutions that are too big to fail. Nevertheless, Greek law recognises that certain credit institutions play a systemic role and that it is necessary to avoid their resolution or reorganisation. For that purpose, Law No. 3864/2010 set up the Hellenic Financial Stability Fund as an independent agency funded by the state. The purpose of the fund is to maintain the stability of the Greek banking system through capital contributions to systemically important banks that have difficulty maintaining their minimum capital requirements. The same institution also provides funding to cover the funding gaps of credit institutions placed into special liquidation. In connection with such funding, Greece has adopted the banking resolution directive (Law No. 4335/2015), which includes, among other things, bail-in requirements and other burden-sharing provisions.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The multi-member first instance court of the district in which the debtor has the centre of its main interests (COMI) has exclusive jurisdiction. The court follows the *ex parte* procedure, hence the court has the authority to review issues beyond what is formally submitted. The court that issues a decision by virtue of which a debtor is declared bankrupt exercises an ongoing surveillance over the bankruptcy proceedings and is authorised to resolve any disputes that arise during the bankruptcy proceedings. However, that court has no authority for any debtor claim against third parties.

As a general rule, the decisions issued by the bankruptcy court are subject to an appeal and appeal in cassation unless otherwise provided in the Greek Bankruptcy Code (GBC). However, the decisions of the

bankruptcy court with regard to the appointment or replacement of the reporting judge and the bankruptcy administrator (syndikos) are excluded from the above-mentioned judicial review.

The court decision that declares the debtor bankrupt, the decision upon the challenge exercised by any creditor who failed to announce its claims within the statutorily established time period and which aims at the verification of the creditor's claims by the bankruptcy court as well as the decision upon a lawsuit exercised by the bankruptcy administrator or any creditor in order to set aside transactions that were made during the suspect period are subject to an appeal and appeal in cassation.

However, the decision that ratifies the recovery agreement may not be appealed. Solely the decision that rejects the application for the ratification of the recovery agreement may be appealed.

As far as the reorganisation plan is concerned, the decision that either ratifies or rejects the plan is subject to an appeal.

In case of realisation of the debtor's estate as a going concern, the reporting judge's decision by virtue of which the value of the business and the first bid price are determined is not subject to an appeal and appeal in cassation. The same applies when the reporting judge approves the transfer agreement, which is concluded with the highest bidder.

Each stage of the public auction procedure that is conducted for the sale of the debtor's estate either as a whole or for the piecemeal liquidation may be challenged by anyone who has a lawful interest with an opposition lodged before the bankruptcy court. The court order upon the opposition is not to judicial remedies. However, the decision upon an opposition against the distribution list is subject to an appeal and appeal in cassation.

Finally, the judgment on the discharge of the debtor is subject to judicial remedies.

In all aforementioned cases in which the exercise of an appeal is provided within the GBC, no special permission must be given to the appellant. However, the appellant must pay a fee of €150, otherwise the Court of Appeal will not examine the application.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Any debtor that has ceased payments in a general and permanent way must file a bankruptcy petition within 30 days following cessation of payments. Cessation of payments is defined by the statute as a general and permanent inability to meet monetary obligations as they become due and payable. Any debtor that is in imminent financial distress, in the sense that it foresees upcoming liquidity problems and potential default on its payments, amounting to a cessation of payments, may also file a bankruptcy petition. Finally, another ground for the declaration of the debtor's bankruptcy is the mere possibility of insolvency provided that the debtor files a reorganisation plan along with the bankruptcy petition.

In principle, once a debtor is declared bankrupt, a bankruptcy administrator will be appointed to manage the debtor's assets and affairs. In exceptional circumstances, a debtor may remain in control of its assets and affairs. The court – following a petition by the debtor and to the extent this is to the benefit of the creditors – may permit the debtor to remain in possession and administration of its assets always along with the bankruptcy administrator's cooperation until the bankruptcy enters the stage of 'union of creditors'.

After a debtor is declared bankrupt, all enforcement actions and proceedings against the debtor are automatically suspended. Secured creditors' rights arising from existing security are not affected but, in practice, realisation of the assets is difficult as enforcement will be impeded in the event that the assets are closely connected to the debtor's business or production unit or enterprise, after a reorganisation plan is approved or when the creditors' meeting decides over the bankruptcy proceedings that will be followed, in which case article 26 of the Bankruptcy Code provides for an automatic suspension of all actions and enforcement procedures. Any enforcement proceedings attempted during the suspension are null and void. If the creditors' meeting decides to sell the debtor's assets as a whole, the moratorium lasts until the sale is concluded.

One of the important consequences of filing a petition on the basis of an imminent cessation of payments is that the court, if convinced, will set the date of cessation of payments as the date on which the decision that declares bankruptcy is published; accordingly, there will be no suspect period and no threat of transactions being set aside by the bankruptcy administrator.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

The Bankruptcy Code provides for two proceedings that are relevant to the restoration of a failed enterprise to financial health; the recovery procedure that precedes bankruptcy and the reorganisation plan, which is considered after the declaration of bankruptcy.

Pre-bankruptcy recovery procedure

A debtor either in cessation of payments or in a situation of imminent cessation of payments may file for the ratification of recovery agreement already reached with the qualified majority of creditors (60 per cent of the total claims, 40 per cent of which should be secured). In addition, any debtor that is not in cessation of payments or in a situation of imminent cessation of payments can be subject to the recovery procedure, provided that the court considers it probable that the debtor will become insolvent, and insolvency can be lifted through implementation of the recovery procedure.

The agreement may consist of a prepack sale of all or part of the business, a disposition of assets, a debt-equity swap, or a change of the term of existing obligations, such as a write-down of the debt, extension of the repayment date, alteration of the interest rate or replacement of the obligation to pay interest by the obligation to provide the creditor with a share of the profits; such changes to liabilities may also be accomplished through a refinancing of existing debt or through the issue of a bond loan that may also include a convertibility feature.

From the submission of the recovery agreement to the Bankruptcy Court until its decision there is an automatic stay for a four-month period on all individual and collective enforcement measures against the debtor. Such automatic moratorium is granted to the debtor only once. In case the court's decision is not published within the four-month period, the court may grant a suspension on all individual and collective enforcement measures against the debtor or any other preventive measure.

Before the submission of the recovery agreement, a moratorium may also be granted – at the request of the debtor or the creditors – if a creditors' declaration in writing of 20 per cent of the total claims is submitted provided that there is an imminent danger. Such stay can be granted by the court only once and for a maximum period of four months.

There are three main criteria for the ratification of an agreement reached by the debtor and the qualified majority of creditors as set out above. First, it must result in a viable business and lift the debtor out of cessation of payments (or prevent it from reaching this state). Second, it must not leave any non-consenting creditors in a less favourable position than they would be in bankruptcy liquidation. Third, each non-consenting creditor may not be treated less favourably than any other creditor of the same rank or priority.

The Bankruptcy Court will not examine the debtor's viability if the following conditions are met:

- contracting creditors agree with the content of the business plan;
- the recovery agreement contains listing of contracting and non-contracting creditors, the claims of which are expected to be effected from the materialisation of the recovery agreement; and
- the recovery agreement along with the business plan were served to all non-contracting creditors, the claims of which are effected from the recovery agreement.

A ratified agreement binds all non-consenting creditors (cram-down effect).

The reorganisation plan

Any debtor may propose a reorganisation plan either along with its bankruptcy petition or within three months of being declared bankrupt. The three-month period may be extended by the reporting judge only

once and up to one additional month if it is proved that the extension is not detrimental to creditors' interests and the plan will be accepted by the creditors.

The main effects are as follows:

- Such process has hardly been tested in practice. The statute seems to permit the development of a debtor-in-possession insolvency proceeding, as the court, upon receiving a voluntary insolvency application and a plan that provides for the continuation of the debtor's business, may decide to allow the debtor to maintain control of the business along with the bankruptcy administrator's cooperation.
- Upon filing for declaration of bankruptcy and until the grant of the relative order, a moratorium against all enforcement actions (including the involuntary grant of security over assets) may be provided by the competent court as a preliminary measure.
- The declaration of bankruptcy puts into immediate effect a moratorium on all enforcement actions by unsecured creditors. Secured creditors cannot continue pursuing their claims against the secured assets that are closely connected to the debtor's business or production unit or enterprise until the reorganisation plan is approved. Any enforcement procedures attempted during the suspension are null and void.
- The ratified reorganisation plan is binding erga omnes (such cram-down includes the dissenting and non-participating creditors).

8 Successful reorganisations

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

A pre-bankruptcy recovery agreement will be judicially ratified if:

- it is signed by creditors representing a majority of 60 per cent of the total claims, 40 per cent of which should be secured;
- it renders the debtor viable;
- non-signatory creditors receive at least as much as they would receive through bankruptcy liquidation;
- it does not violate any mandatory legislation, such as competition law, or is the result of fraud conducted by the debtor or any creditor or any third party;
- creditors of the same class are treated equally and any exceptions are justifiable by important business or social reasons; and
- it lifts the debtor out of cessation of payments.

The Bankruptcy Court will not examine the debtor's viability if the following conditions are met: contracting creditors agree with the content of the business plan; the recovery agreement contains listing of contracting and non-contracting creditors, the claims of which are expected to be affected from the materialisation of the recovery agreement; and the recovery agreement along with the business plan were served to all non-contracting creditors, the claims of which are affected by the recovery agreement, as for instance, when the recovery agreement provides for their write-off or for an extension of the repayment date.

Reorganisation plan

The proposed reorganisation plan must include:

- information relating to the current financial situation of the debtor;
- at least one proposed form of reorganisation; and
- information relating to payments to creditors. The latter is subject to one restriction:
 - the proposed debt settlement must not prejudice creditors' classification.

The plan must mandatorily provide for secured creditors, general preferential creditors, unsecured creditors and subordinated creditors. Employee claims constitute a particular class. Claims of unsecured creditors that are of diminished value may be classified separately. Within a particular class, more than one group of creditors may be provided. The plan must provide equal treatment among creditors of the same class, or among creditors of the same group.

The plan shall be approved by a majority of creditors representing 60 per cent of the debtor's debt, at least 40 per cent of which represent secured debt.

With respect to a recovery agreement, pursuant to the provisions of the GBC, a guarantor's or co-debtor's liability is limited to the value of the claim against the debtor, as such claim was reduced in accordance with the ratified agreement and provided that the relevant creditor consented to the reduction. There is a similar provision with respect to a reorganisation plan.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Any creditor can file a petition to have its debtor declared bankrupt when the latter is in cessation of payments. Insofar as the effects of an involuntary liquidation are concerned, the process follows the same steps as noted in question 6.

Special administration proceedings

Any natural or legal person that may be declared bankrupt and being in a general and permanent inability to meet its overdue financial obligations (cessation of payments) may be placed under special administration of article 68 et seq of Law No. 4307/2014. Alternatively, in case of joint stock companies, they may be subject to the special administration procedure if they fulfill for two consecutive financial years the requirements of article 48 (1) of Law No. 2190/1920 (as of 1 January 2019, Article 165 (1) of Law No. 4548/21018 is applicable) for dissolution (in particular, as of 1 January 2019, when the company does not have the minimum share capital required by law or the financial statements of at least two consecutive financial years have not been published and approved by the general meeting). The petition may be filed by a creditor or creditors whose claims represent at least 40% of the total claims against the debtor. The calculation of the percentage of the applicant creditors, who must include at least one financial institution, shall be based on a list of creditors drawn up by an accountant, tax advisor or an auditor. A written declaration of the proposed special administrator that he or she accepts the position, if appointed, is filed along with the petition for the placement of the debtor under special administration.

The special administrator shall be an auditor or auditing company, a lawyer or law firm with financial-technical expertise or a certified accountant. The special administrator shall be independent from the debtor (ie, not a person affiliated with the debtor's management or having acted as the debtor's auditor during the last five years).

After the publication in the General Commercial Registry of the decision that places the debtor under special administration, the special administrator is assigned with all powers of the statutory bodies of administration and management of the company (ie, general assembly and board of directors). He or she is the representative of the company towards third parties and undertakes the day-to-day operation of the company. Also, the obligation of the general assembly of shareholders to approve the financial statements is suspended during the special administration.

The law provides for an automatic stay suspending the rights of creditors (including the state, social security funds) to enforce claims against the debtor and its assets until the termination of the special administration procedure.

The procedure is a non-consensual one, designed to promptly transfer (through one or more public auctions with no reserve price conducted by the special administrator) the total assets of a debtor's business as a going concern or any branches of the business or any individual assets to the successful bidder and the creditors are satisfied from the auction proceeds. Upon termination of the auction process, the special administrator prepares an auction report announcing the successful bidder; such report is submitted to the court for approval. If only one offer is submitted, the assembly of creditors is convoked by the administrator to approve the offer. If the offer is not approved by the assembly of creditors, the special administrator files for debtor's bankruptcy.

The court judgment approving the successful bidder is not subject to legal recourses. However, any person having a lawful interest and

who was not summoned to attend the hearing may file a third-party objection. The court appoints a reporting judge for the purposes of the distribution of the auction proceeds in accordance with the ranking held by each creditor.

The process is terminated and the special administrator files for the debtor's bankruptcy in the event that either no bids are filed for the transfer of the business on a going concern basis or the transfer of at least 90 per cent of the firm's assets has not been achieved in 12 months, which is the maximum duration of special administration proceedings (exceptions apply).

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Pre-bankruptcy recovery process

Creditors representing 60 per cent of the total claims against the debtor, 40 per cent of which shall be secured claims, may file for ratification of a debtor's recovery agreement, as long as the debtor is in cessation of payments.

Reorganisation plan

Creditors representing 60 per cent of the total claims against the debtor, 40 per cent of which shall be secured claims, may file a reorganisation plan along with the bankruptcy petition against the debtor.

Once the proceedings are opened, there is no material difference to proceedings opened voluntarily.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Yes. The GBC after its recent amendments provides only for an expedited pre-bankruptcy recovery process, in the sense that a recovery agreement may be filed for ratification without first petitioning for the commencement of the process.

12 Unsuccessful reorganisations

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?

Recovery procedure

The bankruptcy court will not ratify a recovery agreement if:

- the debtor is not likely to become viable;
- the non-signatory creditors will receive less than they would have in case of bankruptcy liquidation;
- the recovery agreement violates mandatory legislation, such as competition law, or is the result of fraud conducted by the debtor or any creditor or any third party;
- creditors of the same class are not treated equally; and
- through the proposed recovery, the cessation of payments is not lifted. In that case, provided that there is a pending application for the declaration of bankruptcy, the court declares the debtor bankrupt.

The court's decision is subject to an appeal.

In case the debtor fails to perform its duties under the recovery agreement, the agreement may be annulled following a petition filed by anyone having a lawful interest. As a result, the creditors' claims revert to their initial amount, as they were prior to the ratification of the recovery agreement, reduced by the amount that they have already received.

Reorganisation plan

The bankruptcy court may reject the plan if:

- the formalities with regard to the mandatory features of the reorganisation plan, the classification of creditors, the majority of creditors and the debtor's consent are not met (see also question 8);

- the acceptance of the plan is the consequence of a malicious act perpetrated by the debtor, any creditor, the bankruptcy administrator or any third party;
- rejection is dictated by public interest; or
- the plan prejudices the interests of dissenters, especially in case that they will receive less than they would have in case of bankruptcy liquidation.

The court's decision is subject to an appeal.

The declaration of the debtor's bankruptcy entails the cancellation of implementation of the agreement or the plan. As a result, the creditors' claims revert to their initial amount, as they were prior to the ratification of the agreement or the plan. Any payment made from the debtor on the basis of the ratified agreement or plan and until the cancellation is not returned to the debtor, but it reduces the initial debt. In rem securities that according to the ratified recovery agreement were lifted do not revive, unless otherwise provided in the agreement. In rem securities that were created pursuant to the ratified recovery agreement are valid for the amount and the time agreed, unless otherwise provided therein.

In principle, and regarding both aforementioned procedures, a debtor's default in performing an undertaken obligation does not affect the continuing force and effect of the plan or agreement, unless there is a material breach of the plan or the agreement. In all other cases, if the debtor defaults as to a specific obligation, the non-defaulting counterparty may exercise its individual rights under the law and the contract (ie, repudiation, termination) and, if appropriate, may file for the debtor's involuntary bankruptcy.

13 Corporate procedures

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

Greek laws provide procedures for liquidation or dissolution of all forms of corporations. The general rule is that liquidation or dissolution of a corporation does not affect its ability to be declared bankrupt. Special purpose legal entities such as credit institutions and companies providing investment services can be declared bankrupt, although any bankruptcy proceedings may be suspended if the Bank of Greece orders the winding up of the credit institution or the Hellenic Capital Markets Committee revokes its licence, leading to an initial stage of distribution of segregated client assets (confusingly named 'special liquidation') and, thereafter, to liquidation or bankruptcy. Insurance companies can be declared bankrupt but not prior to the conclusion of a special winding-up process introduced by Law No. 4364/2016.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Recovery and reorganisation proceedings are concluded upon judicial ratification of the respective plan. Liquidation proceedings are concluded upon liquidation and distribution of all the debtor's assets. In addition, insolvency will be terminated if: the bankruptcy estate is inadequate to satisfy creditors' claims; or 10 years have elapsed since bankruptcy has entered the stage of 'union of creditors' (that is the commencement of the liquidation process); or 15 years have elapsed since the formal declaration of bankruptcy.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

Greek law applies a 'cash-flow' insolvency test. A debtor is declared bankrupt in case of present or foreseeable general and permanent inability to meet its financial obligations as they fall due. Inability is 'general' where it covers all or substantially all of the debtor's financial obligations and 'permanent' where it is not circumstantial and there are no substantial recovery expectations or any financial assistance available either in the form of debt or equity. The mere possibility of insolvency constitutes another ground for the declaration of the

debtor's bankruptcy when the debtor files a reorganisation plan along with the bankruptcy petition.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Companies and merchants are required to file for bankruptcy within 30 days following cessation of payments.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Failure to file for bankruptcy in a timely manner will cause a company's representatives to be held personally liable for damages caused to creditors by trading while insolvent. Accordingly, the creditors' compensation is restricted to unpaid debts created during the period between the date the bankruptcy petition should have been filed and the date the company was actually declared bankrupt. The aforementioned claims can be pursued only by the bankruptcy administrators and not by creditors who suffered the damage.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Failure to withhold or pay income tax, or to collect or pay VAT by a corporate entity makes the directors, administrators, executive managers, executive directors and bankruptcy administrators of a joint-stock company liable for payment of such tax. Similarly, management members are also liable for payment of income tax owed by the company or withheld by a company that was wound up. Moreover, failure to pay certified tax debts is a criminal offence for which liability attaches to the company management. The management is also criminally liable for the non-payment of salaries and other employment dues (including social security contributions).

Furthermore, if bankruptcy is the result of a fraudulent act or gross negligence attributable to any members of management, the responsible persons are liable to compensate creditors.

In addition, criminal sanctions may be imposed on officers and directors in cases of, for example, hiding assets, onerous transactions, disposal of merchandise at an undervalue, false statements and dissipation of debtor assets.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

The Greek Company Law provides that the duty is owed to the company itself. However, the majority of jurists interpret the duty as being owed ultimately to the shareholders. The duty is to act exclusively in the interests of the company, and for the pursuit of the company's long-term economic well-being. The duties that directors owe to the corporation do not shift to the creditors when an insolvency or reorganisation proceeding is likely.

However, under article 98 of the GBC, a company's management cannot ignore the interests of creditors when the company becomes insolvent, meaning that they must promptly file a petition for the declaration of bankruptcy, bringing the continuing operation of the company to an end (to the detriment of creditors). The members of the board of directors who are responsible for the delay are severally liable for the damages of corporate creditors.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Bankruptcy and reorganisation proceedings

The right to manage and transfer the debtor's assets passes to the syndikos after the commencement of the insolvency proceedings. Directors and officers, however, continue to exercise the rights that are irrelevant to the administration of the insolvency estate. For instance, the board of directors of a société anonyme and not the syndikos retains the authority to convene the general assembly of the shareholders of the company in order to approve the annual financial statements, while it is the board of directors that is solely competent to certify the payment of the share capital. In exceptional circumstances, a debtor may remain in control of its assets and affairs. The court – following a petition by the debtor and to the extent this is to the benefit of the creditors – may permit the debtor to remain in possession and administration of its assets, always with the syndikos' cooperation, and subject to being recalled if that is held to serve the creditors' interests.

The syndikos oversees performance of the reorganisation plan and reports to the creditors' representative every six months.

Recovery procedure

In general, directors and officers remain in control of a corporation after the ratification of a recovery agreement. However, if it is provided within the terms of the recovery agreement, or following an application made by the debtor or any creditor, the bankruptcy court may appoint a special agent assigned with the following duties: to preserve the bankruptcy estate, perform special managerial tasks, or supervise the execution of the recovery agreement.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

Recovery proceedings

In recovery proceedings, from the submission of the recovery agreement to the Bankruptcy Court until its decision there is an automatic stay for a four-month period on all individual and collective enforcement measures against the debtor. Such automatic moratorium is granted to the debtor only once. In principle, the interim measures may be imposed on creditors' claims that arose prior to the filing of the recovery agreement. Any moratorium regarding enforcement action automatically prevents transfer of the debtor's immovable property and equipment.

In case the court's decision is not published within the four-month period, the court may grant a suspension on all individual and collective enforcement measures against the debtor or any other preventive measure. However, in this case, unless the court decides otherwise, a provisional moratorium will not prevent the enforcement of employee claims. Also, the creditors' enforcement rights arising from any financial collateral arrangement, or from any close-out netting provision, or any creditor's right to terminate the lease agreement if the debtor is in arrears for at least six monthly payments, are excluded from the suspension. Unlike bankruptcy, the stay affects secured creditors as well. However, the declaration of bankruptcy does not suspend the individual enforcement of security rights, unless the debtor's business is sold as a going concern, or bankruptcy is said to enter the stage of 'union of creditors', in which case the list of creditors is finalised.

Before the submission of the recovery agreement, a moratorium may be granted – at the request of the debtor or the creditors – if a creditors' declaration in writing of 20 per cent of the total claims is submitted, provided that there is an imminent danger. Such stay can be granted by the court only once and for a maximum period of four months.

Reorganisation plan and liquidation proceedings

Once the debtor is declared bankrupt, all unsecured and general preferential creditors are barred from enforcing their rights and remedies against the debtor.

Secured creditors can continue to pursue their claims against the secured assets unless the secured assets are closely connected to the debtor's business or production unit or enterprise, until either a reorganisation plan is approved or the creditors' committee decides whether the bankruptcy administrator will continue the debtor's commercial activities for a certain period of time; lease the business; sell the company as a going concern through a public auction; or proceed to the piecemeal sale of the debtor's assets. In any case, the suspension cannot last more than 10 months from the day the debtor was declared bankrupt. If the creditors approve the sale of the debtor's assets as a whole, the suspension lasts until the sale is concluded, for which the law does not set a deadline.

Special administration proceedings

Upon filing of the application, creditors may file a petition for preventive measures suspending any individual enforcement measures against the debtor.

After the placement of the debtor under special administration, there is an automatic stay on all enforcement measures (including the state, social security funds) against the debtor and its assets until the termination of the special administration procedure.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

Recovery procedure

No conditions or restrictions are set by law on the debtor's conduct of business. No conditions apply to creditors who supply goods or services. The court intervenes in key parts of the recovery process. The automatic moratorium regarding enforcement actions against the debtor automatically prevents transfer of the debtor's immovable property and equipment. Moreover, the court decides on the ratification of the agreement. The court may appoint a special administrator to control the debtor's assets or to perform specific actions or to oversee performance of the recovery agreement.

Creditors that, pursuant to the recovery agreement, supply goods and services to the debtor for the continuation of its business activities, are ranked as first-class general preferential creditors for the value of the goods and services provided, superseding all other creditors. Creditors that supplied goods and services during the negotiation period for the conclusion of a recovery agreement, regardless of its ratification and if it is provided within the terms of the recovery agreement, are also ranked as first-class general preferential creditors superseding all other creditors. In this case, the supply of goods or services must be provided within a time period of six months prior to the submission of the recovery agreement.

Finally, the recent amendments in the GBC provide for the satisfaction in full of the above super-seniority claims arising from supply of goods or services when general preferential claims coincide with secured and unsecured claims or in the case where general preferential claims coincide with unsecured claims.

The reorganisation plan

The right to manage and transfer the debtor's assets passes to the syndikos after the commencement of the insolvency proceedings. Directors and officers, however, continue to exercise the rights that are irrelevant to the administration of the insolvency estate. For instance, the board of directors of a *société anonyme* and not the syndikos retains the authority to convene the general assembly of the shareholders of the company in order to approve the annual financial statements, while it is the board of directors that is solely competent to certify the payment of the share capital. In exceptional circumstances, a debtor may remain in control of its assets and affairs. The court – following a petition by the debtor and to the extent this is to the benefit of the creditors – may permit the debtor to remain in possession and administration of

its assets, always with the syndikos' cooperation, and subject to being recalled if that is held to serve the creditors' interests.

The syndikos oversees performance of the reorganisation plan and reports to the creditors' committee every six months.

In reorganisation, the treatment is not the same as in recovery procedure of creditors who supply goods and services to the debtor. As a result, their claims are not ranked as first-class general preferential creditors.

Special administration proceedings

The special administrator may receive new financing (ie, money or supply of goods or services) in order to keep the business in operation, which is granted 'super-seniority' status and is satisfied in full ahead of all other creditors.

23 Post-filing credit

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

There are no specific provisions with regard to funding upon commencement of liquidation proceedings.

However, creditors that pursuant to the recovery agreement or the reorganisation plan, provide loans or credit to the debtor for the continuation of its business activities, are ranked as first-class general preferential creditors, superseding all other creditors. Creditors that provided loans or credit during the negotiation period for the conclusion of a recovery agreement, regardless of its ratification and if it is provided within the terms of the recovery agreement, are also ranked as first-class general preferential creditors superseding all other creditors. In this case, the loans or credit must be provided within a time period of six months prior to the submission of the recovery agreement.

The recent amendments in the GBC provide for the satisfaction in full of the above super-seniority claims arising from loans or credit provided to the debtor, when general preferential claims coincide with secured and unsecured claims or in the case where general preferential claims coincide with unsecured claims. The same applies in special administration proceedings (see also question 22).

24 Sale of assets

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?

Until the ratification of a reorganisation plan or a decision of a creditors' meeting deciding for debtor's liquidation any sale of assets is forbidden without prior permission by the reporting judge granted under exceptional circumstances. Any sale of the debtor's assets in case of a reorganisation plan can be contemplated after ratification of the reorganisation plan, pursuant to its provisions. Liquidation pursuant to a creditors' committee decision is performed through a public auction by submission of sealed offers. The purchaser acquires the assets 'free and clear' of claims.

With respect to sale of assets during pre-bankruptcy procedures the following applies. Transfer of specific assets or the sale of the debtor's entire business may be the object of the recovery agreement. The purchaser in such cases acquires all or part of the debtor's assets and, if provided by the recovery agreement, all or part of the debtor's liabilities. Liabilities are:

- satisfied by the sale price;
- written off;
- converted into equity (debt-equity swaps); or
- remain as part of the debtor's obligations.

Until ratification of the recovery agreement, assets can be transferred in case there is no moratorium in place and subject to rules regarding fraudulent conveyances and provisions regarding transfers during the suspect period.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

'Stalking horse' bids are not possible because all sales are conducted by means of a public auction in which all bidders participate on identical terms. Bilateral negotiations even prior or after are excluded. Credit bidding is permitted under limited circumstances, such as when the debtor's movables are acquired by the debtor's creditor who commenced enforcement proceedings provided that no other creditor announced any claim against the debtor.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 general, any contract may provide for a termination right, in the event that the counterparty is declared bankrupt.

The Greek Bankruptcy Code provides for the maintenance of enforceability of any mutual contract not having been performed by either party in full at the time bankruptcy is declared, unless otherwise provided by the contract. More specifically, the bankruptcy administrator has the right to opt for the performance of the aforementioned contract. If the bankruptcy administrator fails to act, the counterparty can request that the liquidator decide within a reasonable deadline whether he or she opts for the performance of the contract. If the bankruptcy administrator does not reply within the established deadline, or if he or she refuses to perform the contract, then the counterparty is entitled to repudiate the contract and claim for damages.

Contracts of a continuous nature may provide for a termination right in the event of a party's bankruptcy. In the absence of such a term, the Greek Bankruptcy Code establishes the maintenance of their enforceability. In that case, provided that the breach of the contract constitutes an event of default, the contract may be terminated, regardless of the debtor's insolvency.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

There are no special provisions regarding IP rights and the rules generally applicable to the performance of contracts apply. Such law permits the operation of ipso facto contractual clauses: accordingly, insolvency may be agreed to constitute a contractual event of default. If a contract is not terminated, the bankruptcy administrator can elect to continue its performance. However, upon termination the estate is not entitled to the benefit of continuous use of the IP.

28 Personal data

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

There are no special provisions regarding personal information or customer data in the GBC and the restrictions generally applicable to personal data, apply. To the extent that any type of information or customer data is deemed to be personal data, any use thereof, including transfer to a purchaser, as, for instance, in case of transfer of any business as per the provisions of a ratified recovery agreement, is subject to the provisions of Regulation (EU) 2016/679 (the GDPR).

As a general rule, when collecting and processing personal data, data controllers bear the obligations laid down by the GDPR, including obligations towards the data subjects.

Personal information or customer data may be used during any insolvency and pre-insolvency procedure provided that such use is compatible with the purposes for which they were originally collected by the insolvent/pre-insolvent company. Any use of personal data must comply with the principles of the GDPR, including the principles of lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, and integrity and confidentiality.

New consent is not required on the condition that personal data is used for the purposes for which it was originally collected. Any consent must meet the requirements of the law (ie, must be freely given, unambiguous, specific and informed).

Regarding the transfer of such information to a purchaser, such transfer shall be in principle compliant from a data protection law perspective provided that the data subjects have been originally informed that their personal data shall be passed on to other organisations and in principle consented thereto. This may be achieved through appropriate terms in the contractual arrangements entered into between the insolvent and pre-insolvent company and the data subjects.

Even if the data subjects have been appropriately informed about the transfer of their personal data, the transfer is still subject to the principles set by the GDPR. Having said that, personal data must be used by the purchaser for the purposes for which it was originally collected. Personal information should not be used in a way that would be outside of the reasonable expectations of the individuals concerned. If the purchaser intends to use personal data for any other purposes than the purposes for which it was originally collected, consent for the new purpose is required from each data subject.

Following the transfer of personal data, the purchaser shall be deemed to be a controller and shall bear the respective obligations under the GDPR. Therefore, the purchaser will have to inform the data subjects about the change of the controller and provide them information regarding the enforcement of their rights (right of access, right to object, etc).

With regard to the issue of consent, the processing may be carried out without the data subject's consent, where the processing is necessary for compliance with a legal obligation to which the controller is subject, or where processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject that require protection of personal data. Under the GDPR, data controllers are no longer required to notify or seek authorisation by the Data Protection Authority for the processing of personal data, including the transfer of personal data to a third party. They are required instead to put in place effective procedures and mechanisms to assure compliance with the GDPR, including carrying out data protection impact assessments, where a type of processing is likely to result in a high risk to the rights and freedoms of the data subjects. A controller shall consult the Data Protection Authority prior to processing where a data protection impact assessment indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Arbitration cannot be used in bankruptcy proceedings in Greece. Courts have held that an arbitration clause lapses after a debtor is declared bankrupt. However, theorists have proposed that a bankruptcy administrator should be considered competent to appoint arbitrators, continue arbitration or agree on an arbitration clause.

Creditor remedies

30 Creditors' enforcement

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?

Under Greek law, a seizure requires an executory title and a supervised public auction. However, tax authorities are entitled to impose a seizure on debts over €70,000 without obtaining an executory title first. Such significant reform was introduced by Law No. 4336/2015.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Unsecured creditors can individually attempt to recover their debt through ordinary legal proceedings. The creditor can enforce its rights after obtaining an executory title against the debtor (article 904 of the Code of Civil Procedure). A creditor with an executory title can seize any of the debtor's assets, proceed to their forced sale (through an auction) and claim satisfaction from the sale proceeds. Assets sold through a forced sale are relieved from all encumbrances and creditors that have security on those specific assets along with creditors that enjoy a statutory priority are satisfied in priority to other creditors.

Unsecured creditors prior to and until obtaining an executory title can apply for an interim order, for a prenotation of mortgage over the debtor's immovable assets or a conservative attachment over the debtor's other assets. Such proceedings will require at least three and may take as long as eight months and will require, among other things, proof of imminent danger.

No special procedures apply to foreign creditors.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

All decisions with regard to bankruptcy proceedings are published in the Bulletin of Judicial Publications of the Jurists' Pension Fund. All creditors are invited in writing by the bankruptcy administrator to announce their claims within a time period of one month after the publication of the decision that declared the debtor's bankruptcy in the Bulletin of Judicial Publications of the Jurists' Pension Fund. The same applies in special administration procedure *mutatis mutandis*.

The most significant creditors' meetings are:

- the creditors' meeting that decides on the continuation of the business activities, or the sale of all or substantially all of the debtor's assets or the piecemeal liquidation of the debtor's estate; and
- the creditors' meeting for voting on the reorganisation plan.

The bankruptcy administrator must submit to the creditors' meeting a report with regard to the debtor's current financial situation, the reasons that led to its bankruptcy, the prospects of continuing business activities and the possibility of adopting a reorganisation plan. The bankruptcy administrator oversees the performance of the ratified reorganisation plan and every six months submits a report to the creditors' representative.

33 Creditor representation

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?

Following the recent amendments to the GBC, the creditors' committee does not constitute a main body of the bankruptcy procedure.

Nevertheless, the creditors' meeting may pass a resolution upon the appointment of a creditors' committee. The committee consists of three ordinary and three substitute members. One each of the ordinary and substitute members are selected from the class of secured creditors, general preferential and unsecured creditors.

The creditors' committee is assigned with the general duty of supervising the progress of bankruptcy proceedings and assisting the bankruptcy administrator during the performance of his or her duties.

The Bankruptcy Code does not preclude the creditors' committee from retaining external advisers at its own expense, after having obtained the permission of the reporting judge.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

No, the Greek Bankruptcy Code does not permit the estate creditor to pursue its claims if the bankruptcy administrator has no assets to pursue a claim. The Greek Bankruptcy Code contains no specific provisions for the transfer of creditors' claims. Any transfer of claim can take place according to provisions of the Civil Code on assignment.

35 Claims

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

The bankruptcy liquidator invites all creditors that are included within the list provided by the debtor to announce their claims within one month of the public notification of the decision that declared bankruptcy. Creditors that fail to announce their claims within the statutorily established time frame may seek judicial verification of their claims through filing a petition before the bankruptcy court.

Three days following the lapse of the time period that is established for the announcement of creditors' claims, the bankruptcy administrator must verify each creditor's claim before the bankruptcy judge. At this stage, it is likely that a creditor's claim may be challenged by the debtor, the syndikos or other creditors whose claims have temporarily or finally been accepted. The judgment upon admission or rejection of one's creditor claim is subject to an appeal.

The Greek Bankruptcy Code contains no specific provisions for the transfer of creditors' claims. Any transfer of claim can take place according to provisions of the Civil Code on assignment.

The Greek Bankruptcy Code recognises claims for contingent or unliquidated amounts. Finally, at the time bankruptcy is declared, the non-due and payable creditors' claims, excluding the secured creditors' claims, are deemed to be due and payable. The secured creditors' claims are payable at their actual expiry date.

36 Set-off and netting

To what extent may creditors 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 creditors have the right to offset their claims against debtor's claims provided that their claims became due and payable prior to the debtor's bankruptcy. The bankruptcy court may order the temporary suspension of creditors' right to set off.

37 Modifying creditors' rights

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

The Bankruptcy Code does not provide for any change to the classification of creditors' claims. Any involuntary change of priority would

probably be deemed unconstitutional as a violation of article 17 of the Greek Constitution.

38 Priority claims

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

The major privileged claims are the following (in order of seniority):

- Super seniority claims (article 154a): loans or credit provided pursuant to a recovery agreement or a reorganisation plan. Goods or services provided on the basis of a recovery agreement. Loans or credit, goods or services provided during the negotiation period, if it is provided within the terms of the recovery agreement, regardless of its ratification. In this case, loans or credit, goods or services must be provided within a time period of six months prior to the submission of the recovery agreement.
- The following creditors' claims (other general preferential creditors), which are ranked as follows:
 - unpaid employee remuneration incurred in the two years prior to bankruptcy being declared and employment termination compensation, regardless of when it occurred;
 - lawyers' fees that date up to two years prior to the declaration of bankruptcy, and claims for compensation of salaried lawyers owing to termination of their contract for a salaried mandate, regardless of the time it arose;
 - claims of the state arising from value added tax (VAT) and its surcharges;
 - social security contributions that arose until the declaration of bankruptcy; and
 - other claims of the state or local authorities and their surcharges excluding VAT claims.

After deducting bankruptcy expenses and the bankruptcy administrator's remuneration, the super seniority claims are satisfied in full and ahead of any other creditors' claim. Then the secured creditors are paid out of 65 per cent of the sale proceeds. General preferential creditors are paid out of 25 per cent of the sale proceeds ranked as set out above. Unsecured creditors are satisfied by the remaining 10 per cent of the sale proceeds.

Law No. 4512/2018 introduced a parallel to the above ranking system for claims that arise after 17 January 2018 that are secured with a pledge or a mortgage over any movable or immovable property (that was not encumbered on 17 January 2018). If these conditions are cumulatively met, then (after deducting the legal expenses, bankruptcy expenses including the bankruptcy administrators' remuneration) the following ranking is applicable:

- First rank: employees' claims that arose within six months prior to the declaration of bankruptcy and up to an amount equal to six monthly wages per employee. For the purposes of such ranking, the monthly wage is equal to the minimum wage of an employee working over 25 years multiplied by 275 per cent.
- Second rank: super seniority claims of article 154a GBC (ie, loans or credit provided pursuant to a recovery agreement or a reorganisation plan. Goods or services provided on the basis of a recovery agreement. Loans or credit, goods or services provided during the negotiation period, if it is provided within the terms of the recovery agreement, regardless of its ratification. In this case, loans or credit, goods or services must be provided within a time period of six months prior to the submission of the recovery agreement).
- Third rank: secured claims
- Fourth rank: general privileged claims (mainly, employees (the balance of the above claims), Greek state, social security funds etc) and secured claims for expenses incurred for the production and harvesting of harvests in the last six months before the declaration of bankruptcy.
- Fifth rank: unsecured claims.

It should be noted that each rank must be fully satisfied prior to the satisfaction of the following/next rank (ie, first rank fully satisfied prior second rank etc).

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Under Greek law, an employer can terminate an employment contract of indefinite duration by notifying the employee in writing and paying the statutory compensation. Failure to pay the statutory compensation or notify the employee in writing renders the termination null and void. When a debtor is declared bankrupt, contracts are not automatically terminated. The bankruptcy administrator can terminate employment contracts lawfully without paying the statutory compensation at the time the termination occurs. The employee maintains a claim for his or her compensation.

A restructuring does not automatically exempt a debtor from complying with the collective redundancies restrictions (up to 5 per cent for larger employers; in any case it may not exceed thirty employees). However, where a business ceases operations as a result of the appointment of a bankruptcy administrator, or when there is a downsizing as a result of a judicially ratified recovery or reorganisation plan, it is arguable that those employee terminations do not count towards the statutory threshold (in the sense that they are the result of closures pursuant to a judicial decision).

Claims for unpaid wages and salaries as well as claims for termination compensation are treated as priority claims in liquidation and are usually satisfied to a substantial extent. The state-run social security fund is also a privileged priority creditor but there is no similar provision for other employee pension funds or schemes.

40 Pension claims

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

Claims by the social security fund prior to the declaration of insolvency are treated as priority claims and are satisfied as a matter of general priority (set out in greater detail in question 38).

Employee claims that have arisen within two years of the declaration of insolvency are also given special priority under statute. The Bankruptcy Code does not distinguish between claims for unpaid wages and salaries and claims for unpaid voluntary benefits such as unpaid pension contributions, which are also given the same priority.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

If the environmental problems take place after the commencement of insolvency proceedings, and arise by action of the bankruptcy administrator, the person suffering the damage may file a lawsuit against the bankruptcy administrator, under his or her capacity as administrator of the insolvency estate, and upon acquisition of an enforceable title, he or she may be satisfied before the other creditors by the insolvency estate. If the debt cannot be satisfied by the insolvency estate, the bankruptcy administrator is obliged to compensate the creditor, if he or she failed by reason of gross negligence to diagnose that the estate is not likely to be able to satisfy such group debt or actually diagnosed it, but neglected it.

Of course, liability of the bankruptcy administrator under tort is not precluded. In any case, any claim against the bankruptcy administrator is time-barred after a period of three years from the time the person suffering the damage became aware of the damage and of the damaging act.

If the environmental problems take place after the commencement of insolvency proceedings by the action of the debtor, the person

suffering the damage may file a lawsuit against the debtor and, upon acquisition of an enforceable title, he or she may be satisfied by the debtor's estate. It should be noted that the person suffering the damage may be satisfied by the debtor's property that was acquired after the opening of insolvency proceedings and that is not included within the insolvency estate.

If the environmental problems take place before the commencement of insolvency proceedings, the person suffering the damage must participate in the insolvency proceedings (by announcing its claim) in order to be satisfied by the insolvency estate.

42 Liabilities that survive insolvency or reorganisation proceedings

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

As stated above, a recovery agreement may provide for liabilities that pass to the new acquirer or purchaser of debtor's assets and for the discharge or conversion of other liabilities. Otherwise, liabilities continue to lie with the debtor. The debtor, if a natural person, may be discharged either after the lapse of two years as of the declaration of bankruptcy, or if he or she has repaid all creditors in principal and interest. The debtor, if a legal entity, is discharged if it has repaid all creditors in principal and interest. The discharge of a debtor who was convicted for elimination or non-disclosure of assets belonging to the insolvency estate, for acting in a manner contrary to the rules of prudent financial management and for non-keeping or concealing of mandatory business books is prohibited, unless criminal discharge for these acts occurred.

43 Distributions

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

Following liquidation of the debtor's estate, the bankruptcy administrator draws up a list with regard to distributions that will be made to creditors. The bankruptcy administrator may proceed in provisional distributions after having obtained the reporting judge's prior consent. The list of distributions is submitted to the latter and it is posted at his or her office. Public notification at the Bulletin of Judicial Publications of the Jurists' Pension Fund is required as well. Under certain circumstances, the publication of the list of distributions in Greek political and economic daily gazettes or economic gazettes of international circulation may be required.

Security

44 Secured lending and credit (immovables)

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

The following types of security are available for immovable property:

- Mortgage – this is the basic form of security in relation to immovable property. In order to create a mortgage, a creditor must hold a title provided by law, final court decision or a notarial deed. A mortgage is perfected by its registration in the Land Registry.
- Prenotation of mortgage – this is the most common form of security on real property and is created by a court order in the nature of an injunction. It can be viewed as a conditional mortgage that can be converted into a full mortgage upon the debtor's default with retroactive effect as of the issuance of the prenotation order. Prenotations are far more common than mortgages because court fees are significantly lower than the notarial fees that would be payable for the mortgage deed.

45 Secured lending and credit (movables)

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

The following types of security are available for movable assets:

- Pledge: this is the most common form of security. A pledge on a movable asset ensures the preferential satisfaction of the creditor through a forced sale of that movable asset in execution proceedings. A pledge requires physical delivery of the movable asset to the pledgee.

- A chattel mortgage (articles 1 and 3 of Law No. 2844/00) (also non-possessory pledge): a chattel mortgage allows the debtor to retain possession and use of the movable asset, and to freely dispose of it, but it attaches to the asset and ensures that the creditor is preferentially satisfied through the asset's forced sale, following the commencement of execution proceedings.
- Floating charge (article 16 of Law No. 2844/00): a floating charge enables the debtor to deal with (and dispose of) the charged assets (as specified in the agreement) in the ordinary course of business until the occurrence of either a default or an agreed event that causes the floating charge to crystallise. Following crystallisation, a floating charge becomes a fixed charge (similar to a pledge) attaching to whatever movable assets are available at that time.
- Retention or fiduciary transfer of ownership: this allows the creditor, until fully paid, to retain ownership of property or have ownership of property transferred to him or her, but not to dispose of that property. This occurs in two situations:
 - it is common in sales on credit for the seller to retain ownership until full payment of the agreed-upon consideration; and
 - a debtor can conditionally transfer, to the creditor, the ownership of the movable assets to secure performance of its obligations. Once the obligations are fulfilled, ownership reverts automatically to the debtor. However, if the debtor defaults, the creditor must auction the movable asset and satisfy his or her claim through the proceeds of the auction.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

The debtor's transactions that took place during the interval between cessation of payments and declaration of bankruptcy (suspect period) are annulled or may be annulled.

The following transactions that are restrictively enumerated within the Bankruptcy Code are presumed to prejudice creditors' interests and are automatically null and void:

- donations and gratuitous acts;
- payments of debts that did not fall due and payable;
- payments of due debts that were not made in cash; and
- creation of security over the debtor's estate for pre-existing debts.

Any debtor's mutual transaction may be annulled if the debtor's counterparty did not act in good faith, that is, it knew that the debtor has suspended its payments and that the transaction was detrimental to creditors' interests.

Another ground upon which the debtor's transactions can be annulled is the fraudulent prejudice of creditors' interests. More specifically, fraudulent acts committed by the debtor during the last five years prior to the declaration of bankruptcy to the detriment of its creditors' interests or to establish a preference of some creditors over the others, can be avoided and the assets are recovered by the debtor, provided that the third party knew of the debtor's intent.

No transaction contemplated pursuant to a ratified recovery agreement or a reorganisation plan can be annulled.

Apart from the Bankruptcy Code, there are additional provisions stipulating acts that are exempted from bankruptcy revocation, including:

- any mortgage or pledge granted under the Legislative Decrees 17.07/13.08.1923 and 4001/1959 to secure a loan;
- any pledge or mortgage granted to secure claims from bond loans issued according to Law No. 3156/2003;
- the transfer of claims pursuant to Law No. 3156/2003 regarding the securitisation of claims;
- financial collateral agreements as well as the provision of financial collateral under such agreement pursuant to Law No. 3301/2004; and
- within the framework of Law No. 3389/2005 regulating PPPs, any securities granted by a special purpose vehicle (SPV) or any third party in favour of a credit or financial institution or any third party in order to secure claims towards the SPV.

Update and trends

Law No. 4469/2017 introduced the new procedure for the extrajudicial debt settlement, which sets as its main objective the rescue of viable debtors. It is a mainly collective procedure through which all the financial obligations of viable debtors are settled through the conclusion of a debt settlement agreement with the majority of their creditors (including both private creditors and the public sector – the Greek state – the social security funds and entities governed by public law). The service of an abstract of the debtor's application to its creditors as well as the notification of an invitation with regard to the creditors' participation in the process entails an automatic suspension of individual and collective enforcement measures. It is a pre-bankruptcy, optional or consensual (there can be no agreement without the consent of the debtor) procedure in which the debtor remains in administration of its assets and affairs ('debtor in possession').

Moreover, in terms of its objective, it is a reorganisation process that may be requested by any company and natural person that can be declared bankrupt under the GBC. The debtor and its creditors can freely decide on the content of the debt restructuring agreement. A significant restriction to this rule is that the creditors shall receive at least the amount they would receive in the event of liquidation of the debtor's, the co-debtors' and guarantors' estate (no creditor worse off principle). Finally, although the process is named as 'extrajudicial', it should be though ratified by the court to have a cram-down effect. We note that the procedure applies to petitions filed until 31 December 2018; however, an extension of the said deadline is expected.

Law No. 4512/2018 introduced a parallel ranking system for claims that arise after 17 January 2018 that are secured with a pledge or a mortgage over any movable or immovable property (that was not encumbered on 17 January 2018). If these conditions are cumulatively

met, then (after deducting the legal expenses, bankruptcy expenses including the bankruptcy administrators' remuneration) the following ranking is applicable:

- First rank: employees' claims that arose within six months prior to the declaration of bankruptcy and up to an amount equal to six monthly wages per employee. For the purposes of such ranking, the monthly wage is equal to the minimum wage of an employee working over 25 years multiplied by 275 per cent.
- Second rank: super seniority claims of article 154a GBC (ie, loans or credit provided pursuant to a recovery agreement or a reorganisation plan. Goods or services provided on the basis of a recovery agreement. Loans or credit, goods or services provided during the negotiation period, if they are provided within the terms of the recovery agreement, regardless of its ratification. In this case, loans or credit, goods or services must be provided within a time period of six months prior to the submission of the recovery agreement).
- Third rank: secured claims.
- Fourth rank: general privileged claims (mainly, employees (the balance of the above claims), Greek state, social security funds etc) and secured claims for expenses incurred for the production and harvesting of harvests in the last six months before the declaration of bankruptcy.
- Fifth rank: unsecured claims.

It should be noted that each rank must be fully satisfied prior to the satisfaction of the following or next rank (ie, first rank fully satisfied prior second rank etc).

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

The Bankruptcy Code provides a set of rules for the annulment of transactions contemplated during the period from cessation of payments to bankruptcy declaration, and also damage to creditors. The Code presumes that insiders (founders, managers and directors) are aware of the debtor's suspension of payments, and ordinary arm's-length transactions within the debtor's professional or business activities may not be annulled. Claims against the debtor may be verified by the bankruptcy administrator before the reporting judge against the debtor's books and records. The debtor, the bankruptcy administrator and creditors whose claims have been verified may contest claims asserted against the debtor, in which case the Bankruptcy Court will have the final decision. Finally, the Code provides for criminal sanctions in the event of onerous transactions, disposal of merchandise at an undervalue, false statements, dissipation of debtor assets, false acceptance of debts and favourable treatment of the creditor.

Groups of companies

48 Groups of companies

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

As a general rule, the parent company is not liable for the corporate debts incurred by any of its affiliates or vice versa. This is in accordance with the principle of separate corporate personality of each company member of a group. Nevertheless, a parent company or an affiliated corporation may be responsible for the liabilities of a subsidiary or an affiliated company if, under the terms of any concluded agreement, the former is co-debtor or guarantor of the latter.

In a case of joint and several liability, if any of the co-debtors (including the principal debtor) is declared insolvent, the creditor has the right to claim full satisfaction of its claim from each co-debtor if, at the time any co-debtor became insolvent, its claim was actually due and payable. If a creditor enforces its claim against one or more co-debtors and receives an amount exceeding the amount of its claim, then the creditor must reimburse any co-debtor that has a right of recourse against the principal debtor or any co-debtor.

Similarly, in the case of a company that is a guarantor of another company member of the group, the creditor may exercise its rights against the principal debtor that is declared insolvent as well as against the guarantor. In the case of excess payment of its claim, the creditor reimburses the guarantor with the excess amount provided that the latter has the right of recourse against the principal debtor. Alternatively, the creditor may reimburse the excess amount to the bankruptcy administrator.

The Greek Bankruptcy Code does not provide for substantive consolidation in case of bankrupt company members of an enterprise group. Hence, the Bankruptcy Court cannot order a distribution of group company assets pro rata without regard to the assets of the individual corporate entities involved.

49 Combining parent and subsidiary proceedings

In 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?

The Greek Bankruptcy Code does not provide for the bankruptcy of groups of companies. More specifically, it does not provide for any procedural or substantive (pooling of assets and liabilities) consolidation in case of a bankrupt enterprise group. However, each company member of the group is subject to distinct bankruptcy proceedings. This is in accordance with the fundamental principle of separate corporate personality of each company member of a group. However, the provisions of EU Regulation 848/2015 regarding group coordination proceedings and the appointment of a group coordinator may be applicable.

International cases

50 Recognition of foreign judgments

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?

The recast EU Regulation 848/2015 on insolvency proceedings (replacing Regulation 1346/2000), which came into force on 26 June 2015 regarding insolvency proceedings initiating from 26 June 2017, applies because Greece is an EU member state. Moreover, Law No. 3858/2010,

which came into force on 28 June 2010, substantially repeats the text of the UNCITRAL Model Law on Cross-Border Insolvency; caution is required with the definitions, especially that of ‘foreign proceedings’, as the law seems to apply only to foreign proceedings that involve the appointment of a liquidator.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Law No. 3858/2010, which came into force on 28 June 2010, substantially repeats the text of the UNCITRAL Model Law on Cross-Border Insolvency; caution is required with the definitions, especially that of ‘foreign proceedings’, as the law seems to apply only to foreign proceedings that involve the appointment of a liquidator. However, the Model Law also applies in proceedings in which the debtor remains in control of its assets and affairs (debtor-in-possession proceedings). In addition, the Greek court will refuse recognition if it identifies a violation of public order; in that it departs from the text of the Model Law that provides for non-recognition only where the foreign procedure is ‘manifestly’ contrary to the public order. The difference may be slight but may still provide an opening to litigants to successfully resist recognition.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors that seek to commence or participate in bankruptcy proceedings in Greece have the same rights as domestic creditors.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

EU Regulation 848/2015 applies. If it is possible to satisfy all announced claims that have been verified (at the stage of liquidation of assets in secondary insolvency proceedings) the insolvency practitioner appointed in secondary proceedings shall immediately transfer any assets remaining to the insolvency practitioner of the main insolvency proceedings.

54 COMI

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 GBC uses the same criterion as the European Insolvency Regulation to determine the COMI. The COMI corresponds to the

place where the debtor conducts the administration of its interests on a regular basis in a manner that is ascertainable by third parties. The GBC establishes a rebuttable presumption in case of a debtor’s legal entity. A legal entity’s place of registered office is presumed to be the COMI, in the absence of evidence to the contrary.

The Greek Bankruptcy Court does not provide for a COMI of a corporate group. Nevertheless, it is not precluded for a subsidiary’s COMI to coincide with a parent’s COMI. In that case, the bankruptcy proceedings will be centralised before the same court. To the best of our knowledge, to date Greek courts have neither addressed any such case.

55 Cross-border cooperation

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?

Law No. 3858/2010, which implemented most of the UNCITRAL Model Law, introduces the prospect of recognition of foreign insolvency proceedings as well as the cooperation among Greek courts, foreign courts and liquidators of different jurisdictions. To our knowledge, there are no reported cases in which the court refused to recognise foreign proceedings. On the other hand, there are judgments reported in which Greek courts recognised foreign main proceedings and initiated secondary bankruptcy proceedings in Greece according to the provisions of the European Insolvency Regulation.

56 Cross-border insolvency protocols and joint court hearings

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 Greek courts have not concluded any cross-border insolvency protocol or other arrangement that regulates coordination if concurrent insolvency proceedings are opened within different jurisdictions. However, Law No. 3858/2010, which implemented most of the UNCITRAL Model Law, introduces the prospect of cooperation among the Greek courts, foreign courts and liquidators in different jurisdictions. That provision has not yet been tested in practice.

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The legislation principally applicable to insolvency of companies in Hong Kong is the Companies (Winding Up and Miscellaneous Provisions) Ordinance (C(WUMP)O). Further detail is set out in subordinated legislation, the most important of which is contained in the Companies (Winding up) Rules (CWUR), which largely govern the procedural matters in the winding up of a company, and the Companies (Disqualification of Directors) Proceedings Rules.

Certain provisions in the Bankruptcy Ordinance (BO), which governs personal insolvency, may also be relevant to corporate insolvency to the extent that the C(WUMP)O applies those provisions specifically by reference. Other legislation that may be relevant in a corporate insolvency in Hong Kong includes:

- the Companies Ordinance (the CO), relating to general company law, including company formation and dissolution;
- the Conveyancing and Property Ordinance (the CPO), relating to voidable disposition of property and the powers of a receiver;
- the Protection of Wages on Insolvency Ordinance relating to employees' claims for payments from the Hong Kong government's Protection of Wages on Insolvency Fund; and
- the Transfer of Businesses (Protection of Creditors) Ordinance (TBO) relating to the transfer of the business of a company in certain circumstances.

Other legislation may also contribute to the body of insolvency law in Hong Kong. Insurance companies and banks, for example, have specific legislation applicable to their insolvency, which may supplement, modify or disapply certain provisions in the C(WUMP)O governing general corporate insolvency. Case law also plays a significant role in the interpretation of insolvency legislation.

Many of the provisions in the C(WUMP)O and CWUR date back to the insolvency provisions in the English Companies Acts of 1929 and 1948, but Hong Kong did not follow many of the subsequent revisions to the English insolvency regime (such as the administration or company voluntary arrangements procedure). The Hong Kong government enacted a new Companies Ordinance in 2014, which significantly reformed corporate governance and modernised company law in general. However, the statutory provisions relating to insolvency and winding up were not affected and remain in their pre-existing form (albeit now contained in the C(WUMP)O); the government has announced that it intends to introduce an insolvency reform bill that will provide for, inter alia, the introduction of a provisional supervision regime (analogous to the English administration procedure) and the concept of insolvent trading. However, the timetable for the introduction of such a bill is presently unclear.

The C(WUMP)O has been amended by the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance 2016, which came into force on 13 February 2017.

2 Excluded entities and excluded assets

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

As a general rule, a company formed and registered under the C(WUMP)O or the CO (or under earlier Companies Ordinances of 1865 and 1911) may be wound up pursuant to section 169 of the C(WUMP)O and can be subject to all forms of insolvency process (either by the court or voluntarily).

Unregistered companies, which include overseas companies registered under Part XI of the C(WUMP)O, can also be wound up by the court; however, no unregistered company may be wound up voluntarily under the C(WUMP)O (section 327(2)). Overseas companies (which are not registered in Hong Kong) may also be wound up under this section provided they have sufficient connection with the jurisdiction – although this is subject to the discretion of the court (see, for example, *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK 2 Ltd* [2017] HKCFI 1222).

There are special provisions in the Banking Ordinance and Insurance Companies Ordinance relating to the winding up of authorised institutions and insurance institutions in Hong Kong.

The insolvency of partnerships (other than limited partnerships) is governed by the Partnership Ordinance.

3 Public enterprises

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

There is no special regime applicable to the insolvency of a government-owned enterprise and unregistered companies established by statute may be wound up under Part X of the C(WUMP)O.

4 Protection for large financial institutions

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

Hong Kong's Financial Institutions (Resolution) Ordinance (the FIRO), which came into effect on 7 July 2017, is the primary Hong Kong legislation that deals with institutions that are considered too big to fail. The financial institutions that are in-scope for FIRO are all types of banks or authorised institutions (including Hong Kong branches of overseas banks), Securities and Futures Commission (SFC)-licensed corporations that are group companies with entities designated by the Financial Stability Board (the FSB) as Global Systemically Important Banks or Global Systemically Important Insurers (G-SIIs), insurers that are group companies of G-SIIs, certain financial market infrastructures, certain exchanges and other financial services entities designated by Hong Kong's Financial Secretary. Many of the provisions of the FIRO also apply to holding companies and affiliated operating entities of in-scope financial institutions.

The Hong Kong Monetary Authority (the HKMA), the SFC and the Insurance Authority are designated as the resolution authorities for

in-scope banking sector entities, securities and futures sector entities and insurance sector entities, respectively.

The FIRO, among other things, grants to such resolution authorities powers that are consistent with the FSB's *Key Attributes of Effective Resolution Regimes for Financial Institutions*, including powers with respect to resolvability assessments, resolution planning, and stabilisation options that may be applied where the FIRO's conditions to resolution are satisfied and the resolution authority has determined that resolution will be initiated. The conditions that must be satisfied prior to initiation of resolution are that:

- the institution has ceased (or is likely to cease) to be viable;
- there is no reasonable prospect that private sector action (outside of resolution) would result in the institution becoming viable within a reasonable period;
- the non-viability of the institution poses risks to the stability and effective working of the financial system of Hong Kong, including to the continued performance of critical financial functions; and
- resolution will avoid or mitigate those risks.

The possible stabilisation options that a resolution authority may apply include, among other things, bail-in (eg, the write-down of equity or the write-down or conversion into equity of certain liabilities), transfer to a purchaser, transfer to a bridge institution, transfer of assets, rights and liabilities to an asset management vehicle and transfer to a temporary public ownership company.

The FIRO also empowers resolution authorities to make rules prescribing requirements on loss-absorbing capacity (eg, requirements to issue instruments that could be bailed-in in resolution), and the HKMA will issue requirements on loss-absorbing capacity in the future that will apply to some authorised institutions for which the HKMA is the resolution authority.

If a resolution authority in Hong Kong is notified of a resolution action outside of Hong Kong (ie, a resolution action taken by a resolution authority in another jurisdiction), the FIRO provides that the resolution authority in Hong Kong in certain circumstances may take steps to give effect in Hong Kong to the overseas resolution action.

There are Hong Kong regulations, guidance and legislation, in addition to the FIRO, that could also assist with dealing with too big to fail issues. For example, consistent with key attributes requirements, each authorised institution is required by the HKMA's Supervisory Policy Manual module RE-1 (Recovery Planning) to develop a recovery plan that identifies options to restore financial strength and viability when the authorised institution comes under severe stress. As another example, if the HKMA is of the opinion that an authorised institution is insolvent or is likely to become unable to meet its obligations or is about to suspend payment, the HKMA in its capacity as regulator of Hong Kong's banking industry has wide-ranging powers over authorised institutions that include the power to appoint a manager to take charge of the authorised institution's business. The HKMA as banking regulator can exercise such powers under the Banking Ordinance even if it does not, as resolution authority, exercise its powers under the FIRO to initiate resolution of the authorised institution.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Hong Kong does not have any specialist courts that deal solely with insolvency matters, but such matters are usually dealt with by the Companies Court. The High Court can wind up any company incorporated in Hong Kong (and in some cases, foreign companies – see question 2). Any criminal matters must be dealt with by the relevant criminal court.

Corporate insolvency cases are usually heard by a 'companies judge' (a High Court judge with experience dealing with insolvency matters). Appeals from the High Court may be made in the usual course to the Court of Appeal and thereafter (with leave) to the Court of Final Appeal in Hong Kong.

There is no mandatory requirement to post security to proceed with an appeal.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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: a members' voluntary liquidation (MVL) (which is a solvent liquidation) and a creditors' voluntary liquidation (CVL) (typically an insolvent liquidation).

Members' voluntary liquidation

If the directors of the company are able to swear a statutory declaration that the company is solvent, a company can be placed into MVL. The MVL is commenced once a 75 per cent majority of the shareholders has resolved to place the company into liquidation. The MVL commences from that date and the shareholders choose the liquidator. On appointment of the liquidator, the powers of the company directors will cease.

If the liquidator subsequently determines that the company is in fact insolvent, the MVL should be converted into a CVL.

Creditors' voluntary liquidation

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. Again, a resolution must be passed by a 75 per cent majority of the members to place the company into liquidation. The CVL commences on the date on which the shareholders pass this resolution. The shareholders will also appoint a liquidator, but until the creditors' meeting referred to below has taken place, the powers of that liquidator will be limited.

The directors must then hold a creditors' meeting on the same day or on the next day, at which the creditors will be given information on the company (a statement of affairs). The creditors may also appoint a liquidator if a resolution is passed by a majority by value of the creditors present and voting. If the shareholders have previously appointed a liquidator, the creditors' choice of liquidator will prevail.

Section 228A of the C(WUMP)O is a 'special procedure' that allows the directors, in limited circumstances, to commence a voluntary winding up if they have formed the opinion that the company cannot, as a result of its liabilities, continue its business. This procedure may be used in limited circumstances only because the directors would have to declare that the winding up should be commenced under section 228A because it would not be reasonably practicable to proceed under another section of the C(WUMP)O. A creditors' meeting will be held and the winding-up process will, in general, follow that of a CVL.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

There is currently no corporate reorganisation procedure (such as a company voluntary arrangements or administrations procedure) in Hong Kong. It is possible, however, in certain circumstances, to undertake a reorganisation when a company is placed into provisional liquidation pursuant to section 193 of the C(WUMP)O (see, for example, *Re China Solar Energy Holdings Ltd* [2018] HKCFI 555).

Schemes of arrangement under section 669 of the Companies Ordinance

The scheme of arrangement (scheme) legislation under section 669 provides a mechanism to enable a company to enter into a compromise or arrangement with its creditors. This process is commenced by an application to court, by either the company or any creditor (or, where relevant, the liquidator), for an order that a meeting of creditors be summoned. Any proposed compromise or arrangement will become binding on the creditors if it is approved by 75 per cent in value and the majority in number of each class of creditors present and voting, and it is then sanctioned by the court. (A company may also enter into a scheme with its shareholders as part of a reorganisation, though a more detailed consideration of shareholder schemes is outside of the scope of this chapter.)

It is open to creditors to 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 meetings were improperly constituted, the creditors were not given sufficient information or the scheme is unfair. During the scheme process there is no statutory protection for the company from its creditors.

In terms of schemes of foreign companies, Hong Kong law is similar to English case law where a company is entitled to enter into a scheme if it is capable of being wound up in England and Wales. Case law has clarified the position further, confirming 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 one that is dependent on the facts in each case (eg, *Re LDK Solar Co, Ltd (In Provisional Liquidation)* [2015] 1 HKLRD 458 and *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1, which largely follow the approach taken by the English court).

8 Successful reorganisations

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

When an insolvent company proposes a scheme, it should be compared against the 'liquidation analysis' (ie, the rights that the creditors would have against the company in an insolvent liquidation). The rights of creditors under a scheme can differ from those creditors 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. Depending on the differences, however, 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 the rights of one group of creditors differently from another then, subject to questions of materiality, they should form separate classes.

In a scheme, the process is commenced by an application to the court, by either the company or any creditor (or, where relevant, the liquidator or provisional liquidator), 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'. Each class is determined in accordance with the creditors' rights under the scheme, as opposed to broader collateral interests, and it should be noted that a broad view should be taken of the meaning of class and whether a group of creditors forms a single class depends on the analysis of:

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

It can be seen from this that in many cases it is not possible to be certain that a particular type of claim constitutes a class of creditors. In certain cases, however, the distinction is relatively clear-cut; for example, secured creditors and unsecured creditors will almost certainly constitute 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 his or her best interests might reasonably approve.

The English court has confirmed (see *La Seda de Barcelona SA* [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. The court was particularly influenced by the fact that in

return for gaining the benefit of those releases, the guarantor company was itself releasing various group companies from outstanding inter-company debt obligations. This element of 'give and take' was seen as important in establishing a benefit to the scheme creditors, and satisfying the court that its sanction of such releases would be appropriate. This approach was followed by the Hong Kong court in *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

If a creditor seeks to place a company into involuntary liquidation (which is usually called compulsory liquidation or winding up by the court) that creditor has to petition the court to have the company wound up. The most likely ground upon which a creditor would successfully petition the court for a winding-up order is that the company is unable to pay its debts (see question 15).

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 on the date 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 (section 182 of the C(WUMP)O).

Once the winding-up order has been made or a provisional liquidator has been appointed by the court, no action may be started or proceeded against the company without the permission of the court. The directors' powers will also cease on that date. In addition, the business of the company ceases except to the extent necessary for it to be wound up.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

As noted above in question 7, there is currently no corporate reorganisation procedure in Hong Kong although, in certain circumstances, it is possible to undertake a reorganisation when a company is placed into provisional liquidation pursuant to section 193 of the C(WUMP)O.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Many reorganisations result from informal negotiations with creditors outside any formal insolvency or restructuring procedures. As a consequence, the terms of the reorganisation and, therefore, any provisions as to the timetable for the reorganisation are subject to negotiation between all relevant parties.

There are no provisions for the expedition of schemes of arrangement, and the implementation time for a scheme is a matter for the court's discretion and will depend on the scheme's complexity and any urgency. The court has been willing to hear applications on an expedited basis where there is an urgent requirement to do so.

12 Unsuccessful reorganisations

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 scheme of arrangement can be defeated if it does not obtain the statutory majorities of creditors voting in favour of it. 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 dissenting creditor can defeat an informal reorganisation by refusing to take part or, where appropriate, by applying for the company

to be wound up (although the court has to exercise its discretion when making a winding-up order).

If a scheme of an insolvent company is defeated, then unless new reorganisation proposals can be agreed with the requisite majorities of creditors, it is likely that the company will be placed in liquidation.

If there is default by the debtor in performing an approved plan in a scheme, the consequences of default will usually be set out in the scheme document. The consequences of a breach by the debtor of any informal agreement will depend on the terms of the agreement but will usually result in the creditor having all its previous rights restored.

13 Corporate procedures

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

In addition to an MVL, a company may be dissolved under section 750 of the CO without the need for a formal liquidation procedure if all the shareholders agree, the company has never commenced business or operations or ceased carrying on business or operations longer than three months ago, and the company has no outstanding liabilities.

Pursuant to section 760, such companies, as well as companies that have been dissolved following liquidation, may also be restored to the Companies Register following an application to the court by an interested party within 20 years of the date of dissolution.

The court will make an order for restoration if, at the time of the striking off, the company was carrying on business or in operation or if the court considers it just to do so.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In the case of a voluntary winding up, once the company's affairs are fully wound up, the liquidator must present the final accounts, showing how the liquidation has been conducted, to a meeting of creditors. After the meeting, the liquidator will send a copy of the account to the registrar of companies. The company is then deemed dissolved after three months.

In the event of a compulsory liquidation, if the liquidator is not the official receiver, once the winding up of the company is complete (for practical purposes), the liquidator must summon a final general meeting of creditors. The liquidator will 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. The company is deemed 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 winding up 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.

Schemes of arrangement and informal reconstructions, if successful, will end in accordance with their terms.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

'Insolvency' itself is not defined by the C(WUMP)O. Instead, it contains the concept of a company being 'unable to pay its debts'. The main reasons that a company will be deemed unable to pay its debts are:

- if the company has not paid a claim for a sum due to a creditor exceeding HK\$10,000 within three weeks of having been served with a written demand for payment (known as a statutory demand);
- if an execution or judgment against the company is unsatisfied;
- if it is proved to the satisfaction of the court that it is unable to pay its debts, also having regard to contingent and prospective liabilities, as they fall due (see the Insolvency Act in England), meaning the company is cash-flow insolvent; or

- if it is proved to the satisfaction of the court that the value of the company's assets is lower than its liabilities, taking into account contingent and prospective liabilities, meaning that the company is balance-sheet insolvent.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

There is no express duty on a company to commence insolvency proceedings at any particular time on the grounds of either cash-flow or balance-sheet insolvency.

Directors and officers

17 Directors' liability - failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

In Hong Kong, there are currently no 'wrongful trading' or 'insolvent trading' provisions (similar to those in England or Australia) that would allow the liquidators to bring an action against directors for trading after a time when they knew, or ought to have concluded, that there was no reasonable prospect of the company avoiding insolvent liquidation. (At present, Hong Kong law provides only for fraudulent trading, ie, carrying on the business of a company with intent to defraud its creditors.) It is expected that the government will introduce legislation to address this issue, although the timetable for such a bill is presently unclear.

18 Directors' liabilities - other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? 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 of those obligations. However, the company's officers can be held to be personally liable to contribute to the assets of the company for any one of the following reasons:

- misfeasance or breach of any fiduciary or other duty (section 276 of the C(WUMP)O); or
- fraudulent trading: section 275 of the C(WUMP)O, which 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 (on application of a liquidator or any creditor or contributory of the company) that any persons who were knowingly parties to the carrying on of business in that manner are personally responsible. This section is not limited to directors and officers but applies to anyone who has been involved in carrying on the business of the company in a fraudulent manner. It is necessary to prove actual dishonesty.

In addition, where a winding up is commenced on, or within one year after, the date on which payment out of capital was made, the directors who signed the solvency statement in relation to the payment out of capital could be jointly and severally liable with the past shareholders to contribute to the assets of the company (section 170A of the C(WUMP)O).

The remedies against 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 271 to 277 of the C(WUMP)O 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 Part IVA of the C(WUMP)O.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

The directors of a company owe a duty to act in the best interests of the creditors (as opposed to those of the shareholders) of the company in the 'twilight period' (ie, when a company is insolvent or on the brink of insolvency (see the English case of *West Mercia Safetyware Ltd v Dodd* [1988] BCLC 250, cited with approval in *Re Peregrine Investments Holdings Ltd* [1998] HKCFI 644)).

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

The directors' powers in relation to the company cease on the appointment of the liquidator in an MVL or CVL, except where their continuance is sanctioned:

- in the case of a MVL, by the company in general meeting or the liquidator (section 235 of the C(WUMP)O); or
- in the case of a CVL, by the committee of inspection or the creditors (if there is no committee of inspection) (section 244 of the C(WUMP)O).

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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 (and the court order has been made), or when a provisional liquidator has been appointed, no action or proceeding may be started or proceeded with against the company or its property without the permission of the court (section 186 of the C(WUMP)O). 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 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. In an MVL no automatic moratorium applies.

Reorganisations

The vast majority of reorganisations are informal and there is, therefore, no strict procedure governing moratoria or stays of proceedings. Sometimes, it may be possible for the company to agree an informal moratorium with its creditors (commonly known as a standstill) before commencing a reorganisation. Otherwise, the company will be at risk of creditors commencing actions to wind it up, enforce security or seize its assets.

A reorganisation that is implemented by way of a scheme of arrangement lacks a moratorium on creditor actions. A dissenting minority (before it is bound to a scheme that has become effective), is able to petition for the winding up or take other legal action against the company and its property. The company or the supporting creditors may seek the appointment of a provisional liquidator in order to benefit from the statutory stay of proceedings while the terms of the reorganisations are being negotiated and implemented. The English court has permitted a temporary stay on claims brought by dissentient creditors where a scheme of arrangement is proposed (*Bluecrest Mercantile NV v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm)).

The Hong Kong government is considering the proposal for a 'provisional supervision' procedure, which would provide a company corporate rescue procedure that offers a moratorium on creditor actions, during which the company and its creditors may negotiate and

implement a reorganisation. However, the timetable for the introduction of the necessary legislation is presently unclear.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

A company can carry on business during a reorganisation. If there is a consensual restructuring process under way, the creditors involved in that process (eg, the bank group or a bondholder committee) may require additional information about the company during the restructuring process and increased access to management. Other creditors (eg, suppliers) may also change their terms of business to give themselves greater protection should the reorganisation fail and the company subsequently go into insolvent liquidation. 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 (see question 21 for stay of proceedings during liquidation and reorganisation).

23 Post-filing credit

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

A liquidator can raise any money required on the security of the assets of the company. Such credit would have priority over ordinary unsecured creditors as an expense of the liquidation but only in respect of the new funds.

However, any new loans will not take priority over pre-existing debt secured by legal or equitable mortgages or a fixed charge unless this is permitted under the terms of the pre-existing secured debt. Any new security granted to secure the credit cannot take priority over pre-existing security unless this is permitted under the terms of the pre-existing security.

In an informal restructuring, or a restructuring implemented by way of a scheme of arrangement, the obtaining of credit and the use of assets as security is a matter for agreement between the company and its creditors.

24 Sale of assets

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?

Reorganisations

In practice, many reorganisations result from informal negotiations with creditors outside of any formal insolvency or restructuring procedures. As a consequence, 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.

Liquidations

Once a company has gone into liquidation, the directors will be unable to sell its assets. Instead, 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. This power can be exercised by the liquidator in both voluntary and compulsory liquidations without sanction of the court or committee of inspection.

25 Negotiating sale of assets

Does your system allow for ‘stalking horse’ bids in sale procedures and does your system permit credit bidding in sales?

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 liquidator or provisional liquidator (as applicable).

Credit bidding in sales is permitted, although there is also no specific legislation on this point; in considering whether to sanction such an arrangement the court is likely to assess whether accepting the bid is consistent with the liquidator’s duty to act in the best interests of the whole body of creditors.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

A liquidator may disclaim any onerous property with the permission of the court (and subject to section 268 of the C(WUMP)O) at any time in the 12 months after the commencement of the winding up. Onerous property is defined as any property consisting of land burdened with onerous covenants, of shares or stock in companies, or unprofitable contracts, and any other property of the company 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. 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. A contract is not, however, unprofitable merely because it is financially disadvantageous – it is the nature and cause of the disadvantage that will be the decisive factor. The liquidator cannot disclaim a completed contract. This is because if the company has fully performed then it will have no prospective liabilities, which means that the contract is not onerous and therefore cannot be disclaimed.

The liquidator loses his or her right to disclaim if he or she fails to give notice of a disclaimer within 28 days of service of a notice by the other party requiring the liquidator to decide whether to disclaim. The effect of the loss of the right to disclaim is that the liquidator loses the right to terminate the contract unilaterally by notice, thus enabling the other party to elect to hold the contract open for future performance. If the liquidator chooses to allow the company to default on its obligations, the contract continues in force until the other party exercises a right to treat it as repudiated or obtains an order for rescission of the contract.

A disclaimer operates so as to determine, as of 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 insofar as is necessary for the purpose of releasing the company from any liability. Any person suffering loss or damage as a consequence of the operation of the disclaimer is deemed a creditor of the company and may submit proof for the loss or damage in a winding up.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor’s right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

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 (eg, in particular in the event of default and termination provisions). In addition, an insolvency representative does not have the 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.

28 Personal data

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

Hong Kong provides statutory protection for the personal data of individuals, under the Personal Data (Privacy) Ordinance. While there has not been any case law in Hong Kong concerning the status of insolvent companies or the responsibilities of liquidators under the Ordinance, we would expect a Hong Kong court to follow the reasoning of the English High Court in *Re Southern Pacific Personal Loans* [2014] Ch 426. The English court held that the insolvency of a company has a neutral effect on its responsibilities under the equivalent English Data Protection Act 1988 (the DPA) (which has now been superseded by the Data Protection Act 2018, which implements the General Data Protection Regulation (EU) 2016/679 – GDPR).

In *Southern Pacific* (decided under the pre-GDPR data protection regime) the liquidators were not controllers in their own right and were not personally responsible for the company’s compliance with the provisions of the DPA. A Hong Kong company does not have an automatic right to dispose of personal data as part of a sale of its assets. Any transfer of personal data to a third party that is not consistent with the purposes for which the data was originally collected would require the consent of the individual data subjects concerned. On the other hand, a sale of the shares in the insolvent company preserves the status quo (namely that the company remains the data controller) and does not require a separate consent. In practical terms, liquidators proposing to sell the company’s assets, including its data, should ensure that consent to the transfer to a purchaser was obtained at the time the personal data was originally collected (which will not invariably be the case).

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

See question 21. Where a winding-up order has been made, no action or proceedings may be continued or commenced against the company or its property, except with the permission of the court. Arbitration of disputes is likely to be treated as a legal process that would be subject to the same stay of proceedings.

Creditor remedies**30 Creditors’ enforcement**

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 its security outside of court proceedings by the appointment of a receiver over specified charged assets. The receiver will collect and realise the charged assets towards satisfying the debt. The primary duty of the receiver is owed to the secured creditor (but the receiver acts as the chargor’s agent in relation to the charged assets). A mortgagee may take physical possession of the assets subject to the mortgagor’s equity of redemption, and such possession does not require a court order. If the mortgagee wishes to foreclose (ie, to become the owner of the assets free of the mortgagor’s equity of redemption), an order of the court is required.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Certain creditors may have the benefit of a lien (by contract or by operation of law) over assets in their possession (see question 45). A landlord or other creditor who has completed the distraint against the company’s assets before the commencement of insolvency (ie, the company’s assets have been seized and sold) may keep the proceeds

(there is, however, no equivalent to the English statutory provisions that would allow a landlord to distrain post-commencement of insolvency for up to six months of unpaid rent). A supplier of goods may protect itself 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 its goods.

If the above remedy is not available, then an unsecured creditor would have to commence proceedings against the debtor for recovery of its debt. 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 it 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 the assets, it can apply to the court for an order that assets up to the amount claimed (eg, bank accounts) be frozen or prevented from being dealt with or dissipated. Once a judgment has been obtained, then proceedings to enforce the judgment can be commenced. Remedies include sending a court officer to seize the debtor's goods or diverting an income source (eg, bank balances or book debts) directly to a creditor (a third-party debt order, formerly known as a 'garnishee order').

There are no special rules for foreign creditors except that a foreign creditor may sometimes be required to provide security for the debtor's legal costs by making a payment into court (although the requirement to provide security for costs can also apply to non-foreign creditors in certain circumstances).

Unsecured creditors are also able to file winding-up petitions.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Generally, the C(WUMP)O provides for early notification of all creditors by advertisement and for the holding of a meeting of creditors. The first creditors' meeting held in a CVL will take place on the same day or the day after the shareholders pass a resolution to place the company in liquidation. At this meeting, the main purposes will be to appoint a liquidator, fix the liquidator's remuneration and potentially appoint a committee of inspection. The liquidator must call a further meeting of the creditors generally if the liquidation lasts more than one year. Before the company is finally dissolved, the liquidator must call a final meeting of creditors.

In a compulsory liquidation, the official receiver is usually automatically appointed as the provisional liquidator until a meeting of the company's creditors and contributories is convened and the court has ordered the appointment of a liquidator. The liquidator must advertise his or her appointment.

In a liquidation (whether it is a CVL or compulsory liquidation), if one-tenth in value of the company's creditors (or contributories) request the liquidator to hold a meeting of creditors, then there is an obligation to do so.

33 Creditor representation

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 committee of inspection may be appointed in a liquidation. The committee may ordinarily consist of no more than five persons.

If a committee of inspection is appointed in either a CVL or a compulsory liquidation its role is mainly supervisory. It also fixes the liquidator's remuneration and has the ability to sanction the exercise of certain of the liquidator's powers (which can also be sanctioned by the

court). The liquidator has to report to the committee of inspection on a regular basis.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

Creditors may determine that it is in their best interests to fund the estate or insolvency office holder in order that a claim may be pursued by the insolvency office holder; however, creditors are not themselves able to pursue remedies on behalf of the estate (this being the function of the insolvency office holder) except:

- bringing proceedings against any officer of the company or anyone involved in the formation or promotion of the company in connection with any alleged misfeasance or breach of fiduciary duty under section 276 of C(WUMP)O; or
- bringing proceedings for fraudulent trading under section 275 of C(WUMP)O.

Assignment of remedies to a third party who has no interest in the action or any other motive to justify his or her interference in law is likely to be deemed as maintenance, which is illegal under Hong Kong law (*Winnie Lo v HKSAR* [2012] HKEC 263). An exception exists in relation to a company in liquidation because under section 199(2)(a) of C(WUMP)O a liquidator may sell a cause of action vested in the company over which he or she has been appointed. However, this power does not extend to a cause of action that is vested in the liquidator as such, for instance, unfair preferences (*Re Cyberworks Audio Video Technology* [2010] 2 HKLRD 1137).

Further, under the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, third-party funding will be permitted in arbitration, mediation and related proceedings when the relevant provision of the Ordinance becomes effective, on a date to be appointed by the Secretary for Justice.

35 Claims

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

Generally, unsecured creditors' claims are not submitted until the company is in liquidation. All creditors submit a claim by sending particulars of it to the liquidator 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 liquidation (this element has been the subject of much case law).

Time limits may be set for receipt and processing of claims before interim dividends are paid. If the creditor misses the deadline it will be entitled to receive previous interim dividends once it has proved its claim. Once the liquidator has realised all the company's assets, he or she will give notice of intention to declare a final dividend. All claims have to be established by the date set out in the notice declaring the final dividend.

The liquidator 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.

There are no specific provisions dealing with the purchase, sale or transfer of claims against the debtor. See also the answer to question 34.

36 Set-off and netting

To what extent may creditors 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, the normal rules on set-off and netting continue to apply. Contractual set-off could be amended by agreement as part of an informal reorganisation.

Theoretically, it would also be possible to amend rights of set-off as part of a formal restructuring (eg, via a scheme of arrangement), but this could only be done if it was 'fair' to the relevant creditors. This may be difficult to achieve as rights of set-off are likely to vary from creditor to creditor.

Insolvency set-off applies where there have been mutual dealings between a creditor and the company. The office holder is required to take an account of what is due from each party to the other in respect of dealings and set off the sums due from one party to the other. Insolvency set-off is mandatory and cannot be contracted out of.

37 Modifying creditors' rights

May the court change the rank (priority) 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, and there are insufficient assets to meet the statutory preferential debts, an insolvency office holder must apply the realisations to pay such preferential debts ahead of the floating charge holder.

Rule 179 of the CWUR sets out a list of winding-up expenses and the priority in which they should be paid out of the assets. Pursuant to section 220 of the C(WUMP)O, 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 winding up in such order of priority as the court thinks just. However, the power of the court only extends to being able to vary the order of priority of the winding-up expenses set out in the aforementioned list. The court does not have jurisdiction to treat costs that are not contained in that list as expenses of the winding up.

The 'anti-deprivation' rule under common law also makes it clear that parties cannot contract out of the statutory rules for the realisation and distribution of assets in insolvency that are contained in the C(WUMP)O.

38 Priority claims

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 the sale of those assets.

In addition to the costs of preserving and realising the floating charge 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. Primarily, these include wages and certain government debts.

The costs and expenses of the liquidator rank ahead of payments to unsecured creditors out of the realisation of uncharged assets.

Creditors who can establish valid retention of title and other proprietary claims will have their property returned (or its monetary equivalent) in priority to those listed above. Where there have been mutual dealings between a creditor and the company, the liquidator is required to take an account of what is due from each party to the other in respect of dealings and set off the sums due from one party to the other.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Contracts of employment will automatically terminate upon a compulsory liquidation. Generally, employees will be unsecured creditors in the liquidation of the company, except to the extent that any of their claims constitute preferential debts under section 265 of the C(WUMP)O (such as unpaid wages and certain employment-related claims up to a limit), which will be paid ahead of other unsecured creditors' claims. Contracts of employment will not automatically terminate upon a CVL as the business of the company does not terminate instantly.

When a liquidator sells part or all of a business in a CVL or MVL, he or she must have regard to the TBO, as the transferee may become liable for the debts of the transferor (including employment claims). There are, however, certain exceptions under the TBO that apply to a business that is sold by a liquidator appointed in a compulsory winding up or a receiver pursuant to a charge that has been registered for at least one year.

40 Pension claims

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

Unpaid contributions to occupational retirement schemes and the mandatory provident fund (under the Mandatory Provident Fund Schemes Ordinance) are categorised as preferential debts for the purpose of priority under section 265 of the C(WUMP)O.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

There is no legislation in Hong Kong governing the treatment of such liabilities, thus it is likely that in an insolvency context any environmental liabilities that pre-date the insolvency would be categorised as unsecured claims. It is unclear how any environmental liabilities arising as a result of anything done or omitted to be done by the insolvency office holder would be treated.

42 Liabilities that survive insolvency or reorganisation proceedings

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

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

Where a purchaser buys the assets from an insolvent debtor, the liabilities remain with the debtor, apart from certain employment liabilities that may transfer to the purchaser in accordance with the TBO.

43 Distributions

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. In the case of a reorganisation, the terms of any distribution will usually be set out in the restructuring agreement or the scheme of arrangement, as appropriate.

Security

44 Secured lending and credit (immovables)**What principal types of security are taken on immovable (real) property?**

The principal type of security granted over immovable property is the legal mortgage. A legal mortgage is a transfer of the whole of the debtor's legal ownership in the property subject to the security. This 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 effects an absolute transfer subject to the right of redemption.

An alternative is the equitable mortgage, which differs from the legal mortgage in that it creates a charge on the property but does not convey any legal estate or interest to the creditor. An equitable mortgage 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 to the legal mortgage 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 the property is 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.

A company must register a mortgage or charge (whether fixed or floating) within one month of the date on which it was created (section 335 of the CO); failure to do so will not only expose the company and every person responsible for the company to criminal liability, but also render the security granted by the charge void against any liquidator and creditor of the company (section 337 of the CO).

45 Secured lending and credit (movables)**What principal types of security are taken on movable (personal) property?**

The principal security devices relating to movable property are mortgages and fixed charges (see question 44), 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. In practice, floating charges are generally created over the whole business and undertaking of a company and therefore cover all present and future assets of that company. It is only on the occurrence of certain events, 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 company must register a mortgage or charge (whether fixed or floating) within one month of the date on which it was created (section 335 of the CO); failure to do so will not only expose the company and every person responsible for the company to criminal liability, but also render the security granted by the charge void against any liquidator and creditor of the company (section 337 of the CO).

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.

Clawback and related-party transactions

46 Transactions that may be annulled**What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?**

A transaction may be set aside by a liquidator under the C(WUMP)O if it is an unfair preference entered into within a specified look-back period. 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 if the company went into insolvent liquidation (section 266A of the C(WUMP)O). 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 presumed where the recipient of the preference is connected with the company (otherwise than by reason only of being its employee) under section 266 of the C(WUMP)O. The look-back period is two years in the case of a person connected with the company (otherwise than by reason only of being its employee) and six months in other cases.

'Transactions at an undervalue', as the concept exists under English law, has now been introduced to Hong Kong law by the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance 2016, which came into operation on 13 February 2017. A transaction that is entered into by a company within five years before the commencement of its winding up may now be set aside if no consideration was provided to the company or the consideration was significantly less than the value of the transaction.

In addition to unfair preferences, certain floating charges will also be invalid under section 267 of the C(WUMP)O, except to the extent of any valuable consideration (being money, goods or services supplied, or a discharge or reduction of any debt or interest). Where the floating charge is created in favour of a person who is connected with the company, it can be annulled if it was created within two years of commencement of winding up, whereas the corresponding period for floating charges created in favour of a non-connected person is 12 months.

The court will not make any order unless, at the time of making the preference, entering into a transaction at an undervalue, or granting the floating charge (other than in favour of a connected person), the company was unable to pay its debts, or became unable to pay its debts as a consequence of the transaction.

Separately, a liquidator may apply to the court to set aside an extortionate credit transaction, referring to a transaction including terms requiring grossly exorbitant payments to be made in respect of the provision of credit or otherwise grossly contravened ordinary principles of fair dealing (section 246B of the C(WUMP)O).

A transaction may also be set aside by the court if it is a fraudulent conveyance under section 60 of the CPO, which is a disposition of property made with intent to defraud creditors.

Under Hong Kong law, there are no specific legislative provisions that allow for transactions to be annulled as a result of a reorganisation.

47 Equitable subordination**Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?**

There are no equitable subordination rules as such in Hong Kong insolvency law. The rules for distribution of an insolvent estate are set out in the C(WUMP)O and CWUR, 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 the usual rules of distribution will apply.

The rules relating to unfair preference are more stringent if the transaction is with an 'associate' or is connected to the company (discussed more fully in question 46). For example, an 'associate' is presumed to be influenced by the desire in giving a preference and the time limit is extended from six months prior to the commencement of the winding up to two years prior.

Groups of companies

48 Groups of companies**In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?**

Generally, Hong Kong law treats each member of a corporate group as an entirely distinct entity from other members of the group, other than in very specific circumstances. Accordingly, a parent or affiliated corporation is not responsible for the liabilities of subsidiaries or affiliates in an insolvency process.

A parent company may conceivably be held liable for the acts of its subsidiary pursuant to the law of agency; however, there is no presumption that a subsidiary is the agent or alter ego of the parent company. In very limited circumstances the Hong Kong 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, depending on the facts, there can be a primary, direct duty of care on a parent company towards employees (and potentially others) affected by the activities of a subsidiary under the tort of negligence.

There is no mechanism under Hong Kong law by which assets may be dealt with at the level of the corporate group without regard to the insolvencies of individual entities.

49 Combining parent and subsidiary proceedings**In 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?**

Hong Kong law treats each member of a corporate group as an entirely distinct entity from 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 separately.

International cases

50 Recognition of foreign judgments**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?**

Generally, Hong Kong courts will recognise judgments and orders made by courts in another jurisdiction where the Hong Kong courts consider that such judgment or order has been properly made under that foreign law and that the foreign court had the necessary jurisdiction.

At common law, a money judgment issued by a competent court from any jurisdiction may be enforced in Hong Kong if it is final and conclusive and enforcement would not be contrary to public policy. In addition, the judgment cannot have been obtained by fraud or in contravention of natural justice, and the proceedings must not have been brought contrary to a dispute settlement agreement between the parties, or if so, the person against whom judgment was granted must have either agreed to the bringing of the proceedings or submitted to the foreign court's jurisdiction.

A foreign money judgment that is final and conclusive may also be registered with the Hong Kong courts under the Foreign Judgments (Reciprocal Enforcement) Ordinance if the judgment originated from a superior court of a state specified in the Ordinance.

The court will normally try to act in a way consistent with the orders of courts of other competent jurisdictions, but this does not justify a departure from the normal rules of conflict of laws whether in the insolvency context or more generally. In *Re BJB Career Education Co* [2017] 1 HKLRD 113, the Hong Kong court formally adopted the approach of the UK Supreme Court in *Rubin v Eurofinance SA* [2012] UKSC 46, which considered in detail the common law power to recognise and grant assistance to foreign insolvency proceedings. There may

be circumstances, however, where the Hong Kong court will restrict the application of a foreign insolvency order to protect Hong Kong creditors. Therefore, if there are concurrent liquidations, one of which is in Hong Kong, the Hong Kong courts may refuse to hand over Hong Kong assets to the foreign office holder (even where there is a foreign order to that effect), where to do so would prejudice the rights of creditors who have proved their claims in the Hong Kong liquidation.

Hong Kong is not a signatory to any treaties on international insolvency. However, Hong Kong has entered into reciprocal enforcement treaties with a number of foreign jurisdictions. Hong Kong and China have a memorandum of understanding in place that would give mutual recognition of certain types of judgments.

51 UNCITRAL Model Law**Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?**

Hong Kong has not implemented the UNCITRAL Model Law on Cross-Border Insolvency, which would have provided to a foreign insolvency representative a menu of cross-border insolvency regimes to consider when seeking judicial assistance, including the ability of a foreign insolvency representative to apply for insolvency proceedings in Hong Kong, to participate in insolvency proceedings already commenced, and to seek recognition and relief for foreign insolvency proceedings.

52 Foreign creditors**How are foreign creditors dealt with in liquidations and reorganisations?**

In general, foreign creditors and domestic creditors are treated the same under the Hong Kong insolvency regime. Foreign creditors will be able to provide evidence of their claims in a Hong Kong winding-up proceeding 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 Hong Kong will only be entitled to share in any distribution once any amount received in the foreign proceedings has been taken into account. Foreign currency debts are converted into Hong Kong dollars as at the date of the winding-up order. Section 34(3B) of the BO provides that, in the context of personal insolvency, foreign currency debts are to be converted into Hong Kong dollars at the midpoint between the selling and buying telegraphic transfer rates of exchange quoted by The Hong Kong Association of Banks on the day the bankruptcy order is made. There is no equivalent provision in the C(WUMP)O; however, section 264 of the C(WUMP)O provides that the same rules shall apply with regard to the respective rights of secured and unsecured creditors and to debts provable in a winding up as apply to the same in bankruptcy. The High Court has held that, in relation to foreign currency debts provable in a winding up, this means that the relevant date is that of the making of the winding-up order rather than the presentation of the petition (see *Re Moulin Global Eyecare Trading Ltd* [2007] HKCFI 747).

53 Cross-border transfers of assets under administration**May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?**

Assets would only properly transfer to an insolvency in another country in the event that it was demonstrated to the satisfaction of the relevant insolvency office holder that the Hong Kong company did not have right and title to the asset and that it should in fact be treated as an asset of another company (potentially within the same group). Given the insolvency office holder'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.

54 COMI

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?

A company's COMI is a concept derived from the EC Insolvency Regulation (EC) No. 1346/2000 in the context of the EU and the UNCITRAL Model Law on Cross-Border Insolvency for those countries that have adopted the Model Law. As Hong Kong is neither a member of the European Union, nor has adopted the Model Law, the concept of COMI is of limited relevance under Hong Kong law. As discussed above (see question 2), when deciding whether to exercise jurisdiction over a company, it is more likely that a Hong Kong court will have regard to the sufficient connection test.

55 Cross-border cooperation

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?

Under the common law principle of judicial comity, a Hong Kong court will ordinarily recognise a liquidator appointed in the country of the company's incorporation where there are no public policy issues that would prevent recognition (see *Joint Official Liquidators of A Co v B* [2014] 4 HKLRD 374). This includes recognising a foreign liquidator appointed voluntarily (see *Re The Joint Liquidators of Supreme Tycoon Limited (In Liquidation in the British Virgin Islands)* [2018] HKCU 492 declining to follow the obiter view expressed by the Privy Council in *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36). In addition, it is possible that a Hong Kong court will recognise an insolvency office holder appointed in a jurisdiction other than the company's place of incorporation – though this point has yet to be formally decided.

Hong Kong proceedings may be required to establish the foreign insolvency officer's authority to deal with assets in Hong Kong. Recognition of a foreign insolvency officer's position will, in itself,

confer standing on the officer to represent the foreign company in the Hong Kong courts. The officer may bring proceedings in the Hong Kong courts in the name of the foreign company and, generally, administer the assets of the foreign company present in Hong Kong. However, the Hong Kong courts' power to assist a foreign office holder is limited by the extent to which the type of order sought is available under the Hong Kong insolvency regime and common law or equitable principles: hence the court has recently refused to grant the application of administrators appointed in England and Wales for an order restraining the sale of property subject to a fixed charge, on the basis that no such statutory moratorium or equivalent power exists in Hong Kong (see *Joint Administrators of African Minerals Ltd (in administration) v Madison Pacific Trust Ltd & Shandong Steel Hong Kong Zengli Ltd* [2015] HKEC 608).

See also questions 50, 51 and 52.

56 Cross-border insolvency protocols and joint court hearings

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 insolvency representatives appointed by the Hong Kong court and the insolvency representatives in a number of other jurisdictions (eg, Bermuda and the Cayman Islands) to harmonise proceedings between the two relevant countries.

In the *Lehman Brothers* case, it was clear that, because of the volume and size of the claims involved and the international dimension of the business, international cooperation would be of paramount importance. In 2009, Lehman Brothers insolvency representatives in several jurisdictions, including Hong Kong, signed a protocol that focused on cooperation and exchange of information. The Hong Kong courts had in the past approved Hong Kong insolvency practitioners entering into and implementing such protocols in similar cross-border insolvency cases; in general, the court will proceed on the (rebuttable) presumption that the liquidator will normally be in the best position to take an informed and objective view as to what is in the best interests of the liquidation.



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The main provisions concerning the insolvency of an economic operator are regulated in:

- Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings (the Bankruptcy Act);
- Act CXXXII of 1997 on Hungarian Branch Offices and Commercial Representative Offices of Foreign-Registered Companies;
- Act LXXXVIII of 2014 on Insurance Business Activity;
- Act I of 2012 on the Labour Code;
- Act V of 2013 on the Civil Code;
- Act CXXX of 2016 on the Code of Civil Procedure;
- Act XXXVII of 2014 on the Further Development of the Institutional System Promoting the Security of Certain Actors of the Financial Intermediary System;
- Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings;
- Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises;
- Act CXXXIX of 2013 on the National Bank of Hungary; and
- 106/1995 (IX.8) Government Decree on the Requirements of Environmental and Nature Protection during Liquidation and Bankruptcy Proceedings.

2 Excluded entities and excluded assets

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

The Bankruptcy Act shall apply to all economic operators and their creditors. For the purpose of the Bankruptcy Act, economic operator shall mean (i) business associations, private pension funds, cooperative societies, associations etc established in Hungary, furthermore (ii) all other legal entities and unincorporated organisations qualified as business associations under national law, and any other organisation pursuing economic activities who have their centre of main interests within the territory of the European Union according to European Parliament and Council Regulation EU/2015/848, and the insolvency proceedings to which it is subject fall within the scope of Regulation 2015/848/EU.

All assets held by the economic operator in bankruptcy or under liquidation proceedings at the time of the opening of proceedings, as well as all assets acquired during the proceedings, shall be realised in bankruptcy and during liquidation proceedings. The assets of an economic operator shall comprise all assets that it owns or controls.

Assets such as natural preservation areas, land reserved for compensation purposes and taxes and other similar dues taken out of the wages of employees shall not be construed to comprise the economic operator's assets.

Special provisions apply to banks, municipalities and major economic operators of preferential status for strategic considerations.

3 Public enterprises

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

The provisions of the Bankruptcy Act apply to government-owned enterprises too. The creditors of a government-owned enterprise have the same remedies as the creditors of a private enterprise.

However, the Bankruptcy Act contains special provisions to Major Economic Operators of Preferential Status for Strategic Considerations. Major Economic Operator of Preferential Status for Strategic Considerations shall mean any economic operator: (i) that operates in fields that may be construed to be of national importance for reasons of public health, infrastructure development, defence, law enforcement, military, energy safety, energy supply etc; (ii) that is involved in the implementation of, or undertook to execute, projects given priority for national economy consideration; (iii) that is involved in discharging public functions conferred by law nationwide; or (iv) that received large amounts of state aid for restructuring, credit guarantees, surety facilities or export credit insurance, or that is engaged in the pursuit of, or undertook to carry out, concession-bound activities, and is therefore engaged under contract with the state or specific public bodies (including the government-owned enterprise established for carrying out the aforesaid functions) in connection with the above.

The government may classify as Major Economic Operators of Preferential Status for Strategic Considerations those economic operators to which the following criteria applies: (i) settlement of the debts of such operators, composition with creditors or reorganisation is in the interests of the national economy or is of particular common interest; or (ii) the winding up of such operators without succession – where the lack of funding and insolvency cannot presumably be resolved – in a simplified, transparent and standardised procedure is given priority because of economic considerations.

4 Protection for large financial institutions

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

To maintain the stability of the financial sector, the Hungarian parliament adopted the Act XXXVII of 2014 on the further development of the institutional system promoting the security of certain actors of the financial intermediary system, which introduced the resolution system based on the Bank Recovery and Resolution Directive of the European Union. The Hungarian resolution authority is the Hungarian National Bank (MNB). The MNB shall order and launch the resolution proceeding in respect of an institution if all of the following conditions have been met:

- the MNB acting in its scope of authority for the supervision of the financial intermediary system establishes that the institution is failing or likely to fail;
- according to the judgment of the MNB, apart from the resolution actions no other measure is likely to prevent the insolvency of the institution under the circumstances; and
- according to the judgment of the MNB, the resolution is justified by public interests.

The Resolution Fund, which is composed of the contributions of market participants (credit institutions and investment firms) finances the costs incurred in the resolution phase of institutional crisis management (ie, the application of the resolution tools). The Hungarian Resolution Asset Management Company, which is fully owned by the Resolution Fund, was set up in 2015 for the purpose of receiving some or all of the assets, liabilities, rights and obligations of one or more institutions under resolution or bridge institutions.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Bankruptcy and liquidation proceedings are non-contentious proceedings falling within the competence and exclusive jurisdiction of the general court responsible for the place where the debtor's Hungarian registered office of record is located on the day when the request for opening the proceedings has been submitted. The Budapest Metropolitan Court shall have competence and jurisdiction to open and conduct main insolvency proceedings instituted against an economic operator covered by European Parliament and Council Regulation EU/2015/848, established in a place other than Hungary.

As regards procedural issues that are not otherwise provided in the Bankruptcy Act, the provisions of the Code of Civil Procedure on non-contentious judicial civil actions shall apply, subject to the derogations stemming from the special characteristics of non-contentious proceedings, as well as the general provisions of the Act on the Rules Applicable to Non-Contentious Civil Actions and on Non-Contentious Court Proceedings.

The Bankruptcy Act stipulates provisions concerning the redress options in the case of the opening of the insolvency procedure. In bankruptcy proceedings, the court decision ordering the opening of bankruptcy proceedings may not be appealed separately. An appeal against the decision for the refusal of the petition for the opening of bankruptcy proceedings shall be lodged within eight days. No justification shall be accepted determined in priority proceedings, at the latest within 15 days. In liquidation proceedings, the court decision ordering the opening of the liquidation may be appealed separately.

Under Hungarian law, there is no requirement to post security in order to proceed with an appeal; however, duty shall be paid when submitting an appeal. The amount of the duty is determined by Act XCIII of 1990 on Duties.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Debtors may request the opening of liquidation proceedings if unable or unwilling to enter into bankruptcy. The petition may be submitted in possession of the prior consent of the supreme body of the debtor economic operator exercising founders' (shareholders') rights. In the case of sole proprietorships, the petition may be submitted by the owner at his or her own discretion. Employees and the trade unions defined in the Labour Code or the competent works councils shall be duly informed when the petition is filed. Legal representation shall be mandatory with regard to submission of the application. Commencing a voluntary liquidation has the same effect as commencing liquidation by the creditors.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

The directors of debtor economic operators may submit an application for the opening of bankruptcy proceedings at the court of law. Legal representation for the debtor shall be mandatory with regard to submission of the application. The debtor may not file a petition for bankruptcy if already adjudicated in bankruptcy, or if a request for its liquidation has been submitted, and a decision has already been adopted in the first instance for the debtor's liquidation. The debtor

may not file another petition for bankruptcy before the satisfaction of any creditor's claim that existed at the time of ordering the previous bankruptcy proceedings or that was established by such proceedings, and inside a period of two years following the time of publication of the final and definitive conclusion of the previous bankruptcy proceedings, or if the court ex officio refused the debtor's request for the previous bankruptcy proceedings pursuant to the provisions of the Bankruptcy Act, and if inside the one-year period following the time of publication of the final ruling thereof.

If the court did not refuse the request for the opening of bankruptcy proceedings, it shall forthwith adopt a ruling for the opening of bankruptcy proceedings, and shall consequently provide for having the ruling thereof published in the company gazette and for having the indication 'cs. a.' entered in the register of companies next to the company's name. The court shall ex officio appoint an administrator from the register of liquidators in its ruling on the bankruptcy and unless otherwise provided for in the Bankruptcy Act, no remedy shall lie against such ruling.

As a consequence of the opening of bankruptcy proceedings, the debtor is granted a stay of payment with a view to seeking an arrangement with creditors. The objective of stay of payment is to preserve the assets under bankruptcy protection with a view to reaching a composition with creditors, during which the debtor, the administrator, the financial institutions carrying their accounts and creditors are liable to refrain from taking any measure contradictory to the objective of the stay of payment.

8 Successful reorganisations

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

Composition means the debtor's agreement with the creditors laying down the conditions for debt settlement, such as in particular any allowances and payment facilities relating to the debt, on the remission or assumption of certain claims, on receiving shares in the debtor company in exchange for a debt, on guarantees for the satisfaction of claims and other similar securities, on the approval of the debtor's programme for restructuring and for cutting losses, and any and all other action deemed necessary to restore or preserve the debtor's solvency, including the duration of and the procedures for monitoring the implementation of the composition arrangement.

A composition agreement (reorganisation plan) shall separate creditors into classes. In particular, it shall distinguish between secured and unsecured creditors. A reorganisation plan may be concluded if the debtor was able to secure the majority of the votes for the agreement from the creditors holding voting rights.

In the composition conference, voting rights shall be held by any creditor who registered its claim by the deadline specified in the Bankruptcy Act, who paid the registration fee, and whose claim is shown under recognised or uncontested claims. The composition agreement shall be signed by the parties, and by their legal representatives or proxies, and shall be countersigned by the administrator and by the select committee, if there is one.

If the composition arrangement is in conformity with the relevant legislation, the court shall grant approval by way of a ruling and shall declare the bankruptcy proceedings dismissed.

If no composition is arranged, or if the arrangement fails to comply with the relevant regulations, the court shall dismiss the bankruptcy proceedings and shall consequently declare the debtor insolvent ex officio in the liquidation proceedings and shall order the liquidation of the debtor.

The composition agreement shall not release non-debtor parties from liability. However, because of the accessory nature, a guarantor or surety etc shall be released from liability to the extent of the reduction of the claim secured by the guarantor or surety.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

If the liquidation is requested by the creditor, the petition to the competent court shall specify the debtor's liabilities (the amount of the claim), the date of maturity (due date) and a summary of the reasons for claiming that the debtor is deemed insolvent.

The documents in proof of the contents of the petition shall also be attached, including a copy of the written notice sent to the debtor. If the court has not rejected the petition, it shall notify the debtor by sending a copy of the petition. The debtor shall, within eight days of receipt of the notice, declare before the court whether he or she acknowledges the contents of the petition. If the debtor acknowledges the claim, he or she shall also simultaneously declare whether he or she wishes a respite for the settlement of the debts and shall supply the numbers of all his or her accounts and the names of the payment service providers carrying such accounts, including the accounts opened following receipt of the petition, and furthermore, in the case of a concession, he or she shall inform the concessionaire concerning the opening of liquidation proceedings. If the debtor fails to respond to the court within the above-specified deadline, his or her insolvency shall be presumed.

Upon the request of creditor, the court shall appoint a temporary administrator without delay if the requesting creditor evidences that satisfaction of its claim at a later date is in jeopardy, proves the contract underlying the extent and expiry of the claim, with full probative document, and has advanced the fee of the temporary administrator (200,000 forints if the debtor has no legal personality and 400,000 forints for legal persons) and deposited it at the time of lodging the request.

Commencing an involuntary liquidation has the effect that upon the ruling ordering liquidation of a debtor becoming final, the court shall without delay appoint the liquidator and shall order to have the abstract of the ruling ordering liquidation and the ruling on the appointment of the liquidator published in the company gazette.

Once the proceeding is opened, there are not any material differences to proceedings opened voluntarily.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

The Hungarian law does not regulate the kind of reorganisation that creditors could commence.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

No expedited reorganisations exist under Hungarian law.

12 Unsuccessful reorganisations

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?

During the opening session of the composition conference, the creditors may express their refusal to support the composition proposal. If the debtor refuses to rework the composition proposal, the meeting shall be declared closed and so recorded in the minutes, and it shall be sent to the court and the supreme body of the debtor. If no composition is arranged with the creditors, or if the arrangement fails to comply with the relevant regulations, the court shall dismiss the bankruptcy proceedings and shall consequently declare the debtor insolvent and shall order the liquidation of the debtor.

If the debtor did not fulfil his or her payment obligation as stipulated in the composition agreement concluded in bankruptcy proceedings, the court shall declare the debtor insolvent and order the liquidation of the debtor by way of a ruling.

13 Corporate procedures

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

Act V of 2006 (the Companies Act) contains the rules for dissolution proceedings. According to the Companies Act, a company, if not insolvent, may be wound up without succession by way of dissolution proceedings. Dissolution proceedings may be opened by decision of the supreme body of the company.

While in case of dissolution proceedings, the company is not insolvent, and it is the intention of the supreme body to wind up its company without succession. The company's supreme body may elect any person to serve as the receiver, if in conformity with the requirements set out for the director, and if this person accepts the assignment. If the receiver concludes that the company's assets are insufficient to cover the creditors' claims, and the members fail to supply the funds lacking within 30 days, a request for liquidation must be submitted without delay. The request for liquidation may be submitted in the absence of the consent of the supreme body.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

See questions 8, 32, 33, 35 and 49.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

The court shall declare the debtor insolvent:

- upon the debtor's failure to settle or contest his or her previously uncontested and acknowledged contractual debts within twenty days of the due date, and failure to satisfy such debt upon receipt of the creditor's written payment notice;
- upon the debtor's failure to settle his or her debt within the deadline specified in a final court decision or order for payment;
- if the enforcement procedure against the debtor was unsuccessful;
- if the debtor did not fulfil his or her payment obligation as stipulated in the composition agreement concluded in bankruptcy or liquidation proceedings;
- if it has declared the previous bankruptcy proceedings terminated; or
- if the debtor liabilities in proceedings initiated by the debtor or by the receiver exceed the debtor's assets, or the debtor was unable and presumably will not be able to settle its debt (debts) on the date when they are due, and in proceedings opened by the receiver the members (shareholders) of the debtor economic operator fail to provide a statement of commitment, following due notice, to guarantee the funds necessary to cover such debts when due.

A debtor cannot be declared insolvent in the cases defined above inside the deadline specified by the court for the settling of debts.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Under Hungarian law, there is no such obligation for the companies to commence insolvency proceedings. Companies may initiate bankruptcy or liquidation proceedings voluntarily.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Any creditor or – in the debtor's name – the liquidator may bring action during the liquidation proceedings for the court to establish that the former executives of the economic operator failed to properly represent the interests of creditors in the span of three years prior to the opening of liquidation proceedings in the wake of any situation carrying potential danger of insolvency, in direct consequence of which the economic operator's assets have diminished, or providing full satisfaction for the creditors' claims may be frustrated for other reasons.

Criminal liability of the directors may arise if a company carries on business while insolvent.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Any creditor or the liquidator may bring action during the liquidation proceedings for the court to establish that the former executives of the economic operator failed to properly represent the interests of creditors in the span of three years prior to the opening of liquidation proceedings. Financial security may also be demanded with a view to providing satisfaction for the creditor's claims. The creditors' interests shall be considered to have been ignored if the manager failed to fulfil the obligations set out by law relating to the prevention of environmental damage or the seizure of environmental offenses, or concerning remediation, in consequence of which providing full satisfaction for the creditors' claims may be frustrated. If damage is caused by several persons together, their liability shall be joint and several.

Any executive referred to who is able to verify that they have not taken any business risk that may be considered unreasonable in light of the debtor's financial position, or that they have taken all measures within reason, that are to be expected from persons in such positions, upon the occurrence of a situation carrying potential danger of insolvency so as to prevent and mitigate the losses of creditors, and to prompt the supreme body of the debtor economic operator to take action, shall not be held responsible.

Within a 90-day limitation period following the time of publication in the company gazette of the resolution on the final conclusion of liquidation proceedings, any creditor may bring action before the competent court for ordering the debtor's former executive, whose liability was already established based on the action described above, to satisfy the debtor's claim registered in the liquidation proceedings, that were not recovered in such proceedings, up to the extent of loss suffered.

The court shall impose a fine upon the head of the debtor economic operator for effecting any payment in violation of the provisions of the Bankruptcy Act, or for enabling creditors to obtain satisfaction for their claims in violation of the provisions of the Bankruptcy Act. The fine shall cover 10 per cent of the amount paid out.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Under Hungarian law, any creditor or – in the debtor's name – the liquidator may bring action during the liquidation proceedings before the court to establish that the former executives of the economic operator failed to properly represent the interests of creditors in the span of three years prior to the opening of liquidation proceedings in the wake of any situation carrying potential danger of insolvency, in direct consequence of which the economic operator's assets have diminished, or

providing full satisfaction for the creditors' claims may be frustrated for other reasons. Please see also question 18.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

In case of reorganisation, the directors of a debtor economic operator, including its supreme body and owners, shall exercise their respective rights only if it does not violate the powers vested in the administrator.

The administrator shall approve and endorse any financial commitment of the debtor after the time of the opening of bankruptcy proceedings. The administrator shall have powers to approve any new commitment made by the debtor. After the opening of liquidation, only the liquidator shall be authorised to make any legal statements in connection with the assets of the economic operator.

As of the time of the opening of liquidation, only the liquidator shall be authorised to make any legal statements in connection with the assets of the economic operator.

In case of liquidation, the directors of the debtor company – following the temporary administrator taking office – shall be restricted from entering into any contract considered to be in excess of the scope of normal operations where the economic operators assets are concerned without the prior consent and endorsement of the temporary administrator, or from entering into any other commitment, including where the debtor is compelled to perform under an existing contract. As of the time of the opening of liquidation, only the liquidator shall be authorised to make any legal statements in connection with the assets of the company. However, the director of the debtor company is only entitled to proceed in the internal legal relationship of the company.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

In the case of a reorganisation, the debtor is granted a stay of payment period (moratorium) to preserve the assets under bankruptcy protection, during which the debtor, the administrator, the financial institutions carrying their accounts and creditors are liable to refrain from taking any measure contradictory to the objective of the stay of payment. The stay of payment shall not apply to claims like claims for wages and other similar benefits, claims to any value added tax or to refunds of sums transferred to the debtor's account by mistake.

Under the duration of the stay of payment, as a general rule:

- set-off may not be applied against the debtor; however, a set-off may be adjudged in judicial proceedings initiated by the debtor and still in progress, if submitted before the time of the opening of bankruptcy proceedings;
- payment orders may not be satisfied from the debtor's accounts;
- the enforcement of money claims against the debtor shall be suspended, and the enforcement of such claims may not be ordered;
- no satisfaction may be sought on the basis of a lien on the debtor's assets, the debtor cannot effect any payment for claims existing at the time of the opening of bankruptcy proceedings;
- the contract concluded with the debtor may not be avoided, and it may not be terminated on the grounds of the debtor's failure to settle during the term of the stay of payment its debts incurred before the term of the temporary stay of payment; and
- the legal consequences associated with any non-performance or late performance of the debtor's money payment obligations shall not apply.

Judicial enforcement proceedings in progress against the debtor at the time of the opening of liquidation proceedings in connection with any assets realised in liquidation shall be abated forthwith by the court (authority) ordering the enforcement, and the assets seized and the funds yet unpaid, remaining after deducting the costs of the enforcement proceeding, shall be transferred to the appointed liquidator.

Judicial and non-judicial proceedings opened prior to the time of the opening of liquidation proceedings shall continue before the same court.

From the time of the opening of liquidation proceedings, any pecuniary claim against the economic operator in connection with any assets to be liquidated may only be enforced in the framework of liquidation. The creditor – in the proceedings brought by the economic operator – may enforce his or her claim existing at the time of the opening of liquidation proceedings against the economic operator as a setoff claim, provided that the claim has not been assigned.

Generally, the creditors cannot obtain relief from such prohibitions.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

In case of reorganisation, under the duration of the stay of payment, the debtor shall be allowed to undertake any new commitment subject to the consent of the administrator and payments may be made from the debtor's assets subject to authorisation by the administrator. During the reorganisation, the debtor can carry on business only with the supervision of the administrator. During the liquidation, carrying on business by the debtor shall be fit for the purposes of the liquidation proceedings (eg, if needed for the operation of the debtor company).

In reorganisation, no special treatment is given to creditors doing business after filing.

It is the duty of the administrator to supervise the debtor's business activities with a view to protect the creditors' interests and to make preparations for the composition with creditors. The court does not supervise the debtor's business activities; however, the approval of the composition agreement falls within the court's exclusive competence.

In liquidation proceedings, if the creditors have formed a select committee or selected a creditors' representative, the consent of the committee (representative) is required to obtain for continuing business operations during liquidation within 100 days of the publication of the opening of liquidation proceedings. If the select committee fails to respond within 15 days of receipt of the liquidator's request, it shall be construed to have granted its consent for the continuing of such business operations.

In liquidation, no special treatment is given to creditors who supply goods or services after filing unless the costs are in connection with the rational termination of the debtor's business operations.

23 Post-filing credit

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

In case of reorganisation, according to the general rule, no priority is given for post-filing credits. The debtor shall be allowed to undertake any new commitment – secured or unsecured loans or credit – only with the consent of the administrator.

In case of liquidation, the Bankruptcy Act does not expressly regulate a debtor's right to obtain secured or unsecured loans or credit. The liquidator, however, is able to contract new obligations, such as a loan or a credit, but only in connection with the rational termination of the debtor's business operations. Such loans granted to the debtor have a priority in the liquidation.

See questions 21 and 22.

24 Sale of assets

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 case of reorganisation, the sale of specific assets out of the ordinary course of business or the entire business of the debtor is subject to the

approval of the administrator. By selling assets in reorganisation, the encumbrance on assets will maintain.

In case of liquidation, the liquidator shall dispose of the debtor's assets through public sales at the highest price that can be obtained on the market, in which case the highest bidder will acquire the assets free and clear. The liquidator shall effect the sale by way of tender or auction. The liquidator may forego the application of these procedures only upon the prior consent of the select committee formed by creditors, or if the asset in question deteriorates rapidly, or if the estimated proceeds are insufficient to cover the costs of sale, or if the difference between the prospective proceeds and estimated costs is less than 100,000 forints. In this case the liquidator may apply other public forms of sale for the purpose of achieving a more favourable result.

If the assets to be sold include land or a farmstead, their sale shall be governed by the relevant provisions of the Act on Transactions in Agricultural and Forestry Land and the decree implementing it.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

No stalking horse rules and credit bidding apply under Hungarian law regarding insolvency proceedings.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 Hungarian insolvency law does not recognise the concept of rejection and the concept of disclaimer of contracts.

In reorganisation, the debtor or the administrator may challenge the contract before ordinary court only in accordance with the Hungarian Civil Code and the provisions of the Code of Civil Procedure. Claims arising after the commencement of the insolvency may also be registered.

In case of liquidation, all debts of the economic operator shall be deemed payable (due) at the time of the opening of liquidation proceedings. In that connection, the liquidator shall have powers to terminate, with immediate effect, the contracts concluded by the debtor, or to rescind from the contract if neither of the parties rendered any services.

Any claim that is due to the other party owing to the above may be enforced by notifying the liquidator within 40 days from the date when the rescission or termination was communicated.

There are no specific regulations with regard the debtor's breach of contract after the insolvency case is opened. The debtor's breach of contract is governed by the general breach of contract provisions of the Hungarian Civil Code.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

No specific rules exist under Hungarian law regarding the IP rights in case of bankruptcy or liquidation.

According to the general rule, during bankruptcy a contract concluded with the debtor may not be avoided, and it may not be terminated on the grounds of the debtor's failure to settle, during the term of the stay of payment, its debts incurred before the term of the temporary stay of payment. However, if the given contract stipulates that the commencement of bankruptcy proceeding or liquidation proceeding establishes a right to terminate the contract, the licensor or the owner has the right to do so.

The liquidator has the right to terminate any contract of the debtor.

28 Personal data

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

The Bankruptcy Act does not stipulate special provisions regarding the use of any personal information or customer data collected by a company in liquidation or reorganisation.

In accordance with the provisions of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information, personal data may be processed only for specified and explicit purposes, where they are necessary for the implementation of certain rights or obligations. The purpose of processing must be satisfied in all stages of data processing operations; recording of personal data shall be done under the principle of lawfulness and fairness. The personal data processed must be essential for the purpose for which they were recorded, and it must be suitable to achieve that purpose. Personal data may be processed to the extent and for the duration necessary to achieve their purpose. Personal data may be processed only when the data subject has given consent, or when processing is necessary as decreed by law or by a local authority based on authorisation conferred by law.

The EU General Data Protection Regulation is also applicable in case of the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data that form part of a filing system or are intended to form part of a filing system.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Bankruptcy and liquidation proceedings are non-contentious proceedings conducted exclusively by the general court of competence and jurisdiction by reference to the debtor's registered office of record on the day when the request for opening the proceedings has been submitted and by the Budapest Metropolitan Court. Thus, arbitration courts cannot commence insolvency proceedings.

Creditor remedies

30 Creditors' enforcement

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?

Claims can be enforced only within the frame and according to the rules of the bankruptcy or liquidation proceedings.

If the debtor provides collateral security under a financial collateral arrangement to secure a claim before the time of the opening of liquidation proceedings, the collateral taker shall be able to realise the collateral directly, irrespective of whether liquidation is opened or not, and shall refund any excess collateral to and settle accounts with the liquidator. If the collateral taker fails to exercise his or her right to direct satisfaction within three months following publication of the opening of liquidation, he or she may seek satisfaction as lien holder. If the collateral taker is under the debtor's majority control, he or she shall release the collateral to the liquidator – acting as the representative of the debtor – upon publication of the notice of liquidation. Collateral security may be arranged on money and securities and on payment account balances.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

The Bankruptcy Act does not stipulate special remedies regarding the unsecured creditors. Application of interim measures may be requested in accordance with the provisions of the Code of Civil Procedure.

Although, the regulations on preferred ranking claims secured by lien shall also apply to claims that are satisfied by seized movable property or for which the right of enforcement has been registered before the time of the opening of liquidation proceedings.

In bankruptcy and liquidation proceedings, the rank of the claims of the unsecured creditors will be lower than the rank of the secured ones (see question 38). However, the place in ranking of those claims under execution shall be determined consistent with the date of seizure of the movable property or the date of registration of the right of enforcement.

There are no specific statutory provisions dealing with pre-judgment attachments in Bankruptcy Act.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

In case of bankruptcy, the debtor shall notify its creditors directly within five working days following publication of the ruling ordering the opening of bankruptcy proceedings, and furthermore, shall publish a notice in a daily newspaper of nationwide circulation and also on its website (if available) advising the creditors to register their claims within the time limit specified and to make the payment charged for the registration of claims to the payment account of the administrator appointed by the court, and to attach the documents in proof of their claim.

In case of liquidation, upon the ruling ordering liquidation of a debtor becoming final, the court shall without delay appoint the liquidator and shall order to have the abstract of the ruling ordering liquidation and the ruling on the appointment of the liquidator published in the company gazette. The notice published shall contain, among others, a notice sent to the creditors to report their known claims to the liquidator within 40 days of publication of the ruling ordering liquidation.

Moreover, the directors of the company under liquidation are obliged to inform the beneficiaries of the claims specified in the Bankruptcy Act regarding the opening of liquidation proceedings within 15 days from the time of opening. If the director does not comply with the regulations, the court shall impose a fine.

In bankruptcy and liquidation proceedings, the meeting between the creditors and the debtor is called composition conference.

The liquidator shall send a financial statement and give account of his or her activities to the creditors' select committee (creditors' representative) quarterly, and report on the financial status (revenues, expenses) of the debtor and on the costs of liquidation.

33 Creditor representation

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?

Creditors may form a creditors' select committee for the protection of their interests and to provide representation, furthermore, to monitor the activities of the administrator and the liquidator. The select committee shall exercise the rights and entitlements conferred by the Bankruptcy Act. The select committee has, among others, the following rights:

- upon a request received during bankruptcy proceedings and liquidation proceedings, the director of the debtor company, the administrator or the liquidator shall, within eight working days, inform the select committee;
- the liquidator shall inform the select committee at least 15 days in advance, or eight working days in advance in justified cases, about any contracts that exceed the scope of day-to-day operations, the termination of valid contracts, and discarding the debtor's stocks, provided, however, that the committee shall have the right to comment such actions within eight working days of receipt of notice;

- the liquidator shall send a financial statement and give account of his or her activities to the select committee quarterly, and report on the financial status (revenues, expenses) of the debtor and on the costs of liquidation; and
- upon request, the liquidator shall present the timetable to the select committee, with entitlement to contest it in court, etc.

Only one select committee can be appointed in respect of any one company in debt. Other creditors may subsequently join in the operation of the creditors' select committee. In bankruptcy proceedings, a select committee shall be deemed legitimate if comprising at least one-third of the creditors with voting rights, and if these creditors control at least one-half of the votes. In liquidation proceedings, a select committee shall be deemed legitimate if comprising at least one-third of the notified creditors and these creditors hold at least one-third of all claims of creditors entitled to participate in the composition agreement. If the number of creditors operating the select committee is later reduced, and consequently the rate of participation no longer reaches the percentage required, the select committee shall cease to exist on the 30th day following the time of the occurrence of the said circumstance, except if other creditors have joined up within the said time limit, thereby reaching the required rate of participation. For the purpose of establishing a creditors' select committee or for selecting a creditors' representative, the liquidator shall convene all registered creditors within 75 days following the date of publication of the opening of liquidation.

The select committee's powers, representation of the creditors operating the select committee, the provision of funding and the rules for the advancing and accounting of costs and expenses shall be laid down by agreement concluded by the creditors. In the process of setting up and operating the select committee, voting rights shall be distributed among the participating creditors. Decisions shall be adopted by open ballot subject to simple majority. A creditors' select committee that was established in bankruptcy may continue to function in the liquidation proceedings, if it is able to meet the conditions specified.

Creditors may also appoint a creditors' representative instead of the creditors' select committee, who will have the same rights and entitlements as the select committee.

The creditors' select committee may request the court to appoint an expert for the cross-verification of the appraised value of the assets offered for sale, and shall advance the costs involved. The court shall decide upon the request within eight days. The fee of the expert shall be claimed under liquidation costs if the appraised value he or she had supplied is accepted. If the expert is of the opinion that the appraised value need not be modified, the expert's fee shall be borne by the creditors participating in the select committee in the percentage shown in their agreement for requesting an expert.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

The estate's rights are part of the assets of the company under liquidation. In principle, the creditors are not allowed to pursue the estate's remedies in the absence of assets to pursue a claim. It is the liquidator's right and obligation to enforce the claims. As regards the proceeds from assets realised in liquidation, the regulations on satisfying debts shall be applied. For further information see question 38.

35 Claims

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

In case of reorganisation, creditors shall make the payment charged for the registration of claims to the payment account of the administrator appointed by the court, and shall attach the documents in proof of their claim. No claim will be registered in the event of their failure to do so in

due time. Claims where any payment obligation of the debtor depends on a future event need not be notified yet. The registration of claims is subject to a registration fee payable by the creditor amounting to 1 per cent of the claim – 100,000 forints maximum – to the administrator's current account. The administrator shall then categorise and register the claims. The debtor and creditors shall be informed without delay concerning the classification of claims and the amount registered, and they shall be given an opportunity to present their views within five working days. Such comments shall be decided by the administrator and the creditor and the debtor shall be notified immediately, upon which they shall have five working days to submit any objection to the court concerning the administrator's action pertaining to the classification process, including the case where the administrator registered a claim of an amount other than the one notified by the creditor. The court shall adopt a decision relating to such objection in priority proceedings. The ruling may not be appealed separately.

In case of liquidation, the liquidator shall register the claims against the debtor that are notified after 40 days, but within 180 days of the publication of the opening of liquidation proceedings. These claims shall be satisfied if there are sufficient funds remaining following the settlement of the debts notified duly. The general rules on the order of satisfaction shall apply to the creditors notifying their claims past the prescribed time limit.

36 Set-off and netting

To what extent may creditors 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?

For the duration of the stay of payment, set-off may not be applied against the debtor; however, a set-off claim may be heard in judicial proceedings initiated by the debtor and still in progress, if submitted before the time of the opening of bankruptcy proceedings.

In a liquidation proceeding, only such claims can be set off that have been registered by the liquidator as acknowledged and have not been assigned subsequent to the time of the opening of liquidation proceedings, or, if the claim has occurred at a later date, subsequent to its occurrence. If performance is affected after the time of the opening of liquidation proceedings, the creditor may not exercise the right of set-off with regard to debts assumed under section 6:203 of the Civil Code (assumption of debt), or undertaken under section 6:206 of the Civil Code (undertaking a debt) inside a period of two years prior to the date when the court received the petition for opening liquidation proceedings, or subsequently, nor with regard to performance assumed under section 6:205 of the Civil Code (assumption of performance). The directors and executive employees of the debtor economic operator, their close relatives and their domestic partners, furthermore, any member (shareholder) of the economic operator with majority control over the debtor or the economic operator in which the debtor has majority control (or the member in the case of single-member companies, the owner in the case of sole proprietorships, or the foreign-registered company in the case of Hungarian branches) may not set off their claims against the debtor.

In addition, in the case of an agreement for close-out netting concluded prior to the time of the opening of liquidation proceedings, the creditor shall notify this net claim to the liquidator, and the liquidator shall enforce this net claim. Contracts underlying close-out netting arrangements or framework contracts may be avoided or cancelled only if done concurrently.

For further information in accordance with out of court proceedings, please see question 30.

37 Modifying creditors' rights

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

Under Hungarian law, the court may change the rank (priority) of a creditor's claim – which is determined by law, see question 38 – if the creditor appealed the administrator's decision of ranking its claim and the court rules in favour of the creditor.

38 Priority claims

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

In the liquidation process the following priority groups of claims exist:

- liquidation costs;
- claims secured;
- claims as alimony and life-annuity payments, compensation benefits, income supplement to minors, which are payable by the economic operator, furthermore monetary aid granted to members of agricultural cooperatives in lieu of household land or produce for which the beneficiary is entitled for his or her lifetime;
- claims of private individuals not originating from economic activities, claims of small and micro companies;
- debts owed to social security funds, taxes;
- other claims;
- default interests and late charges, as well as surcharges and penalty and similar debts; and
- claims, other than wages and other similar benefits.

In bankruptcy proceedings, the administrator shall categorise the claims as per the following:

- claims with regard to stay of payment; and
- secured and unsecured claims notified within the time limit.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

According to the Hungarian Labour Code, the employer shall be permitted to terminate an employment relationship by notice if undergoing liquidation or bankruptcy proceedings; thus, without stipulating differently in the contract, no claims will arise from termination. In case of different contractual obligations, the employee may submit a claim. The employer is entitled to collective redundancy according to the provisions of the Labour Code.

The employer shall be liable to pay up to six months' absentee pay due to the executive employee from the remuneration payable upon termination of his employment, if the notice of termination is delivered after the opening of bankruptcy or liquidation proceedings. Any additional sum shall be payable upon the conclusion or termination of bankruptcy proceedings, or upon the conclusion of liquidation proceedings.

40 Pension claims

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

Employers in Hungary have no obligations to offer pension plans, thus no claims arise against employers in case of insolvency proceedings. The administrator, however, is obliged to transfer the relevant data to the competent Hungarian authority, regarding employment relationships. Termination-related costs are considered liquidation costs, which have the highest priority among claims.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The 106/1995 (IX.8) Government Decree on the Requirements of Environmental and Nature Protection during Liquidation and Bankruptcy Proceedings stipulates the provisions regarding

environmental protection, the requirements and the manner of resolving environmental damage and contamination; furthermore, the types of expenses arising therefrom. According to the general rule, the liquidator shall provide for damage and contamination of the environment proven to originate from before the time of the opening of liquidation proceedings. This means that the costs of the necessary measures to be taken – even in the lack of the debtor's assets – to eliminate dangerous waste shall be borne by the central budget of the state.

Any creditor or – in the debtor's name – the liquidator may bring action during the liquidation proceedings for the court to establish that the former executives of the economic operator failed to properly represent the interests of creditors in the span of three years prior to the opening of liquidation proceedings in the wake of any situation carrying potential danger of insolvency, in direct consequence of which the economic operator's assets have diminished, or providing full satisfaction for the creditors' claims may be frustrated for other reasons. In the application of this provision, creditors' interests shall be considered to have been ignored if the executive failed to fulfil the obligations set out by law relating to the prevention of environmental damage or the seizure of environmental offenses, or concerning remediation, in consequence of which providing full satisfaction for the creditors' claims may be frustrated. If damage is caused by several persons together, their liability shall be joint and several.

See also question 18.

42 Liabilities that survive insolvency or reorganisation proceedings

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

In case of reorganisation, the qualified composition agreement shall decide about the survival of any liability, while in case of liquidation, after the proceeding is concluded, the economic operator ceases to exist, thus no liability survives.

43 Distributions

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

In case of reorganisation, distribution is made in accordance with the composition plan. In case of liquidation, distribution is made in accordance with the distribution plan prepared by the liquidator and approved by the court or the decision of the court. The time of the distribution depends on the claim. Generally, the claims shall be distributed within 30 days upon the approval of the closing balance sheet or the closing simplified balance sheet. In certain cases, the claim can be satisfied upon maturity (eg, working capital loans).

See question 38, where the rank of the claims is detailed.

Security

44 Secured lending and credit (immovables)

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

The main types of security on immovables are the real property mortgage and the independent lien.

The mortgage agreement is valid only if concluded in writing and in the form required for registration in the Land Register and goes into effect when it is registered. Priority is determined according to the date of registration; if more than one request is submitted on the same day, the priority is determined according to the date on which the mortgage agreement was concluded.

According to a recent amendment of the new Civil Code, 'seceded lien' has been abolished and independent lien has been introduced. A mortgage may be filed on a real estate property on a financial institution's behalf also by way of pledging the mortgaged property to secure a specific sum other than the secured claim (independent lien). The agreement on establishing the independent lien shall contain a description of the pledged property and indicate the specific sum up to which satisfaction may be sought from the pledged property. That sum shall be entered in the real estate register as well.

The conditions for exercising the right to satisfaction from the pledged property shall be fixed in a guarantee agreement between the

lien holder and the lienor. The guarantee agreement shall be made out in writing and shall specify the reason for which the independent lien is filed, the terms and conditions for, and the extent of, exercising the right to satisfaction, or if the right to satisfaction opens upon cancellation, the conditions for exercising the right of cancellation, including the notice period. The right to satisfaction may be exercised as laid down in the guarantee agreement.

An independent lien may be transferred to another financial institution in whole or in part, or in instalments. The party to whom the independent lien is transferred shall replace in the guarantee agreement the transferor, as commensurate according to the extent of the transfer. If the independent lien is transferred in part or in instalments, the acquiring party may request that the division of the independent lien is indicated in the real estate register.

45 Secured lending and credit (movables)

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

The main types of security on movables are mortgage on movables, pledge on movables, floating charge and security deposit in the form of money, securities or payment account balances (possessory lien).

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

The following transactions can be annulled or set aside. Contracts concluded by the debtor within five years preceding the date when the court received the petition for opening liquidation proceedings or thereafter, or his or her other commitments, if intended to conceal the debtor's assets or to defraud any one creditor or the creditors, and the other party had or should have had knowledge of such intent. Contracts concluded by the debtor within three years preceding the date when the court received the petition for opening liquidation proceedings or thereafter, or his or her other commitments, if intended to transfer the debtor's assets without any compensation or to undertake any commitment for the encumbrance of any part of the debtor's assets, or if the stipulated consideration constitutes unreasonable and extensive benefits to a third party. Contracts concluded by the debtor within 120 days preceding the date when the court received the petition for opening liquidation proceedings or thereafter, or his or her other commitments, if intended to give preference and privileges to any one creditor, such as the amendment of an existing contract to the benefit of a creditor, or to provide financial collateral to a creditor that does not have any. Contracts concluded by the debtor within three years before the date when the court received the petition for opening liquidation proceedings or thereafter, or his or her other commitments, if made for the purpose of transfer of ownership by way of guarantee, or the assignment of a right or claim by way of a guarantee or exercising a collateralised option to buy, where the beneficiary exercised such acquired right by failing to fulfil his or her obligation of accounting toward the debtor, or did so improperly, or failed to pay the amount remaining after the secured claim is satisfied; if the right-holder did not have the acquisition of ownership, or the assignment of a right or claim by way of a guarantee registered in the collateral register, or his or her buy option in the real estate register, the conditions for lodging a contest shall be presumed to exist.

The above transactions can be contested before the court by the creditor, and on behalf of the debtor, the liquidator within 120 days from the time of gaining knowledge or within a one-year limitation period from the date of publication of the notice of liquidation.

If the contest is successful, the provisions of the Civil Code pertaining to invalid contracts shall apply. The liquidator and the creditor may request on the grounds of invalidity to have the original state restored, and to have any right registered in a public register on the asset after the alienation of the asset stricken from the records.

Update and trends

Because of a recent amendment, the Bankruptcy Act contains additional rules on cross-border insolvency proceedings, in accordance with European Parliament and Council Regulation EU/2015/848.

The new EU Regulation basically sets out International Private Law rules relating to bankruptcy proceedings and liquidation proceedings. The EU Regulation applies to all cross-border insolvency proceedings, irrespective of whether the debtor is a natural or legal person, a trader or a private person; furthermore, it also stipulates that the law applicable to the insolvency proceedings is, in principle, the law of the country where the proceedings are opened.

A new element of the EU Regulation is the coordinated insolvency procedure of international Groups of Corporations, which aims to establish a unified strategy for the parties concerned to restore the solvency of Groups of Corporations and its members.

According to a new law of the Bankruptcy Act, in proceedings initiated at the request of the creditor, the court shall terminate the liquidation proceedings without the consent of the creditor if the debtor justifies that the entire claim (capital, interest, the creditor's costs incurred) has been paid.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Generally, there is no such restriction. However, if the debtor enters into an agreement with a company that is under its majority control, with a shareholder or directors of such company, or with their relatives, which agreement is intended to conceal the debtor's assets or to defraud the creditors, or to transfer the debtor's assets without any compensation, and such agreement is contested before the court, bad faith or gratuitous promise shall be presumed. Furthermore, bad faith or gratuitous promise shall also be presumed when such contract is concluded between economic operators that are not directly or indirectly connected by way of affiliation, but are controlled by the same person or the same company.

Groups of companies

48 Groups of companies

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

If any controlled member of the group is undergoing liquidation, the dominant member shall be held liable for any debt the member may have outstanding. The dominant member shall be relieved of liability if able to verify that the controlled member's insolvency did not arise as a consequence of the group's common business strategy. Majority control means a relationship where a natural or legal person (holder of a participating interest) controls over 50 per cent of the voting rights in a legal person, or in which it has a dominant influence.

Insolvency proceedings initiated against the foreign parent company abroad shall only apply to the Hungarian branch office under an international agreement or state of reciprocity or in accordance with European Parliament and Council Regulation EU/2015/848 on insolvency proceedings. If the branch office is not involved in the insolvency proceedings initiated against the foreign parent company abroad under the laws of that country because of the lack of an international agreement or state of reciprocity or if the provisions of European Parliament and Council Regulation EU/2015/848 apply, the general court responsible for the place where the branch office is registered shall order dissolution of the branch office ex officio on the basis of notification by the court of registry.

49 Combining parent and subsidiary proceedings

In 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?

There is no combined insolvency proceedings under Hungarian law. If any controlled member of the group is undergoing liquidation, the dominant member shall be held liable for any debt the member may have outstanding. The dominant member shall be relieved of liability if able to verify that the controlled member's insolvency did not arise as a consequence of the group's common business strategy.

International cases**50 Recognition of foreign judgments**

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?

The general rules regarding foreign judgments apply (with the provisions of the Insolvency Regulation of the EU). Hungary is not a signatory to any treaties on international insolvency or on the recognition of foreign judgments.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model Law on Cross-Border Insolvency has not been adopted in Hungary.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors are dealt the same in liquidations and reorganisations as any other creditor.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

The transfer of specific assets of the debtor under bankruptcy or liquidation cannot be transferred to another country, only in case of the administrator's (liquidator's) approval. For further information see question 24.

54 COMI

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?

No test is officially used to determine the COMI of a debtor company or group of companies. The Bankruptcy Act follows the applicable EU Regulation with respect of determining the COMI.

55 Cross-border cooperation

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 regulations of the EU regarding the recognition of foreign insolvency proceedings apply. In any other case, cooperation and recognition depend on bilateral treaties or on the principle of reciprocity. No court statistics are available regarding refusals.

56 Cross-border insolvency protocols and joint court hearings

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?

Cooperation in cross-border cases is based on the applicable EU laws in insolvency proceedings.

The Budapest Metropolitan Court shall have competence and jurisdiction to open and conduct main insolvency proceedings instituted against an economic operator covered by European Parliament and Council Regulation EU/2015/848, established in a place other than Hungary.

There is no publicly available information on any joint hearings.

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The Insolvency and Bankruptcy Code, 2016 (IBC) is the umbrella law for insolvencies and reorganisations in India. It is a relatively new law and the provisions relating to insolvency and liquidation of corporate persons only came into force on 1 December 2016. The provisions in the IBC relating to personal bankruptcy are yet to be notified. The new law provides for a two-stage process to deal with insolvency of a corporate person. In stage I, the corporate debtor undergoes a corporate insolvency resolution process where the creditors of the debtor attempt to resolve the insolvency of the corporate in a time-bound manner. To resolve the insolvency, 'resolution plans' for the debtor are invited from eligible persons and thereafter approved by the committee of creditors of the corporate debtor. If the corporate insolvency resolution process fails, the corporate debtor enters stage II for its mandatory liquidation.

Besides this, the Companies Act, 2013 (Companies Act) deals with schemes of reorganisation by companies (in a non-insolvency or non-liquidation scenario). The Companies Act provides for schemes of arrangement between the company and its creditors or any class of them or the company and its shareholders or any class of them. The scheme between the company and its creditors can be for any compromise or arrangement and can provide for restructuring of debt, reduction or preponement of debt, conversion of debt into other instruments etc. The scheme of compromise or arrangement between a company and its shareholders can provide for issuance of additional shares, reorganisation of capital, merger, demergers etc. A scheme could involve compromise or arrangement with both creditors and shareholders.

In addition, the Reserve Bank of India (the banking regulator in India) (RBI) has issued various circulars and notifications to the banks under the Banking (Regulation) Act, 1948 (Banking Act) for resolution or restructuring of loans given to distressed assets by the banks, outside the IBC or Companies Act.

2 Excluded entities and excluded assets

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

The IBC applies to all corporate persons (ie, a company, a limited liability partnership or person incorporated with limited liability under any law) other than a 'financial service provider'. Further, the IBC also applies to partnerships and proprietary concerns (though such sections are not in force yet). Hence, as of now, entities that are not corporate persons or are financial service providers are excluded from the IBC. Financial service providers are institutions engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator (for example, banks, non-banking finance companies, insurance companies). The reorganisation proceedings under the Companies Act applies to all companies (except banking companies). Insolvency and reorganisation of banks is dealt under the Banking Act.

As regards insolvency of corporate persons, the assets that are not owned by the corporation are not included within the estate of such corporation (and hence are excluded or exempt from claims of its creditors). For instance, personal assets of any shareholder (unless the assets are held on account of transactions that may be avoided in insolvency), assets held under trust or bailment contracts, assets in security collateral held by financial services providers that are subject to netting and set-off in multilateral trading or clearing transactions. However, in case any creditor holds security over third-party collateral (for example the personal assets of a shareholder), such creditor may enforce security against such assets, even during insolvency or liquidation proceedings of the principal debtor.

3 Public enterprises

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

There is no specific legislation for insolvency of government-owned enterprises. If the government-owned enterprise is a 'corporate person' under the IBC (ie, a company, a limited liability partnership or is incorporated with limited liability under any law, except a financial service provider), then the IBC will also be applicable to it and same procedures will apply for their insolvency and the creditors will have the same remedies as available to creditors of any other corporate person.

4 Protection for large financial institutions

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

Not yet. However, as mentioned, the IBC does not apply to entities that are financial service providers such as banks, insurance companies, non-banking finance companies, etc. The government is considering enacting a law to deal with insolvency of financial service providers.

Further, the government (under the Companies Act) and the RBI (under the Banking Act) has a right to order amalgamation of companies or banks (as relevant) in the national or public interest. The RBI, in 2014, released the framework to reduce the risks attributable to domestic systemically important banks. This framework was introduced to reduce risks attributable to Systemically Important Financial Institutions of India. Presently the RBI has identified three banks (ie, the State Bank of India, ICICI Bank and HDFC Bank) as domestic systemically important banks.

Apart from the above, there is no specific legislation dealing with institutions that are 'too big to fail'.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The courts of first instance dealing with the IBC and company law matters are the National Company Law Tribunals (NCLT), which are specialised tribunals constituted under the Companies Act. NCLT benches are spread across various parts of the country. The petition is

filed in the NCLT within whose jurisdiction the registered office of the relevant company is situated.

The appeal from the NCLT lies to the National Company Law Appellate Tribunal (NCLAT), which is situated in New Delhi. The appeal from the order of NCLAT lies to the Supreme Court of India (the highest appellate authority in India). The appeal against the order of NCLT or NCLAT can be filed on specific grounds mentioned in the IBC, within the specified limitation period. The right to appeal on such grounds (within the limitation period) is automatic. Appeals beyond the limitation period need to be condoned by the relevant appellate authority. There is no requirement to post security to proceed with an appeal and a simple fee for filing appeal as prescribed by the NCLAT Rules, 2016 would suffice.

Outside the IBC, the specialised courts dealing with enforcement of security interest by banks and financial institutions are the Debt Recovery Tribunals (DRT). The appeal can be filed within the limitation period before the Debt Recovery Appellate Tribunal (DRAT), and from there to the Supreme Court of India. The person aggrieved from the order of the DRT has to deposit an amount of 75 per cent of the amount due from him or her for purposes of appeal to DRAT.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Voluntary liquidation proceedings can be commenced by the corporate debtor under the IBC only in a no-default situation (ie, if it has not defaulted on any debt due to any person). In case there is a default on any debt, the only way for the debtor to commence its liquidation is by initiating its insolvency resolution process (ie, Stage I) under the IBC. As mentioned, if the debtor's insolvency cannot be resolved in Stage I, it is liquidated. For the process to initiate the voluntary insolvency resolution process, please see response to question 7.

For initiating voluntary liquidation in a no-default situation, the corporate debtor has to take the following steps.

Obtain a declaration by way of affidavit from the majority of partners (in case of a limited liability partnership) or individuals constituting the governing body in case of other corporate persons, stating that they have enquired into the affairs of the debtor and have formed an opinion that either the debtor has no debt or will be able to pay its debts in full from the liquidation estate; and that the debtor is not being liquidated to defraud any person. This declaration is to be accompanied with audited financial statements for the two preceding years or for the period since its incorporation (whichever is later) and a report of assets, if any.

- Within four weeks of such declaration, the debtor is required to obtain approval of shareholders or partners (as the case may be) for voluntary liquidation and appointment of liquidator by way of special majority or resolution. A special resolution in the context of a company means a vote of shareholders holding 75 per cent or more shareholding.
- If the debtor owes any debt to any person, creditors representing two-thirds in value of the debt should also approve this resolution. The debtor is then required to notify the Registrar of Companies and the Insolvency and Bankruptcy Board of India about the resolution passed.

The voluntary liquidation proceedings in respect of a corporate person shall be deemed to be commenced from the date of passing of the special resolution. Once this resolution is passed by the shareholders, the company cannot carry any business except for completion of such liquidation. A liquidator is appointed by the shareholders who performs his or her duties under the IBC. These include inviting and verifying claims against the company, taking custody of all assets of the company, selling the liquidation estate and distributing the assets to the stakeholders as per the prescribed waterfall mechanism. Once the assets have been completely liquidated, the liquidator makes an application to the NCLT for dissolution of the company. Once the dissolution order is passed by the NCLT, the company stands dissolved.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Under the IBC

A corporate debtor who has committed a default may initiate its own corporate insolvency resolution process (voluntary reorganisation) under the IBC by filing an application with the relevant NCLT. Such filing requires a special resolution of the shareholders of the corporate debtor (in case of a company) and resolution of at least three-quarters of the total number of partners (in case of a limited liability partnership).

The application to NCLT must be filed in a prescribed form along with prescribed documents (including documents showing debt and default) and the requisite fees. The NCLT has the power to accept or reject such application (and in case of rejection, the NCLT is required to give a notice to the applicant to rectify the defects in its application within a prescribed period). Once the application gets accepted or admitted by the NCLT by way of an order, the corporate insolvency resolution process (ie, reorganisation process) starts.

Upon passing of the admission order by the NCLT, a moratorium (in respect of actions against the debtor) comes into effect and is in effect during the entire resolution process. An interim resolution professional is appointed for the debtor to oversee the resolution process (this is akin to an administrator) and the powers of the board of directors of the debtor are suspended and vest with the interim resolution professional. The interim resolution professional invites claims from creditors and forms a committee of creditors that can either continue with the interim resolution professional as the resolution professional or replace the interim resolution professional with a new resolution professional. The resolution professional manages the debtor as a going concern and invites 'resolution plans' for the debtor from persons who satisfy the eligibility criteria laid out by the resolution professional with approval of the committee of creditors. Any person who satisfies the eligibility criteria and is otherwise not disqualified to present the plan under the IBC can submit a resolution plan for the debtor.

The resolution plan sets out proposals for resolving insolvency of the company and can include proposals for debt restructuring, sale of assets, merger, takeover of company etc. This is essentially a reorganisation plan for the company. All resolution plans that comply with requirements of IBC are placed before the committee of creditors before their consideration. If any resolution plan is approved by the committee (with a vote over 66 per cent), it is presented to the NCLT for final approval.

The entire corporate insolvency resolution process (from date of admission of petition or application till submission of the resolution plan with NCLT for its approval) must be completed within a time period of 180 days (extendable to 270 days in certain circumstances). If during this period, no resolution plan is approved by the committee and submitted to the NCLT, the company is mandatorily liquidated.

If the resolution plan is approved by the NCLT, the same is binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

Under the Companies Act

The aforesaid process is for a reorganisation under the IBC. In addition, as mentioned earlier, voluntary reorganisation under the Companies Act can be undertaken by a company by formulating a scheme of arrangement or compromise (Scheme). The Scheme can be between the company and its creditors or any class of them or the company and its shareholders or any class of them. A Scheme could involve compromise or arrangement with both creditors and shareholders.

For approval of a Scheme, an application is made by the company to the NCLT in a prescribed format, along with the Scheme and prescribed documents. In such application, the company will request separate meetings of creditors or class of creditors, or shareholders or class of shareholders to approve of the Scheme. The NCLT directs holding of such meetings of creditors or shareholders and also appoints a chairperson for the meeting. Once such direction is given, a notice of the meetings is given to all the creditors, members and relevant government authorities or regulators in a prescribed form and accompanied by a statement disclosing the prescribed details of the Scheme. The government authorities or regulators can make representations in respect of the Scheme, if any, to the NCLT within a period of 30 days

from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the Scheme.

If at the NCLT convened meetings, a majority of persons representing three-quarters of the creditors or shareholders (or class thereof) as the case may be, approves the Scheme, then a petition is filed with the NCLT for sanction of the Scheme. Upon hearing of the petition, and objections (if any), the NCLT sanctions the Scheme by way of an order. The Scheme becomes effective once a certified copy of the NCLT order is filed with the Registrar of Companies.

Once the Scheme is sanctioned, the same is binding on the company, its creditors, shareholders and contributories.

8 Successful reorganisations

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

Under the IBC, creditors are broadly classified as financial creditors and operational creditors. All financial creditors (secured and unsecured) have a right to constitute the committee of creditors and a right to vote on the resolution plan. The operational creditors do not form part of the committee of creditors and hence have no voting rights. A financial creditor is a person to whom a financial debt is owned (including assignee or transferee). An operational creditor, on the other hand, is a person to whom an operational debt is owned (including assignee or transferee).

As mentioned earlier, all persons who fulfil the eligibility criteria approved by the committee and are otherwise not disqualified under the IBC can submit a resolution plan. All resolution plans that comply with the mandatory requirements set out under the IBC are placed before the committee for its consideration. The committee may approve any resolution plan by a vote of not less than 66 per cent of the voting share (calculated with reference to the value of financial debt admitted), after considering its feasibility and viability. The approved resolution plan is thereafter submitted to the NCLT. If the NCLT is satisfied that the resolution plan meets the mandatory requirements of the IBC (and accompanying regulations) and has provisions for its effective implementation, it shall, by order, approve the resolution plan.

The IBC also recognises the classification of creditors into secured and unsecured creditors for purpose of 'distribution waterfall' in liquidation. While for the purpose of liquidation, secured creditors get priority over unsecured creditors in distribution of the liquidation estate, it is unclear as to whether the resolution plan can provide differential treatment to secured and unsecured financial creditors (the issue in this regard is pending before NCLAT at the time of writing).

The Companies Act also recognises the concept of 'class of creditors' for the purpose of a re-organisation plan. Broadly speaking, courts in India have held secured and unsecured creditors as separate classes of creditors for the purpose of voting for a re-organisation plan under the Companies Act. For the process of approval of a Scheme under the Companies Act, see question 7.

Release of non-debtor parties

Once approved, the resolution plan and Scheme (as relevant) are binding on the stakeholders. Hence, discharge of non-debtor parties would depend on the terms of the resolution plan or Scheme. However, there are exceptions to this rule and the law in this regard is not fully settled. For instance, the resolution plan or Scheme may not discharge the officers of the company in respect of breach of their statutory or fiduciary duties or from criminal liabilities. As regard guarantors, the Indian Contract Act provides for discharge of surety in cases where the principal debtor is discharged or released, or where creditor compounds with the principal debtor or where the contract with debtor is varied (without the guarantor's consent). Hence, there is some case law to suggest that a voluntary Scheme or composition will discharge the guarantors. However, being a new law, the position under the IBC is not clear as regards discharge of the guarantor pursuant to a resolution plan. A recent ruling by the Supreme Court suggests that the guarantor may not get discharged if the resolution plan itself provides for payment to the creditors by the guarantor.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

In a default situation, direct liquidation of debtor by the creditor is not possible. The debtor will first need to undergo the corporate insolvency resolution process under the IBC. A financial creditor or operational creditor of the debtor can initiate the resolution process of the debtor by filing an application to the NCLT (having jurisdiction over registered office of the debtor) in case there is a default of 100,000 rupees or more. There is some difference between filings by a financial creditor and filings by an operational creditor. See question 10 for details on filings by financial creditors and operational creditors for initiating this process.

Once the application of the creditor for initiating insolvency resolution gets admitted by the NCLT, the corporate insolvency resolution process of the corporate debtor starts. See question 7 on the process that follows once the corporate debtor is placed in the corporate insolvency resolution process. If the corporate insolvency resolution process is successful (ie, a resolution plan for the debtor gets approved by the committee of creditors and then by the NCLT), then the debtor will not be liquidated. On the other hand, the NCLT will pass a liquidation order for the debtor if:

- no application is filed with the NCLT for approval of the resolution plan within the prescribed timeline (180 to 270 days from admission);
- the resolution plan (if filed before the NCLT) is rejected by the NCLT for non-compliance;
- prior to confirmation of a resolution plan, the committee of creditors decide to liquidate the debtor; or
- a resolution plan approved by the NCLT is contravened by the corporate debtor.

Upon passing the liquidation order by the NCLT, a liquidator is appointed by the NCLT and the liquidation process commences. The order for liquidation shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator. Just like a resolution professional, the liquidator takes control and custody of the assets of the debtor (the board of director remains suspended) and invites claims from the creditors of the debtor. The liquidator also forms a liquidation state and makes distributions to the stakeholders as per the distribution waterfall provided under the IBC. Once all the assets are distributed, the liquidator makes an application to NCLT for the dissolution of the debtor. During the liquidation period, no suit or legal proceedings can be instituted against the debtor.

There is no material difference between the voluntary and involuntary commencement of insolvency resolution and further, once the corporate insolvency resolution process commences, the process of finding a resolution is also the same. In both cases, if the resolution is not achieved during the prescribed timelines, the NCLT passes a liquidation order and here again, the process of liquidation remains the same.

However, there is material difference in the process of starting voluntary and involuntary liquidation. Voluntary liquidation can only be started by the debtor itself in no-default cases, after taking shareholder consent. NCLT approval is not required for starting voluntary liquidation proceedings. As opposed to this, involuntary liquidation by a creditor can only be done after first going through the resolution process and it is the NCLT that passes the liquidation order upon failure of the resolution process. See question 6 on the process of voluntary liquidation.

Once the liquidation starts, thereafter, the process followed by the liquidators in liquidating the estate is similar. However, the NCLT supervision is much greater in cases of involuntary liquidation, as opposed to voluntary liquidation.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

The IBC

Under the IBC, a financial creditor or operational creditor of the debtor can initiate the corporate insolvency resolution process of the debtor by filing an application under the IBC to the NCLT (having jurisdiction over the registered office of the debtor) in case there is a default of 100,000 rupees or more. There is some difference between filings made by operational and financial creditors.

The financial creditor files the application to the NCLT in a prescribed form along with all prescribed documents (including documents showing debt and default) and the requisite fees. The financial creditor is also required to nominate an interim resolution professional for the corporate debtor. The NCLT reviews the application, checks if the same is complete and admits it if there is a debt and default. A financial creditor may file an application not only in case of default in its own debt but even in case of default in any financial debt of any other financial creditor.

On the other hand, the operational creditor can file an application only in case of default in its own operational debt. Before filing the application, the operational creditor must issue a statutory demand notice on the debtor. The debtor then has 10 days to either pay or issue a notice of dispute, bringing to the notice of the creditor, the existence of a dispute on payment of the debt. Such dispute should exist prior to receipt of the demand notice by the debtor. If the debt is not disputed, the operational creditor can file an application to the NCLT in a prescribed form along with all prescribed documents (including documents showing debt and default) and the requisite fees. The NCLT reviews the application, checks if the same is complete and admits it if there is a debt and default and provided there is no existence of dispute.

In either case, the NCLT will issue notice to the corporate debtor and give it an opportunity to oppose the admission. In case the NCLT notices any defects in the application, then before rejecting the application, the NCLT shall give a notice to the applicant to rectify defects in its application within a prescribed period. Once the application of the creditor is admitted by the NCLT, the corporate insolvency resolution process of the corporate debtor starts. See question 7 on the process that follows once the corporate insolvency resolution process starts.

Companies Act

Under the Companies Act, a creditor can file an application before the NCLT for compromise or arrangement between the debtor and its creditors by way of a Scheme. The requirements for creditors commencing an involuntary reorganisation are the same as those outlined in question 7.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

There is no concept of a prepackaged reorganisation under the IBC. Once the corporate insolvency resolution process for a company starts, the process provided in the IBC (and related regulations) on invitation and approval of a resolution plan needs to be followed. Any eligible person can submit a resolution plan and all complying plans are placed before the committee of creditors for its consideration. However, there are provisions for a 'fast-track' corporate insolvency resolution process. An application for a fast-track corporate insolvency resolution process can be made in respect of certain categories of corporate debtors – namely, debtors having assets and income below a level as may be notified by the government, debtors having a class of creditor or amount of debt notified by the government or such other category of corporate persons as may be notified by the government. The prescribed time limit for completion of this process is 90 days from the date of the admission of the application (extendable by a further period of 45 days).

Besides this, parties can agree on expedited re-organisations outside the IBC under the framework of guidelines passed by the RBI for debt restructuring of distressed assets.

12 Unsuccessful reorganisations

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?

Reorganisation by way of resolution plan

Under the IBC, a proposed reorganisation is by way of a resolution plan. The resolution plan must be submitted by eligible persons and must comply with certain mandatory provisions specified in the IBC (and related regulations) and should be approved by the committee of creditors (by not less than 66 per cent voting share) within the mandated time frame of 180 to 270 days. Once approved by the committee of creditors, the plan has to be approved by the NCLT. Hence, a proposed reorganisation is defeated if no resolution plan is received or if the committee of creditors do not approve any resolution plan within the mandated time frame or if prior to confirmation of a resolution plan, the committee of creditors decide to liquidate the debtor. The reorganisation is also defeated if the NCLT rejects the resolution plan submitted to it (though the scope of judicial review is limited). If the proposed reorganisation is defeated, the NCLT passes an order for liquidation of the debtor.

If the debtor contravenes a resolution approved by the NCLT, any person (other than the corporate debtor) whose interests are prejudicially affected by such contravention can make an application to the NCLT for liquidation of the debtor. Further, a corporate debtor is liable to be punished with imprisonment of not less than one year, but which may extend to five years, or with a fine that shall not be less than 100,000 rupees but may extend to 10 million rupees, or both.

Reorganisation by way of a Scheme

A proposed reorganisation (ie, scheme of arrangement or compromise) under the Companies Act may be defeated if it is not approved by the majority of person representing three-quarters in value of the creditors, class of creditors, shareholders or class of shareholders (as relevant). Further, the NCLT may reject the Scheme if the requirements under the Companies Act are not met or if any objection to the Scheme is made (and it agrees with such objection) or if it is contrary to public interest. Here again, the scope of judicial review by the NCLT is limited. If the Scheme is not approved by the NCLT, the reorganisation fails and does not have any effect. Further, once the Scheme is sanctioned by the NCLT, the NCLT has the power to supervise its implementation and if it is satisfied that the sanctioned scheme cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the Scheme, it may make an order for liquidation of the company.

13 Corporate procedures

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

In bankruptcy proceedings, once a liquidation order is passed against the debtor (see question 12), the liquidation process is carried out by the liquidator. After all assets of the debtor are distributed by the liquidator to the stakeholders, the liquidator files an application to the NCLT for dissolution of the corporate debtor. The NCLT, on receiving such application, orders the dissolution of the debtor and from the date of the dissolution order, the debtor stands dissolved.

In a non-bankruptcy scenario, dissolution can take place in the manner outlined below.

In case of voluntary liquidation, similar to liquidation in a bankruptcy scenario, the liquidator files for dissolution once the assets of the corporation are distributed. In this case, as mentioned earlier, NCLT supervision is less involved when compared to liquidation in a bankruptcy scenario.

Under the Companies Act, a company can be wound up by the NCLT (and thereafter dissolved after the liquidation process) if a default is made by the company in making filings of its balance sheet and profit and loss account or annual return to the Registrar of Companies for any consecutive five years or if the company does not commence its business within a year from its incorporation or suspends its business for a whole year or if the NCLT is of the opinion that it is just and equitable that the company should be wound up. Here also, the process of dissolution is similar to bankruptcy scenario cases, except that here the

liquidator is appointed under the Companies Act and the duties of the liquidator are different from those of a liquidator under the IBC.

There are also provisions under the Companies Act for striking off of a company from the Registrar of Companies (without following liquidation process) in the following circumstances:

- if a company fails to commence its business within one year of its incorporation;
- if a company is not carrying on any business or operations for a period of two consecutive financial years and has not made any application for obtaining a status of dormant company; or
- where the company after extinguishing all its liabilities, obtains a special resolution or consent of shareholders holding a 75 per cent shareholding.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

The liquidation proceedings are formally concluded by passing of the dissolution order by the NCLT (once the assets of the debtor are distributed). Such order is also filed with the Registrar of Companies. The company stands dissolved from the date of the NCLT order and the Registrar of Companies will record the same in their minute book, recording the dissolution of the company and deleting the name of the company from its records.

In the case of reorganisation under the IBC, the process is successfully concluded when the NCLT passes an order approving the resolution plan. In case of failure of reorganisation, the liquidation order is passed. Under the Companies Act, the reorganisation is concluded when the NCLT passes an order approving the Scheme and the said order is filed with the Registrar of Companies. In addition, the reorganisation then has to be carried out in terms of the resolution plan or Scheme (as relevant).

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

Under the IBC, insolvency is tested by checking if there is a default of 1 million rupees or more in payment of financial debt or operational debt. In addition, in case of operational debt, NCLT will also test if the debt is undisputed.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

A company may file (but is not mandated to file) for initiation of insolvency proceedings if it commits a default of 1 million rupees or more. However, see question 17 on liabilities of directors for wrongful trading.

Directors and officers

17 Directors' liability - failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

The directors are not mandated to commence insolvency proceedings and there are no specific provisions in the IBC penalising directors or officers for carrying on business while insolvent. However, there are wrongful trading provisions in the IBC that make directors liable to contribute to assets of the debtor if, before insolvency commencement, such director knew or ought to have known that there was no reasonable prospect of avoiding the commencement of the debtor's resolution process and such director failed to exercise due diligence in minimising the potential loss to the creditors of the debtor. Hence, under this wrongful trading provision, a director could be made liable for carrying on business while insolvent if he or she knew (or ought to have known) about the insolvency and failed to exercise due diligence during this period in minimising the potential loss to the creditors.

18 Directors' liabilities - other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

The directors or officers are not ordinarily personally liable for the company's obligations. In respect of pre-insolvency actions, apart from liability for wrongful trading as mentioned in response to question 17, under the IBC, the directors and officers of the company can be made liable for fraudulent trading. Hence, if they are knowingly parties to the carrying on of the business of corporate debtors with intent to defraud creditors or for any fraudulent purpose - in such a case, they can be made liable to make such contributions to the assets of the corporate debtor as the NCLT may deem fit. This is a civil sanction.

In addition, under the IBC, the directors or officers can be punished for the following offences committed by them prior to the insolvency commencement date. These are criminal sanctions where they can be punished with imprisonment for a term of three to 5 years or with a fine of between 100,000 to 10 million rupees, or both:

- if they are involved in concealment of any property or any debt that is due to or from the company or fraudulently removing any part of the property of the company within 12 months immediately preceding the insolvency commencement date;
- if they are involved in concealment, destroying, mutilating or falsification of the books of the company within 12 months immediately preceding the insolvency commencement date;
- if they have wilfully created any security interest over, transferred or disposed of any property of the company that has been obtained on credit and has not been paid for within 12 months immediately preceding the insolvency commencement date, unless such creation, transfer or disposal was in ordinary course of business; or
- if prior to the insolvency commencement date, they have made a false representation to the creditor of the company or committed any fraud for the purpose of obtaining the consent of the creditors to an agreement with reference to the affairs of the corporate debtor.

Note that even otherwise, under various Indian laws, directors or officers can be made vicariously liable for offences committed by the company. Such liability typically arises when they have knowledge of the offence or were involved in the offence or did not undertake due diligence in preventing the offence.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Yes, under wrongful trading provisions, directors have a duty to exercise due diligence to minimise the potential loss to the creditors during the period when they knew or ought to have known that there is no reasonable prospect of avoiding the insolvency commencement of the company.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

When insolvency or liquidation proceedings under the IBC are admitted, the powers of the board of directors are suspended and are instead exercised by the insolvency professional appointed by the NCLT (interim resolution professional or resolution professional). During this time, the directors and officers are required to report to the insolvency professional and extend all cooperation to him or her, as required for managing the affairs of the company. The directors have a right to participate (but not vote) in the meetings of the committee of creditors of the company. Apart from this, the directors or officers don't exercise any powers after commencement of insolvency or liquidation proceedings under the IBC.

In case the company is reorganising itself under the Companies Act, 2013, no powers of the directors and officers are affected by the said restructuring.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

Upon admission of an application by the NCLT for initiation of the corporate insolvency resolution process, a statutory protection or moratorium is available to the debtor. The moratorium extends during the entire period of corporate insolvency resolution and prohibits institution or continuation of a suit or proceedings against the debtor, as well as recovery and enforcement of security by the creditors. In case of liquidation also, after the liquidation order is passed by the NCLT, no suit or legal proceeding can be initiated against the debtor. However, a secured creditor can choose to stand outside the liquidation and enforce its security in accordance with law. The moratorium is absolute, and creditors cannot obtain relief from the prohibitions.

In case of a reorganisation under the Companies Act, no moratorium protection is available under law. However, in exceptional circumstances, the NCLT may provide some moratorium protection even in case of reorganisation under the Companies Act (this was provided in a recent case).

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

After the commencement of insolvency resolution of the debtor under the IBC, the insolvency professional (and not the board) carries out the business of the debtor as a going concern. During this period, certain key actions by the insolvency professional require prior approval of the committee of creditors. Except for this, neither the creditors nor the NCLT supervise a debtor's business activities. Also in case of liquidation, the powers of the board vest with liquidator. However, in liquidation, the liquidation order discharges all employees and officers of the company unless the business of the company is continued during the liquidation process by the liquidator. In this case, neither the creditors nor the NCLT play any role in supervising the debtor's business activities.

In case of reorganisation under the Companies Act, the existing management continues and there is no specific bar on them (in law) in carrying out the company's business. Neither the creditors nor the NCLT play any role in supervising the debtor's business activities in this case. No special treatment is given to the creditors who supply goods and services during the reorganisation under the Companies Act.

23 Post-filing credit

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

Under the IBC, after commencement of the insolvency resolution process, the interim resolution professional can raise interim finance (secured or unsecured). Creation of security over already encumbered assets requires prior consent of the relevant secured creditor, unless the value of such property is not less than the amount equivalent to twice the amount of the debt. Once the committee of creditors is formed (this takes about a month), the resolution professional can also raise interim finance and create security with approval of the committee (66 per cent vote). The amount of interim finance forms part of the insolvency resolution process costs and is given priority along with other such costs in reorganisation as well as in liquidation.

Raising of loans or credit in case of reorganisation under the Companies Act is not regulated.

24 Sale of assets

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?

During the corporate insolvency resolution process under the IBC, the resolution professional may sell unencumbered assets of the debtor outside the ordinary course if such sale is necessary for the better realisation of value under the facts and circumstances of the case. Such sale requires approval of the committee of creditors. The purchaser acquires a free, clear and marketable title to such assets notwithstanding the terms of the constitutional documents of the corporate debtor, shareholders agreement, joint venture agreement or other documents of similar nature. Other than this, the resolution plan for the company may provide for the sale of assets of the company or business.

In liquidation, the liquidator will sell the assets forming part of the liquidation estate. The sale may take place through auction or by way of private sale (subject to certain conditions). The liquidator may do piecemeal sale of assets or may carry out a 'slump sale' (by consolidating assets) or may even sell the business as a going concern. In liquidation, the liabilities of the company are dealt with by way of distribution against such liabilities as per distribution waterfall. However, because the sale of assets in liquidation is on an 'as is where is' basis, the purchaser may not be able to acquire the assets 'free and clear' of liabilities, if any liability is attached to a specific asset.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Neither the IBC nor the Companies Act deals with stalking horse bids or credit bidding in sales. Note that the process of calling for a resolution plan under the IBC is regulated and all complying resolution plans need to be placed before the committee of creditors for its consideration. The plans are then tested on an evaluation matrix, which is approved by the committee. The committee may follow a negotiation or bidding process with applicants that it deems suitable. However, entering into an interim sale agreement during this process with a bidder may not be possible given that only a resolution plan can be voted by the committee. As far as credit bidding is concerned, the IBC or the court do not regulate this. A resolution plan submitted by a creditor could possibly provide for credit bidding (provided other mandatory requirements of a resolution plan are met).

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

There is no provision for rejection or disclaimer of unfavourable contracts in a reorganisation process. Such a disclaimer may not be possible in reorganisation under the Companies Act. However, in case of reorganisation under the IBC, rejection of a contract is possible if the same relates to an avoidance transaction (ie, preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction). In such a case, the resolution professional will make an application before the NCLT for avoidance of the contract and the NCLT may, if conditions of the avoidance transaction are met, set aside or modify such transactions (see question 46). Further, a resolution plan under the IBC could possibly provide for rejection of an unfavourable contract; however, the legality of this is not finally settled yet.

Disclaimer of onerous contracts is possible in liquidation. When any part of the property of the corporate debtor consists of land of any tenure, burdened with onerous covenants; or shares or stocks in companies; or any other property not saleable thereof being bound by a performance of any onerous act; or unprofitable contracts, then the liquidator can make an application to the NCLT within six months of the

liquidation commencement date to disclaim such property or contract. The liquidator is required to serve notice to persons interested in the onerous property, at least seven days prior to making an application for disclaimer.

There are no specific provisions dealing with the effect of a debtor breaching a contract after initiation of insolvency proceedings. Such contracts continue to be binding and the counterparty could have a claim against the debtor under contract law. However, this is subject to the moratorium provisions, which provide that no suit or arbitration proceedings can be commenced against the debtor during the corporate insolvency resolution process.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

This would depend on the terms of the IP agreement. Neither the Companies Act nor the IBC provide protection against termination of IP contracts. In a reorganisation, the insolvency professional can take control and custody of the intangible assets of the debtor and continue to use it to carry on business, subject to its terms. Similarly, in liquidation, if the liquidator is continuing the business of the company, he or she may continue to use the IP, subject to its terms.

28 Personal data

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

In case of corporate insolvency resolution process under the IBC, all confidential information of the company is shared with potential purchasers (who wish to conduct due diligence), subject to receipt of confidentiality undertaking. Further, the insolvency professional is required to maintain confidentiality of all the information relating to the insolvency resolution process and liquidation process. However, the insolvency professional can share the information with the consent of the parties or as required by law. Further, the law relating to protection of 'personal information' will continue to apply. In India, the 'sensitive personal data' or 'personal information' of individuals is protected under the Information Technology Act and the same cannot be transferred except with consent of the relevant individual.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Once insolvency proceedings are admitted or liquidation commences under the IBC, there is a moratorium on all arbitration proceedings against the company. During the corporate insolvency resolution process, a company may continue arbitration proceedings that are for its benefit and in liquidation, the liquidator can commence legal proceedings on behalf of the company with NCLT consent. However, the arbitration proceedings are not used in relation to liquidation or reorganisation proceedings as only the NCLT (and the appellate authorities) has jurisdiction to resolve legal issues arising in such proceedings.

The following types of disputes may not be arbitrated:

- disputes related to rights and liabilities arising from criminal offence;
- matrimonial disputes;
- guardianship matters;
- insolvency and winding up;
- fraud;
- anti-trust or competition;
- patent, trademark and copyright; and
- matters related to eviction of tenants.

Creditor remedies

30 Creditors' enforcement

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 the application for initiation of the corporate insolvency resolution process is admitted under the IBC, the creditors cannot enforce security or seize assets of the company during the moratorium period. There is no process by which any creditor may do this.

However, in case of liquidation, a secured creditor may choose to realise its security interest outside the liquidation proceedings. Before undertaking any such action, the secured creditor has to notify the liquidator and the liquidator is required to verify the security interest. Banks or financial institutions may sell the secured assets in accordance with laws applicable to enforcement of security, without any further interference of the liquidator (except payment of their pro-rata share of corporate insolvency resolution process costs, to the extent unpaid). The other secured creditors need to intimate the liquidator of the price at which they propose to realise their secured asset. The liquidator can inform the secured creditor within a specified period if any person is willing to buy the asset at a higher price within a specified period, in which case, the creditor shall sell the asset to such person. If the liquidator does not so inform the creditor or if the buyer does not buy the asset, the secured creditor may realise the secured asset in the manner it deems fit, but at least at the price intimated to the liquidator.

Except for the above, there is no process by which a creditor can seize assets forming part of a liquidation estate.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Before the admission of the insolvency petition, an unsecured creditor can file recovery suits before the Indian civil court for recovery of its debt or initiate arbitration proceedings (in case of an arbitration clause in the agreement). If the financial unsecured creditor is a bank or financial institution, it can file an application for recovery under the provision of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 before the Debt Recovery Tribunal. Criminal proceedings can also be started by the creditor in case of dishonour of cheques. Such processes are time consuming. Pre-judgment attachments may be available by way of court order if the court is satisfied that the debtor may dispose of the asset.

Once insolvency proceedings are admitted, the unsecured creditor cannot maintain or continue recovery proceedings against the company and can only file a claim form with the interim resolution professional or resolution professional. If the claim is rejected, the unsecured creditor can appeal against the rejection to the NCLT. In a resolution process, the claim of the unsecured creditor will be dealt with in the resolution plan.

In liquidation, the remedy available to the unsecured creditor is to file a claim with the liquidator. If the claim is rejected, the unsecured creditor can appeal against the rejection to the NCLT. Once the claim is admitted, the distribution takes place only as per the prescribed waterfall mechanism.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

The IBC

Both during the reorganisation of debtor as well as in liquidation, the interim resolution professional or liquidator (as relevant) makes a public announcement calling upon the creditors of the debtor to submit

their respective claims. Such claims are then verified and admitted by the insolvency professional.

In case of reorganisation under the IBC, the insolvency professional constitutes a committee of creditors (comprising of financial creditors) and holds regular meetings of the committee. The meetings of the committee are called by giving a notice to the participants (of a prescribed number of days). All important information about the company is shared with the committee during the insolvency process, including claims received and admitted and the information memorandum of the company (containing prescribed details of the company including list of assets). The liquidation value and fair value of the company (as per valuations commissioned by the resolution professional) is also shared with the committee once the resolution plans are received.

In liquidation, there is no committee of creditors and hence there are no specific meetings required to be held between the liquidator and creditors and no specific information that needs to be shared with the creditors. However, the liquidator may conduct a consultation meeting with the stakeholders (including creditors). Further, a liquidator has extensive reporting requirements to the NCLT (for instance, a liquidator is required to prepare and submit to the NCLT a preliminary report, an asset memorandum, progress reports, sale report, minutes of consultation with stakeholders and final report prior to dissolution). The asset memorandum containing details of assets of the company is not accessible to any person during the course of liquidation; however, a creditor may apply to the NCLT to get such access.

Companies Act

In case of reorganisation under the Companies Act through a scheme or compromise or arrangement, a meeting of creditors is called pursuant to the order of the NCLT. A notice of the meeting is given to creditors and such meeting is required to be conducted as per the directions of the NCLT. The notice of the meeting given to the creditors is accompanied by all important details about the Scheme, including the terms of the proposed reorganisation or arrangement, a copy of the valuation report (if any) and a report capturing the effect of the reorganisation on the creditors, key managerial personnel, promoters, non-promoters etc.

33 Creditor representation

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 IBC

A committee of creditors is constituted by the interim resolution professional during the corporate insolvency resolution process, comprising financial creditors of the debtor whose claims have been admitted. Related parties of the debtor do not have any right of participation or vote in the committee. In case there are no financial creditors or if all financial creditors are related parties then the committee can comprise of 18 of the largest operational creditors by value, one representative elected by all the workmen and one representative elected by all the employees.

The committee oversees the resolution process and all key decisions during this period can be taken by the resolution professional only after the committee's approval. These include decisions on raising of interim finance, creation of security interest over the assets of the corporate debtor, change in the capital structure, change in management and most importantly, approval or rejection of a resolution plan for the debtor.

Both resolution professional as well as the committee can appoint or retain professional advisers including counsels. The fee or expenses of advisers of the resolution professional forms part of the insolvency resolution process cost (to the extent they are ratified by the committee) and are paid in priority in case of resolution or liquidation of the company. However, the expenses of advisers of the committee are borne by members of the committee (in accordance with their inter-creditor arrangements).

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

The IBC does not provide the creditor with any right to pursue an estate's remedies on their own. However, the liquidator may sell the actionable claims of the corporate debtor in liquidation by auction or by private sale and in such a case, the buyer (who may also be a creditor) can pursue the actional claim and retain the fruits of the remedies.

35 Claims

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

Submission of claims

Once the NCLT admits a corporate debtor into the corporate insolvency resolution process, a public announcement is made by the interim resolution professional (within three days of his or her appointment) inviting claims from the creditors of the debtor by publishing the relevant details in an English-language newspaper and a regional-language newspaper with wide circulation. Thereafter, the creditors are required to submit their claims in a specified format to the interim resolution professional within 14 days of the date of appointment of the insolvency resolution professional. If a creditor fails to submit its claim with such 14 days, then the creditor may submit the claim on or before the 90th day from the insolvency commencement date.

In a liquidation process, once the NCLT passes the liquidation order, the liquidator appointed by the NCLT issues a public announcement within five days of his or her appointment, calling upon the creditors to submit their claims within the last date for submission of their claims (which is within 30 days of the liquidation commencement date). Thereafter, the stakeholders are required to submit their claims in a specified format along with a proof of their claims to the liquidator.

Rejection of claims and appeal

Both under the corporate insolvency resolution process and liquidation, the insolvency professional (ie, the interim resolution professional, resolution professional or liquidator) verifies the claims received and may direct the creditor to provide evidence or documentary proof for such claim. The professional may reject such claim (on the grounds that such claim does not exist) by providing reasons in writing for such rejection. An appeal against the decision of the insolvency professional for rejection of the claim may be made by the creditor by filing an application with the NCLT.

Contingent or unliquidated amounts

Yes, claims for both contingent or unliquidated amounts can be made. The insolvency professional is required to make a best estimate of such claim on the basis of information available with him or her. Further, in liquidation, a person may prove for a claim whose payment was not yet due and subject to any contract to the contrary, where a stakeholder has proved for a claim and the debt has not fallen due before distribution, he or she is entitled to distribution of the admitted claim reduced as per a specified formula.

Transfer of claims

Both under the reorganisation and the liquidation process under the IBC, transfer of claims by a creditor is permitted; however, the terms of such assignment or transfer and the identity of the assignee or the transferee must be disclosed to the relevant insolvency professional. The amounts involved in such claim would be the amount owed by the corporate debtor to the original creditor (as opposed to the amount at which such claim was transferred to the transferee).

36 Set-off and netting

To what extent may creditors 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?

A security collateral held by financial services providers, which are netted and set off in multilateral trading or clearing transactions, do not form part of the debtor's liquidation estate. Further, in liquidation, where there are mutual dealings between the corporate person and another party, the sums due from one party are required to be set off against the sums due from the other to arrive at the net amount payable to the corporate debtor or to the other party. In a resolution process, a set-off exercised by a creditor (for an amount due prior to the insolvency commencement date) may amount to a breach of moratorium provisions as it may be viewed as a recovery action, which cannot be undertaken by a creditor during the corporate insolvency resolution process.

In respect of a scheme of arrangement or compromise under the Companies Act, there are no specific provisions on set-off. Hence, a set-off of claims of creditors can be accounted for in the scheme of arrangement or compromise.

37 Modifying creditors' rights

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

In liquidation, the order of priority of claims are as set out in the IBC and the courts cannot change this.

In case of reorganisation (ie, resolution) under the IBC, the resolution applicant provides for payments to debtor's creditors in the resolution plan. While there is no payment waterfall prescribed for resolution and the applicant is free to decide what payments it will make under the resolution plan, the following minimum requirements must be met in a resolution plan:

- insolvency process resolution cost must be paid in priority to all other payments; and
- the operational creditors must be paid an amount no less than the amount they would have received in the event of liquidation. Amounts due to the operational creditors under a resolution plan are to be paid in priority to any payments to the financial creditors.

Provided the above mandatory payments are provided in the resolution plan, the NCLT will not by itself change the rank or priority of payments in the resolution plan. However, there are some cases where the NCLT has questioned non-payment of statutory dues in a resolution plan (even though the crown debts now rank much lower in the distribution waterfall and are not mandated as a payment to be made in a resolution plan).

In case of reorganisation pursuant to a scheme of arrangement or compromise under the Companies Act, no priority of claims is prescribed.

38 Priority claims

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

In liquidation, the assets of the debtor are distributed in the following order of priority:

- the costs involved in the insolvency resolution process and the liquidation costs are to be paid in full;
- workmen's dues for the period of 24 months preceding the liquidation commencement date and debts owed to a secured creditor where the secured creditor has relinquished its right to realise the security (*pari passu*);
- wages and unpaid dues owed to employees other than workmen for the period of 12 months preceding the liquidation commencement date;
- financial debts owed to unsecured creditors;
- any amount due to the central government and the state government, including the amount to be received on account of the

Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date and debts owed to a secured creditor for any amount unpaid following the enforcement of a security interest (*pari passu*);

- any remaining debts and dues;
- preference shareholders, if any; and
- equity shareholders or partners as the case may be.

As can be seen from the above, the costs involved in the insolvency resolution process and the liquidation costs are the major privileged claim in liquidation and have priority over secured creditors. Apart from this, certain assets don't form part of the liquidation estate. For instance, all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund. Hence, such amounts will be paid out to workmen or employees and don't form part of assets of the company for the purpose of distribution.

For priority in reorganisation, please refer to question 37.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

In case of termination of employees' contracts during the reorganisation process (under the IBC or the Companies Act), the claims of the employees would be as per the employment contract and the applicable labour laws governing payment of gratuity, pension, provident fund and similar employee dues. There is no specific procedure prescribed for termination of an employment contract during reorganisation. The procedure for termination, including the requirement of giving sufficient notice, would be as per terms of the contract between the employee and the corporate debtor and applicable labour laws.

In case of liquidation of a corporate debtor, the liquidation order of the NCLT is deemed to be a notice of discharge to the corporate debtor's officers, employees and workmen and, therefore, there is no requirement of separately terminating employment contracts. An exception to this is where the liquidator continues the business during the liquidation process. In such a case, if an employment contract is to be terminated, such termination would have to be as per the terms of the contract and applicable labour laws.

There are no provisions in the IBC or Companies Act whereby employee claims are wholesale increased in case of large-scale termination of employees' contracts or if the business of the corporate debtor ceases operations, whether in reorganisation or liquidation. However, there are labour laws providing for retrenchment compensation in the case of retrenchment of employees.

40 Pension claims

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

Sums due to any workmen or employees from the provident fund, the pension fund and the gratuity fund do not form part of the liquidation estate. Hence, such amounts are to be paid out to employees and don't form part of assets to be distributed in liquidation. To the extent there are no such funds available, employee claims are paid out as per the prescribed distribution waterfall. Here, the IBC makes a distinction between workmen dues and employee dues. Workmen dues (which would include pension dues) for the period of 24 months preceding the liquidation commencement date rank second (after insolvency and liquidation costs) and *pari passu* with debts owed to a secured creditor that has relinquished its right to realise the security. Wages and unpaid dues owed to employees other than workmen for the period of 12 months preceding the liquidation commencement date rank third in the waterfall.

As regards deficiencies in pension assets and unpaid contributions to pension funds, the IBC does not address whether these will have priorities in liquidation. However, in a recent NCLT case, the NCLT has held that unpaid contributions to a provident fund will be deemed to be

an asset excluded from the liquidation estate and hence will have priority over other distributions.

During the corporate insolvency resolution process, the employee claims are considered to be operational debt and the employees can submit their claim, as on insolvency commencement date, in the relevant form to the interim resolution professional or resolution professional. While there is no specific provision for payment of pension claims in a resolution process, the resolution plan would address payment of such claims to the employees. In a resolution plan, the operational creditors (including employees) must be paid an amount not less than the liquidation value payable to such operational creditors in liquidation. Further, amounts due to operational creditors (including employees) in a resolution plan are to be paid in priority to any payments to the financial creditors.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Where environmental damage has been caused by a company, the company and persons directly in charge of, or responsible for, the conduct of the company's business (this would include directors) can be held liable for the damage and punished accordingly. Once the insolvency or liquidation proceedings commence, because the board of the company is suspended, the insolvency professional is made responsible for complying with the requirements under applicable law on behalf of the corporate debtor. Hence, the insolvency professional would also be responsible for environmental compliances during this period. Further, persons responsible for the damage (for instance directors or officers) can be made liable under applicable environmental laws.

While there is protection given to the insolvency professionals for actions in good faith, a circular issued by the Insolvency and Bankruptcy Board of India (the regulator for insolvency and bankruptcy) states that if any loss, including penalty, is suffered by the corporate debtor on account of any non-compliance with applicable laws during the resolution or liquidation process, such loss would not form part of the insolvency resolution process cost or liquidation cost and that the insolvency professional will be responsible for such non-compliance if it is on account of conduct of the insolvency professional.

It must also be noted that in view of the moratorium being in force during the resolution and liquidation process, no suit or proceeding can be instituted or continued against the corporate debtor by any authority (which would include environmental authorities). Such authorities may, however, file their claims against the corporate debtor with the insolvency professional.

42 Liabilities that survive insolvency or reorganisation proceedings

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

In case of resolution under the IBC, the treatment of liabilities of a corporate debtor would be as per the resolution plan approved by the NCLT. This would include liabilities due to financial and operational creditors. Barring the liabilities that are proposed to be paid under the resolution plan, the resolution plan would typically provide for settlement, extinguishment or waiver of all other liabilities, including statutory liabilities. Many NCLTs are reluctant to extinguish or waive liabilities that are statutory in nature on the ground that they do not possess powers to allow such extinguishment or waivers. Hence, the legal position in this respect is not fully settled.

In case of reorganisation under the Companies Act, the scheme or arrangement or compromise with creditors will deal with the liabilities of the debtor qua such creditors (and does not deal with statutory or other liabilities). Hence these other liabilities (except liabilities compromised with creditors in a Scheme) would survive.

In case of liquidation, once distributions are made, the company is dissolved and no liabilities survive.

43 Distributions

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

In case of corporate insolvency resolution, distributions are made as per the resolution plan that is approved by the committee of creditors and the NCLT. Barring certain mandatory payments, there is no payment waterfall prescribed for resolution and the applicant is free to decide what payments it will make under the resolution plan and when. See question 37 for details.

In case of a scheme of arrangement or compromise under the Companies Act, the distributions are made as per the Scheme, once the NCLT approves the Scheme and the order is filed with the Registrar of Companies.

In case of liquidation, the liquidator can commence distribution only after the list of stakeholders of the corporate debtor and the asset memorandum (containing details regarding the liquidation assets that are intended to be realised by way of sale) has been filed with the NCLT. The distribution of realisation proceeds must be made to the stakeholders within six months from the receipt of the amount, after deducting the insolvency resolution process costs, if any, and the liquidation costs. In case of assets that cannot be readily or advantageously sold because of its peculiar nature or other special circumstances, the liquidator may distribute such assets among the stakeholders, with the permission of the NCLT by way of an application. The assets are to be distributed as per the prescribed liquidation waterfall.

Security

44 Secured lending and credit (immovables)

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

In India, the principal security taken on immovable property is mortgage over the property in favour of the creditor. There are six kinds of mortgages that can be created, outlined below.

- Simple mortgage: here the possession of property is not transferred to the mortgagee. The mortgagor binds him or herself to personally pay the mortgage money. In the event of failure to pay the mortgage money, mortgaged property can be sold and the proceeds of such sale be applied in payment of the mortgage money.
- Mortgage by conditional sale: in this case, the mortgagor sells the property on the condition that the sale will become absolute in case of default in payment of the mortgage money. However, in the event of repayment of the loan, the sale becomes void.
- Usufructuary mortgage: the mortgagor delivers the possession of the mortgaged property to the mortgagee and authorises him or her to retain such possession until repayment of the loan. The mortgagee also has the right to receive the rents and profits accruing from the property.
- English mortgage: the property is transferred to the mortgagee until the repayment of the mortgaged money. On payment the property is re-transferred to the mortgagor.
- Mortgage by deposit of title deeds (or equitable mortgage): in this case, the mortgagor delivers title deeds of the property to the mortgagee with the intention to create security.
- Anomalous mortgage: a mortgage that does not fall into any of the aforementioned categories, but is a mixture of any two or more of the aforementioned mortgages.

45 Secured lending and credit (movables)

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

The following are the principal types of security that may be created over movable properties.

- Pledge: bailment of goods as security for payment of a debt or performance of a promise. In case of pledge there is a delivery of possession to the pledgee; however, the title of goods remains with the pledgor.
- Hypothecation: this is a charge in or upon any movable property, existing or future, without the delivery of possession of the property to the creditor. In this case, both the title and possession of the movable property remains with the debtor.

- **Charge:** a charge is a right created by the debtor on its movable property in favour of the creditor for extending financial assistance. There are two types of 'charge' recognised by Indian law. Fixed charge, which is a charge created in case of property that is ascertainable or quantifiable (present or future); and floating charge, which is a charge created in case of property that is fluctuating in nature, such as stock-in-trade or raw material.
- **Assignment:** the debtor who is the owner of a contract may assign the contract in favour of a creditor as security for the financial assistance provided.
- **Lien:** a lien is a security where the actual or constructive possession of the property is ordinarily retained by the creditor until the payment for the debt is made. There are two forms of lien recognised under the Indian Contract Act, 1872, a particular lien and general lien. A particular lien is where the bailee of goods has a particular lien over the goods, where the bailee has rendered any service involving exercise of labour or skill in respect of goods bailed. Such bailee may retain such goods unless due remuneration is paid for the services rendered (in the absence of a contract to the contrary). General lien is where, in the absence of a contract to the contrary, bankers, factors, wharfingers, attorneys and policy brokers have general lien over any goods bailed to them for security of a general balance of account.
- **Escrow:** it is also common, especially in project financing, to have an escrow of receivables or cash-flows in a particular account, with a right given to the lender to control the outflow.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

The following transactions may be annulled or set aside by the NCLT in liquidation and insolvency resolution process in the IBC.

Preferential transaction

- These are transactions where the corporate debtor has transferred any property (or interest thereof) for the benefit of any creditor, surety or guarantor for or on account of any antecedent debt or liabilities owed by the corporate debtor and where such transfer has the effect of putting such creditor, surety or guarantor in a more beneficial position than it would have been in case of distribution of assets in liquidation.
- Transactions that are in the ordinary course of business of the corporate debtor or the transferee or that create security for new value are not considered preferential.
- Only an insolvency professional can attack such a transaction by filing an application to the NCLT.
- The transaction is considered preferential if undertaken during the two years preceding the insolvency commencement date (if made to related party) and one year preceding the insolvency commencement date (if made to any other party).
- The NCLT may annul the transaction and pass various orders for such purpose including providing for vesting of property in the debtor or release of security or require the preferred person to pay or return the benefit, direct guarantor to be under new or revived debts, etc.
- In certain cases, protection is available to transferees who acquire property from a person other than the corporate debtor in good faith and for value and to persons who receive benefit from preferential transactions in good faith and for value.

Undervalued transactions

- These are transactions where the debtor gifts or transfers its assets for a consideration significantly less than its value, unless such transaction is in the ordinary course of business of the corporate debtor.
- Insolvency professionals or even a creditor, member or partner of a corporate debtor can make this application to the NCLT.
- The relevant timing for the transaction is, if undertaken during the two years preceding the insolvency commencement date (in

case of related party) and one year preceding the insolvency commencement date (if case of any other party).

- The NCLT may annul the transaction and pass various orders for such purpose including providing for vesting of property in the debtor or release of security or requiring payment of the benefit received, or payment of consideration as determined by an expert.

Transactions defrauding creditors

- If an undervalued transaction is deliberately entered into by the debtor for keeping its assets beyond the reach of any person entitled to make a claim against the debtor or in order to adversely affect the interests of such person in relation to the claim, then it is considered to be a transaction defrauding creditors. There is no look-back period prescribed for this.
- The NCLT may pass an order restoring the position as it existed prior to the transaction and protecting interest of persons who are victims of such transaction.
- In certain cases, protection is available to transferees who acquire property from a person other than the corporate debtor in good faith and for value and without notice and to persons who receive benefit from undervalued transactions in good faith and for value and with without notice.

Extortionate credit transaction

- These are transactions that require the corporate debtor to make exorbitant payments in respect of any credit provided or is unconscionable under the principles of law relating to contracts. Exception is available to debt extended by any financial services provider that is in compliance with the law applicable in relation to such debt.
- Only an insolvency professional can make this application to the NCLT.
- The look-back period is two years preceding the insolvency commencement date.
- The NCLT may annul the transaction and pass orders restoring the position or setting aside the debt or modify the terms of the transaction or require counterparty to repay the amount received or require relinquishment of security interest created under the transaction.

Fraudulent trading

- Liability in this case arises if the business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose.
- Only an insolvency professional can make application to the NCLT. No look-back period is prescribed.
- The NCLT may pass an order directing that any persons who were knowingly parties to the fraudulent trading be liable to make such contributions to the assets of the corporate debtor as the NCLT deems fit. Further directions may be issued to give effect to the contribution order such as providing for liability of any person under the order to be a charge on any debt or obligation due from the corporate debtor to him or her.

Wrongful trading

- Liability in this case arises if, before the insolvency commencement date, a director or partner knew or ought to have known that there was no reasonable prospect of avoiding the insolvency commencement and yet did not exercise due diligence in minimising the potential loss to the creditors.
- Only a resolution professional can make an application to the NCLT. No look-back period is prescribed.
- The NCLT may pass an order directing directors or partners to make such contributions to the assets of the corporate debtor as the NCLT deems fit. Further directions may be issued to give effect to the contribution order such as providing for liability of any person under the order to be a charge on any debt or obligation due from the corporate debtor to him or her.

Update and trends

The IBC is a fairly recent legislation and hence many regulations, rules, circulars etc are being passed to facilitate the successful implementation of the law. Further, courts are also developing the jurisprudence under the IBC. The law, in many aspects, is not settled and is evolving constantly.

With a push for resolution coming from the RBI, more and more companies are being admitted to insolvency pursuant to applications filed by the banks. The IBC is soon becoming the preferred route for restructuring of bad debts. However, given the strict timeline for completion of the resolution process, and strict rules on qualification of bidders, concerns are also being expressed as to whether the companies will be able to resolve within the timelines provided and whether there are enough bidders for the assets. In these early days of insolvency, many companies are ending up in liquidation as opposed to getting resolved.

Some of the hot topics are around treatment of group insolvency, interpretation of provisions relating to disqualification of bidders, the possibility of extinguishment of contingent and statutory liabilities in a resolution plan and treatment of personal guarantees in a resolution plan.

Pending laws relate to cross-border insolvency, notification of provisions in the IBC for personal and partnership bankruptcy and laws relating to insolvency of financial service providers.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There are no restrictions on related parties or non-arm's length creditors (including shareholders) in making claims against corporations in insolvency or re-organisation proceedings. However, related parties who are financial creditors do not have any right of representation, participation or voting in creditors' committees in a resolution process under the IBC. There is no such restriction in case of creditors' meetings in case of a reorganisation under the Companies Act.

Further, claims by related parties or non-arm's length creditors may be defeated in case of resolution or liquidation under the IBC in case they fall within the category of avoidance transactions (see question 46). For instance, an undervalued transaction can be set aside in insolvency proceedings. There are no such restrictions in case of a reorganisation under the Companies Act.

Groups of companies

48 Groups of companies

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

Under Indian law, each company has a separate legal existence and only in very rare circumstances the courts will pierce the corporate veil (eg, fraud). A parent or an affiliated corporation is not responsible for the liabilities of its subsidiaries or affiliates (typically these form part of the 'excluded assets' for the parent company) unless they have given guarantees or security for the debts of subsidiaries or affiliates.

Presently, the IBC does not contain any provision to enable combining proceedings against entities that are of the same group (ie, a parent or affiliated corporation). Therefore, insolvency of each company is conducted separately and the NCLT cannot disregard the separate identity of group entities to order a consolidated distribution.

49 Combining parent and subsidiary proceedings

In 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?

As stated in question 48, insolvency proceedings of the parent and of its subsidiaries are separate and are not combined. Furthermore, the assets of the subsidiary are excluded assets with respect to the parent under the IBC and are not pooled for distribution purposes. Similarly, the liabilities of the subsidiary are also not considered with respect to

the insolvency proceedings of the parent. An exception to this is where the parent has given a guarantee for subsidiaries' liabilities. In this case, a claim can be made on the parent (undergoing insolvency proceedings) by the creditors of the subsidiary.

International cases

50 Recognition of foreign judgments

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?

A foreign judgment must satisfy the requirements of the Indian Code of Civil Procedure, 1908 (CPC) to be recognised in India. A foreign order on the other hand, being of an interim nature, is not enforceable. A foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim under the same title, except where: (i) it has not been pronounced by a court of competent jurisdiction; (ii) it has not been given on the merits of the case; (iii) it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable; (iv) the proceedings in which the judgment was obtained are opposed to natural justice; (v) it has been obtained by fraud; and (vi) it sustains a claim founded on a breach of any law in force in India.

Further, a money decree passed by a superior court of any reciprocating country (ie, countries notified by the government, where Indian decrees are also recognised) can be executed in India as if it has been passed by an Indian court, subject to meeting requirements or recognition set out above. Where the foreign decree is from a non-reciprocating country (ie, any country that is not a reciprocating country) then such party has the option of filing a fresh suit in the Indian court of competent jurisdiction based on that foreign decree or on the underlying cause of action, or both. In this case, as mentioned above, the foreign decree will be considered conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim under the same title, provided the conditions of recognition set out above are met.

India is currently neither a signatory to any treaty on international insolvency nor on recognition or enforcement of foreign judgments or decrees.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model Law on Cross-Border Insolvency, 1997 (Model Law) has not yet been adopted in India. However, the Insolvency Law Committee (set up by the Ministry of Corporate Affairs to make recommendations to the Indian government on model law) has recently submitted a report to the government on adoption of the Model Law with certain modifications to adapt it to Indian conditions.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Neither the IBC nor the Companies Act discriminates between foreign and domestic creditors, whether in liquidations or reorganisations. However, the extant foreign exchange regulations prescribe conditions for remittance of assets of Indian companies under liquidation or directions issued by a court or on orders of the liquidator, as applicable.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

As of the date of writing, there is no provision in the IBC or otherwise under the Indian legal regime that permits such transfer of assets.

54 COMI

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?

As stated in question 51, the introduction of a chapter on cross-border insolvency in the IBC is presently under consideration. As of now, if the debtor is incorporated in India, then its insolvency can be commenced in India and if the debtor is not incorporated in India, then its insolvency cannot be commenced in India.

The Insolvency Law Committee Report (released recently) recognises that the Model Law provides a rebuttable presumption that location of the registered office of the corporate debtor is its COMI, 'in the absence of proof to the contrary'. The Committee has recommended that there should be proactive enquiry by the NCLT to determine COMI and has recommended a look-back period of three months while enforcing COMI presumption.

55 Cross-border cooperation

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?

For cross-border insolvencies and restructuring, the current framework, which is yet to be enforced, envisages the following:

- the Indian government may enter into bilateral agreements with any foreign government for enforcing the provisions of the IBC and may also notify that the application of the IBC in relation to assets or property of a debtor situated in any foreign country with which India has entered into reciprocal arrangements shall be subject to such conditions as may be specified; and
- the NCLT may issue letter of request to a court of a country with which India has entered into reciprocal arrangements upon being satisfied that evidence or action is required in relation to assets or property of a debtor situated in such country.

Further, as stated in question 51, the introduction of a chapter on cross-border insolvency in the IBC is presently under consideration.

As regards recognition of foreign proceedings, please refer to question 50.

In addition, there are provisions in the CPC that allow the High Court in India to issue commission for examination of witnesses (residing in its jurisdiction) or for discovery or production of documents where a letter of request is issued by a foreign court to the High Court of India. Hence, it may be possible for a liquidator in foreign proceedings to obtain such a letter from the foreign court to a court in India, for the purpose of examination of witnesses residing in India or for discovery or production of documents in India.

56 Cross-border insolvency protocols and joint court hearings

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 stated above, as of now, the provisions pertaining to cross-border insolvency are not in force and consequently no protocols or other arrangements have been entered into with another country in this regard.



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1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The legislation applicable to insolvencies and reorganisations is set out in the Companies Act 1931 (the '31 Act), The Companies (Winding Up) Rules 1934 (the Rules) and the Companies Act 2006 (the 2006 Act).

Companies in the Isle of Man can either be incorporated under the '31 Act ('31 companies) or the 2006 Act (2006 companies) and each of the two types of company have different characteristics and statutory powers as governed by and set out in the respective Companies Act.

The '31 Act sets out the statutory insolvency regime for the Isle of Man in conjunction with the Rules.

The '31 Act insolvency regime (ie, sections 155 to 272 (inclusive) and 277 to 280 (inclusive)) is applied to companies incorporated under the 2006 Act by section 182 of the 2006 Act.

One of the circumstances in which a company may be wound up by court as set out in section 162(5) of the '31 Act is if the company is unable to pay its debts.

Section 163(1) sets out the definition of inability to pay debts as:

- if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty pounds then due, has served on the company, by leaving it at the registered office of the company, a demand under his or her hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
- if execution or other process issued on a judgment decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

2 Excluded entities and excluded assets

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

No entities are excluded from customary insolvency proceedings as long as they are a creditor and the sum owed by the company is more than fifty pounds and, if the entity is a company, that it has not been dissolved or struck off the register of its county of incorporation. In such a circumstance the company would have to be restored to the register and in good standing.

If insolvency proceedings are brought against a protected cell company (PCC) then the creditor can only seek recourse against the assets in the particular cell of which it is a creditor; it cannot proceed or seek recourse against the assets in the other cells of the PCC.

3 Public enterprises

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

Creditors of a government-owned enterprise can proceed by way of the normal insolvency procedures as set out in this chapter.

4 Protection for large financial institutions

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

No, it has not.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The Chancery Division of the High Court of Justice hears all claims to wind up a company for the appointment of a liquidator. Following a judgment of the Chancery Division a party may appeal a winding-up order to the Staff of Government Division of the High Court of Justice (the Isle of Man Appeal Court Division) and any appeal of that court's decision is to the Privy Council.

Subject to complying with statutory timelines for filing any appeals and complying with the requirements of the Rules in relation to service and advertisement requirements, there are no restrictions on the insolvency matters that the divisions of the courts listed above may deal with.

There is no requirement to post security to proceed with an appeal.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

A debtor company can seek to wind itself up by way of a members' voluntary liquidation (MVL). The steps required for an MVL are set out in the '31 Act.

To proceed with an MVL, the directors of the company (or in the case of a company having more than two directors, the majority of the directors) make a statutory declaration of solvency and the company must pass a special resolution (ie, passed by members holding more than 75 per cent of the voting shares) that the company be wound up voluntarily.

If the directors of the company are unable to make the statutory declaration, then the company must proceed by way of a creditors' voluntary liquidation.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Isle of Man law does not provide for company voluntary arrangements (known as 'CVAs' in the UK) and administrations. Debtors can, however, use the process set out in both the '31 Act and the 2006 Act for arrangements, mergers and consolidations.

Schemes of arrangement involve a company entering into a compromise or arrangement with its creditors or members. The meaning of compromise or arrangement is wide; the agreement can be about anything that the company and its creditors or members may properly agree.

The scheme must involve a genuine compromise (ie, the members or creditors must obtain some advantage that compensates them for the alteration of their rights).

An application is made to the court for an order directing meetings of the members, or different classes of members, or the meetings of the creditors, or different classes of the creditors (the court meetings), to approve the scheme. In order for the scheme to be approved, a majority in number representing 75 per cent in value of those present and voting, either in person or by proxy, must vote in favour of the scheme.

In the event the scheme is approved at the court meetings, a second and final court hearing is held at which the court will decide whether to sanction the scheme. Once effective, the scheme is binding on all the creditors and members of each class that approved the scheme.

Similar statutory processes are set out in the legislation for schemes of merger or consolidation.

8 Successful reorganisations

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

It is up to the party proposing the scheme to determine how the creditors will be classified. It may not be possible to be certain that a particular type of claim constitutes a class of creditors; however, by way of example a clear distinction between separate classes is that of secured and unsecured creditors. A scheme of arrangement may release a non-debtor party. However, this is a matter for agreement.

See question 7.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Creditors of a company can file a claim for the appointment of a liquidator (ie, an involuntary liquidation) with the Chancery Division. The grounds upon which the court will wind up the company are as set out in question 1, namely:

- if the creditor has served a statutory demand that has not been paid or secured or compounded to the reasonable satisfaction of the creditor within three weeks of service of the demand; or
- if the creditor has an unsatisfied judgment against the company; or
- it can prove that the company is unable to pay its debts.

Once the claim is filed (and prior to any liquidator or provisional liquidator being appointed by the court) the company cannot dispose of any of its property including things in action, transfer any shares or alter the status of the members of the company without the consent of the court by way of a court order.

Further, once the claim is filed, the creditor, company or contributory may apply to stay any proceedings that are proceeding or pending or restrain any further actions in the action or proceeding.

Once the proceeding is opened, there are no material differences to proceedings opened voluntarily.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

As set out in question 7, a creditor can make an application to court for approval of a scheme of arrangement. However, in practice, it is unlikely that they will have sufficient information about the company's financial position to lead a reorganisation. There is no difference in the procedure for a scheme of arrangement where initiated by a creditor.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

There are no provisions for the expedition of reorganisations or schemes of arrangement, and the implementation time will depend on its complexity, although the majority of the time spent on the reorganisation is commonly in negotiation with the creditors and in preparation of the settlement documentation.

12 Unsuccessful reorganisations

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 creditor may seek to defeat a scheme of arrangement by refusing to take part and apply for the company to be liquidated. The terms of the scheme will usually set out the consequences of a debtor failing to perform the terms of the arrangement.

See question 7.

13 Corporate procedures

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

Yes, a solvent company may be liquidated or dissolved voluntarily by 75 per cent resolution of its shareholders. The difference between dissolution and liquidation is that a dissolved company may be restored to the register of companies at any time within 12 years following the date of its dissolution. A liquidated company may not be restored once two years has elapsed since the date the company's name was removed from the register.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In a winding up by the court, once the liquidator of the company has realised all the company's property, or so much as can, in his or her opinion, be realised without needlessly protracting the liquidation, and has made a final dividend distribution, then the liquidator must provide a report on the accounts of the liquidation to the court. The court will consider the report, and any objections raised by the creditors or contributories, and either grant or withhold the release of the liquidator accordingly. The court will also make an order that the company be dissolved from the date of the order and the liquidator must report this order to the Companies Registry within 14 days of the date of the order.

In both members' and creditors' voluntary winding up, as soon as the affairs of the company are fully wound up, the liquidator must prepare accounts of the winding up showing how it has been conducted and that the property of the company has been disposed of. The liquidator must call a general meeting of the company and creditors to show members the accounts and give any explanation as required. The liquidator must give one month's notice of the meeting. Within one week after the meeting, the liquidator must send a copy of the accounts to the Companies Registry and must make a return to the Registry of the meeting held and its date. Once the Companies Registry receives the accounts and the return they will register the same, and on the expiry of three months from the registration the company shall be deemed to be dissolved.

Insolvency tests and filing requirements

15 Conditions for insolvency**What is the test to determine if a debtor is insolvent?**

The test is whether the company is able to pay its debts as they become due and that the value of the assets exceeds its liabilities.

16 Mandatory filing**Must companies commence insolvency proceedings in particular circumstances?**

Isle of Man law does not expressly require a company to commence insolvency proceedings at a fixed time. Directors are under a continuing obligation to consider whether the company is insolvent or likely to become insolvent with no prospect of recovery. At this stage, the directors must act in the best interests of the creditors as a whole.

If the company carries on business while insolvent, the directors risk personal liability if, in a winding up, it appears that any business of the company has been carried on with intent to defraud creditors or for any fraudulent purpose.

A liquidator may also consider whether a person who has taken part in the formation or promotion of the company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any misfeasance or breach of trust in relation to the company. If so, the court may order him or her to repay or restore the money or property or pay compensation.

In relation to 2006 companies, directors may also be personally liable to repay the company any distribution that was made to a member where the solvency test was not satisfied immediately after that distribution.

Generally, directors also risk being disqualified in the event they carry on the business of the company in circumstances where it is insolvent.

Unlike under English law, there is no concept of wrongful trading.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent**If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?**

See question 16.

18 Directors' liabilities – other sources of liability**Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?**

Generally, no director, officer, agent or liquidator of a company will be liable for any liability or default of the company unless specifically provided for under the legislation, and except in so far as that person may be liable for their own conduct.

However, a director may be held personally liable for his or her company's obligations if it is proven that such director is guilty of fraudulent trading (ie, carried out the business of the company with intent to defraud creditors) or for any other fraudulent purpose. An officer of the company may also be held personally liable for misfeasance if during the course of a winding up it appears that such person has misapplied or retained any money or property of the company. In such case, the liquidator may apply to the court to compel the person to repay or restore the money or property.

While 'wrongful trading' is not recognised in Manx statute, a director could still be liable for wrongful trading under English legislation if company assets were situated in England and Wales.

Directors can be subject to other sanctions during the liquidation process (for example, failure to fully disclose the company's books and records to the liquidator or concealment of the company's property) and may be subject to a fine or imprisonment.

19 Shift in directors' duties**Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?**

Ordinarily, directors are under a duty to act in the best interests of the company and its shareholders. However, once directors form the view that the company is insolvent (ie, unable to pay its debts) their duty is to act primarily in the interests of the company's creditors. This shift does not depend upon the company entering formal insolvency proceedings or a reorganisation.

20 Directors' powers after proceedings commence**What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?**

In respect of compulsory liquidations, the directors' and officers' powers cease on the court making a winding-up order. In respect of creditors' voluntary liquidations, the directors' and officers' powers cease on the company being wound up subject to the committee of inspection, or if there is no committee the creditors, sanctioning their continuance. In respect of members' voluntary liquidations, those powers cease on the company being wound up save for the company, in general meeting, or the liquidator sanctioning the powers continuing.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria**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?**

Where a winding-up order is made by the court or a provisional liquidator is appointed, no proceedings can continue or be commenced against the company except by leave of the court.

In respect of a voluntary winding up, there is no restriction on proceedings being continued or commenced. However, the liquidator may make an application to court for a stay on proceedings, for example on the basis that the issues raised in the proceedings can and should be dealt with in the context of the liquidation as opposed to by way of ordinary civil proceedings.

There is no restriction on proceedings during a reorganisation.

22 Doing business**When can the debtor carry on business during a liquidation or reorganisation? 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?**

The debtor can continue to carry on business during a reorganisation. It is unlikely to be appropriate to cease to carry on business where the purpose of the reorganisation will be to allow the business to continue in its reorganised form. Relationships will continue under the existing contractual terms (subject to the terms of any scheme) and it is likely that existing and prospective creditors will want more information about the company's financial position and the reorganisation.

23 Post-filing credit**May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?**

In a liquidation, a liquidator has the power to raise money on the security of the assets of the company if required. This would be deemed an expense of the liquidator and would therefore have priority over unsecured creditors.

During a reorganisation, the ordinary position in respect of the raising of credit would apply but it may be that the obtaining of new credit or the re-negotiation of existing credit would form part of the terms of the reorganisation itself.

24 Sale of assets

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?

A liquidator can (without sanction) sell the real or personal property and things in action of the company by public auction or private contract including by way of sale of the entire business of the debtor. However, the debtor must beneficially own the property. Therefore, assets subject to a fixed charge or held on trust for a third party cannot be sold.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

There are no restrictions on 'stalking horse' bids or credit bidding.

However, in respect of the latter, in a winding up by the court or a creditors' voluntary liquidation, it will be necessary for the liquidator to seek the court's or (if there is one) the committee of inspection's approval as this will amount to a compromise with a creditor. In a members' voluntary winding up, the liquidator would require the sanction of an extraordinary resolution.

In reorganisations outside of insolvency, there are no restrictions.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

See questions 7 and 22.

In an insolvency, the liquidator has the power to disclaim onerous property, including unfavourable contracts.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The debtor's rights to continue using IP on insolvency or the termination thereof will depend upon the terms of the contract as agreed between the licensor or owner and the debtor. Insolvency will not automatically trigger termination of the rights; however, a specific contract may provide insolvency as a ground for termination. Equally, a liquidator will be bound by the terms agreed with regard to terminating the relevant contract.

28 Personal data

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

The ordinary law on data protection continues to apply despite insolvency and the legislation contains no special provisions or exemptions.

The company and the liquidator will need to comply with the DPA and all of the data protection principles including when entering arrangements such as selling part of the company or its assets. For example, it will be necessary for the liquidator to advise the individuals of the new arrangement and ensure that the transfer is done securely.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Arbitration is used very infrequently in Isle of Man insolvencies.

Creditor remedies**30 Creditors' enforcement**

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?

There may be contractual documentation in existence between a debtor and its creditors that allows the creditors to appoint a receiver to take custody of certain of the debtor's property. If no such documentation is in place, if a creditor obtains judgment against a debtor in the Isle of Man High Court of Justice, that creditor may request the coroner (a court officer similar to a bailiff in the UK) to issue 'execution' in respect of that debtor's goods (ie, to seize certain of the debtor's goods as are sufficient to satisfy the judgment debt).

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

All of the Isle of Man insolvency remedies are available to unsecured creditors and these are in line with other Commonwealth jurisdictions and include: obtaining judgment against the debtor, appointment of a receiver, arrestment order, charging order and attachment of earnings order. An unsecured creditor can also petition for bankruptcy or winding up of a company in the same manner as a secured creditor. None of the procedures are especially difficult or time-consuming and certainly not outside of the normal time for insolvency remedies to be achieved.

No special procedures apply to foreign creditors who can seek recourse against the debtor company in line with the procedures and remedies available to Isle of Man based creditors.

Creditor involvement and proving claims**32 Creditor participation**

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Voluntary winding up

The company will call a meeting of the creditors for the day (or following day) to pass the resolution for voluntary winding up. Notices of such meeting will be sent to the creditors via post. Notice will also be advertised in two local newspapers and in the *London Gazette*. The directors will provide a full statement of the position of the company's affairs, together with a list of the creditors of the company and the estimated amount of their claims. At such meeting, the creditors may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company. If the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator. The creditors may also appoint a committee of inspection, consisting of not more than five persons. The purpose of the committee is to supervise the liquidator.

As soon as the affairs of the company are fully wound up, the liquidator will call a meeting of the creditors for the purpose of laying the account of the company and giving any explanation thereof. Again, such meeting shall be advertised in two local newspapers and in the *London Gazette*, specifying the time, place and agenda of the meeting, one month prior to the meeting taking place.

In the event that winding up continues for more than a year, the liquidator shall summon a meeting of the creditors at the end of the first year from the commencement of the winding up, and of each succeeding year, and shall lay before the meetings an account of his or her acts and dealings and of the conduct of the winding up during the preceding year.

Winding up by the court

Unless the court otherwise directs, the meetings of creditors shall be held within one month after the date of the winding-up order. The dates of such meetings shall be fixed and shall be summoned by the liquidator. Seven days' notice of the meeting must be given and shall be placed in the *London Gazette* providing a date and time of the creditors meeting. The notice shall also be provided to each creditor and shall be sent to the address given in his or her proof, or if he or she has not proved, to the address given in the statement of affairs of the company, if any, or to such other address as may be known to the person summoning the meeting. The notices of the creditors shall state a time within which the creditors must lodge their proofs in order to entitle them to vote at the first meeting.

In the case of the first meeting of creditors, a person shall not be entitled to vote as a creditor unless he or she has duly lodged his or her proof of debt with the liquidator no later than the time prescribed in the notice (as above).

Directors and other officers of the company may also be given seven days' notice of the time and place appointed for each meeting of which they may attend.

The liquidator will send to each creditor named in the company's statement of affairs, a summary of the company's statement of affairs, as soon as practicable. The statement of affairs includes the causes of the company's failure, and any observations thereon that the liquidator may make.

The meeting will not be found to be invalid on the basis that the statement of affairs had not been sent or received prior to the meeting.

Proceedings against third parties

There is no provision under the '31 or 2006 Act, for a creditor to have the ability to bring proceedings against third parties in relation to losses suffered by the company.

33 Creditor representation

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 committee of inspection consists of up to five persons (voted by the creditors at the creditors' meeting). The purpose of the committee is to supervise the liquidator, fix the remuneration to be paid to the liquidators and modify the powers and duties of the liquidators (which can also be modified by the court). The liquidator has to report to the committee on a regular basis. The committee of inspection will also be responsible for determining the process of disposing of the company's books and paper.

No member of the committee, alone or any employer, partner, clerk, agent or servant may purchase any part of the company's assets and any such purchase may be set aside by the court.

No member of the committee is, except under and with sanction of the court, directly or indirectly, entitled to derive any profit from any transaction arising out of the winding up or to receive any payment for services rendered by him or her, out of the assets of the company, or in connection with the administration of the assets. The court may sanction payment to any member of the committee for services rendered by him or her; however, the court shall specify the nature of the services and such sanction shall only be given where the service performed is of a special nature.

Except by the express sanction of the court, no remuneration shall, under any circumstances, be paid to a member of a committee for services rendered by him or her in the discharge of the duties attaching to his or her office as a member of such committee.

See question 32.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

Yes, they can if the liquidator assigns the claim to them.

35 Claims

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

The Rules direct that creditors 'shall ... prove his debt'. The liquidator may impose a time limit in which proofs have to be submitted. Creditors who seek to lodge proof after the expiry of a time limit may do so, but any assets that have already been distributed shall be unaffected, therefore the creditor runs a risk of missing out on his or her share.

In accordance with the Rules, a debt may be proved by delivering or sending through the post an affidavit verifying the debt. An affidavit proving the debt may be made by the creditor himself or herself, or by some person authorised by or on behalf of the creditor. An affidavit proving debt shall contain or refer to a statement of account showing the particulars of the debt and shall state whether the creditor is or is not a secured creditor. A creditor shall bear the cost of proving his or her debt unless the court orders otherwise. A creditor may prove for a debt not payable at the time of the winding-up order or resolution, as if it were payable presently, and may receive dividends equally with the other creditors deducting only thereout a rebate of interest at the rate of 5 per cent per annum, computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

36 Set-off and netting

To what extent may creditors 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?

During a reorganisation outside of insolvency, the usual contractual rules on set-off will apply.

On insolvency, the rules of statutory set-off are set out at section 22 of the Bankruptcy Code 1982, which is applied to companies being wound up by section 248 of the '31 Act. The rules provide that on insolvency, where there are mutual dealings between a company and a creditor claiming to prove a debt, the sum due from one party is to be set off against the sum due to the other party.

37 Modifying creditors' rights

May the court change the rank (priority) 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 creditor's claims, which are determined by statute. However, the court may approve a compromise agreed by the creditors that in effect gives rise to a change in their priorities.

If the security over the company's assets is not registered at the Isle of Man Companies Registry as in the manner prescribed under the '31 Act and 2006 Act in favour of the creditor, it will be void against the liquidator and any creditor of the company. The prescribed time limit for '31 companies to file any such charge is within one month of the date of the security or charge being created. There is no time limit for 2006 companies.

38 Priority claims

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

A liquidator will distribute the proceeds of realised assets and pay creditors in a specified order depending on the source of the proceeds, that is, whether they come from a fixed charge, floating charge or uncharged assets. The liquidator's costs, debts to the Crown, employee payments and unpaid pension contributions rank ahead of secured creditors.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

In a reorganisation outside of the formal insolvency process, normal rules apply in respect of employment and termination of employment contracts.

Liquidation has no statutory effect on contracts of employment; however, a liquidator is likely to terminate employment contracts as part of the winding up and payments due to employees may therein attract priority. Dismissals that 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. Employment legislation dictates that under the Employment Act 2006, where an employer has become insolvent or ceased carrying on business in the Isle of Man, the Treasury may pay certain debts of the employer out of the Manx National Insurance Fund, such as, for example:

- arrears of pay for eight weeks;
- pay during any period of statutory minimum notice;
- arrears for payment for time off;
- an unpaid basic award of compensation for unfair dismissal; and
- up to six weeks' holiday pay accrued in the preceding 12 months.

On an employer's insolvency, certain debts to employees have priority over the debts of ordinary creditors, including:

- arrears of pay for eight weeks (maximum of £250 per week);
- accrued holiday pay;
- unpaid pension contributions; and
- arrears of payment for time off for trade union duties, looking for work carrying out duties as a pension scheme trustee or ante-natal care. However, other preferential debts may have priority over these debts.

An employee may have a contractual claim, such as wrongful dismissal, when a company has ceased business and a statutory right to claim for redundancy or unfair dismissal. In insolvency and cessation of business, the most common type of claim is that of redundancy under employment legislation. Claims for redundancy or unfair dismissal will rank as ordinary unsecured claims in an insolvency scenario.

An employee may claim payment from the Treasury, when a company has ceased business, of an unpaid debt only where he or she has taken all reasonable steps, short of legal action, to recover it from the employer. The employee must make an application in writing to the Treasury within 12 months of the date of termination.

40 Pension claims

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

Under the Preferential Payments Act 1908, unpaid pension contributions have priority over the debts of ordinary creditors. However, please note, other preferential debts may have priority over unpaid pension contributions in accordance with the Preferential Payments Act 1908.

Where there is an occupational pension scheme and the employer company enters a formal insolvency process and there is a deficiency in the scheme, then a debt is triggered immediately prior to the employer's

insolvency by virtue of section 75 of the Pensions Act 1995 (An Act of Parliament), which extends to the Isle of Man. The debt will rank as an ordinary unsecured debt.

There is no equivalent to the UK's Pension Protection Fund.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Manx insolvency legislation does not specifically deal with environmental problems arising prior to or during the course of liquidation. Liability in respect of environmental problems would be found under civil and common law.

While there is no specific reference to the liability of directors or officers for environmental problems within the insolvency legislation, the general rule is that no director, officer, agent or liquidator of a company will be liable for any liability or default of the company unless specifically provided for under the legislation, and except insofar as that person may be liable for their own conduct. Therefore, it would be necessary to consider whether any director or officer of the company could be attributed with any personal liability for their own actions on a case-by-case basis.

Under section 183 of the '31 Act, the liquidator of a company being wound up by the court has the power to, with the court's permission, bring or defend any action or other legal proceedings that relate to the property of the company, therefore it would usually be the liquidator who dealt with any legal action brought in respect of environmental problems.

42 Liabilities that survive insolvency or reorganisation proceedings

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

No. Once a company enters insolvent liquidation, the liquidator will assess that company's liabilities as part of his or her statutory duties to complete the liquidation and the liabilities will be settled as part of the liquidation process.

In a reorganisation of a solvent company, the liabilities may survive, depending on the terms of the scheme or other reorganisation.

43 Distributions

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

In members' and creditors' voluntary liquidations, the liquidator must apply the sale proceeds from the company's assets in satisfaction of its liabilities *pari passu* and then (unless the company's articles of association state otherwise) distribute any outstanding sums to the company's members according to their rights and interests in the company.

In a court ordered winding up, the liquidator must give the creditors two months' notice of his or her intention to declare a dividend. The notice must specify the date proofs must be received by the liquidator to be considered, and this date cannot be less than 14 days from the date of the notice. Subject to there being no appeals against the dividend, the liquidator can proceed to pay the dividend on the date indicated in the notice.

Security

44 Secured lending and credit (immovables)

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

The principal types of security that can be taken against immovable (real) property in the Isle of Man are in line with those in most common law jurisdictions, namely mortgages, fixed and floating charges and debentures.

45 Secured lending and credit (movables)**What principal types of security are taken on movable (personal) property?**

The principal types of security that can be taken against movable property are liens, pledges (normally share pledges), debentures and title retention.

Clawback and related-party transactions**46 Transactions that may be annulled****What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?**

Manx company law states that any transactions that are deemed a 'fraudulent preference' may be set aside. In order to demonstrate fraudulent preference, it must be shown that there was an intention to prefer one creditor and that the company was insolvent at the time of the transaction or became so as a result of the same.

A floating charge that is created within six months of the winding up of a company will be invalid unless it is proven that the company was solvent immediately after its creation.

The liquidator can, with the court's leave, disclaim onerous property, such as land burdened with covenants, unprofitable contracts or unsaleable property.

Any dispositions of property or transfers of shares made after the commencement of winding-up proceedings will be void unless the court orders otherwise.

A further catch-all provision to protect creditors is found in the Fraudulent Assignments Act 1736, whereby any fraudulent transfers of assignments of the debtor's goods or effects shall be void and of no effect against just creditors.

It is generally the liquidator who has the standing to set aside transactions of this type. The time frames vary depending upon what is being challenged. For example, a floating charge that is created within six months of the winding up of a company will be invalid unless it is proven that the company was solvent immediately after its creation. Otherwise, there doesn't appear to be a time limit post-liquidation when they can be set aside, the statute states 'where a company is being wound up', they can be set aside. So, in theory, any time after the winding-up order is made and before the winding up is concluded.

47 Equitable subordination**Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?**

No, but it is open to a liquidator to reject a proof of debt filed by a non-arm's length creditor or related party if the liquidator has reasonable grounds to believe that such creditor's claim is not genuine.

Groups of companies**48 Groups of companies****In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?**

In Isle of Man law, a company has separate legal personality from its directors and shareholders, and also from other companies in its corporate group. The Isle of Man High Court is very unlikely to make an order that one company be responsible for the debts or obligations of another company in its corporate group, unless: such order was requested as part of a scheme of arrangement or compromise arrangement put forward by the company or its creditors; or a court is made to 'pierce the corporate veil' because the company in question is a sham; for example, if the company has only one shareholder who is also the sole director.

Yes, a court can order a distribution of group company assets pro rata without regard to the assets of the individual corporate entities involved by way of the company entering into compromises with its creditors or debtors. See question 49.

49 Combining parent and subsidiary proceedings**In 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?**

Notwithstanding the general rule explained above, it is possible for the assets and liabilities of a number of group companies to be pooled for distribution purposes by way of the company entering into compromises with their creditors or debtors that give effect to such pooling (such compromises require court approval). Alternatively, the assets and liabilities of a group of companies may be pooled by way of each company's liquidators proposing a 'scheme of arrangement' whereby the assets and liabilities of each company are consolidated for distribution purposes.

International cases**50 Recognition of foreign judgments****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?**

The Manx courts have demonstrated that they are keen to assist foreign jurisdictions with insolvency proceedings, subject to there being proper scope to do so, if it results in a more efficient and pragmatic approach (see comments of the Isle of Man's First Deemster (Chief Justice) in *Interdevelco Limited v Waste2Energy* (2012) CHP 2012/56 at paragraph 2).

In order to avoid the situation whereby liquidators are appointed in two jurisdictions, it is possible for an application to be made to the Manx courts to recognise the appointment of a liquidator in a foreign jurisdiction and allow them certain powers over companies or assets in the Isle of Man.

Foreign creditors in respect of insolvency proceedings in the Isle of Man are dealt with in the same manner as local creditors; all must prove any debts owed to them in the usual course.

The UNCITRAL Model has not been adopted in the Isle of Man and we are not aware of any considerations for its adoption at present.

51 UNCITRAL Model Law**Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?**

The UNCITRAL Model has not been adopted in the Isle of Man and we are not aware of any considerations for its adoption at present.

52 Foreign creditors**How are foreign creditors dealt with in liquidations and reorganisations?**

Foreign creditors in respect of insolvency proceedings in the Isle of Man are dealt with in the same manner as local creditors; all must prove any debts owed to them in the usual course.

53 Cross-border transfers of assets under administration**May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?**

The concept of administration does not exist in Isle of Man law. Having said that, in a judgment known as *Capita v Gulldale* (CHP 2013/145) the Isle of Man Court held that an Isle of Man company may be placed into administration under the laws of England and Wales if that Isle of Man company has significant connections with England and Wales. In the *Capita* case, the Isle of Man company had interests in properties in the City of London.

54 COMI

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 concept of COMI does not exist in Isle of Man law because the Isle of Man is not a member state of the EU and therefore the directive relating to COMI does not apply in the island. From a tax perspective, the question is where the company's 'management and control' takes place.

55 Cross-border cooperation

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 Isle of Man High Court has frequently assisted courts, insolvency officers and others from countries outside the Isle of Man when they have requested assistance in obtaining information and evidence in the Isle of Man, especially in cases of alleged wrongdoing or insolvency (see First Deemster Doyle's comments in *Britain v Impex Services* (2004) CP 2003/96, paragraph 107).

56 Cross-border insolvency protocols and joint court hearings

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 Manx courts have not to date entered into any cross-border insolvency protocols or coordinating arrangements, or held joint hearings with courts in other countries in cross-border cases.

However, in the case of *Capita v Gulldale* (2014) CHP 2013/145, the Manx courts ordered that a letter of request could be sent to the English High Court requesting they place the defendant, a Manx company with its centre of main interests in the Isle of Man, into administration under the laws of England and Wales. In the circumstances of the case, the court granted this request, recognising that Manx insolvency legislation does not offer administration, and this would seem the 'efficient and effective' way to deal with the defendant company's assets.



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The main Italian legislation governing the liquidation, restructuring and insolvency of corporate entities is as follows:

- Royal Decree No. 262 of 16 March 1942 (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);
- 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);
- Legislative Decree No. 270 of 8 July 1999, governing the Extraordinary Administration (Law No. 270/1999) as amended and supplemented; and
- Law No. 39 of 18 February 2004, governing the Extraordinary Administration of Large Enterprises as subsequently amended and supplemented (Law No. 39/2004).

2 Excluded entities and excluded assets

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

Under Italian law, 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 Ministry of Justice may update the thresholds every three years by a decree. 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, etc).

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 bankruptcy 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 clawback 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.

3 Public enterprises

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 has stated that said companies, under certain conditions, could also qualify as 'public entities' and, so, 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 and also by the Supreme Court of Cassation. The ruling of the Supreme Court is based on various grounds, among which: 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'; and 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 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. 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. A recent case law approach has stated that companies that have local authorities among their shareholders are subject to the same treatment of those operating within the same market, with the same forms and the same manners. Indeed, the

Supreme Court held that the legislator's choice to allow the exercise of certain activities through capital companies and, so, to pursue the public interest through a private way, implies that it has to bear the risks associated with their insolvency. Otherwise, the principles of equal treatment and protection of legitimate expectation of those who come into contact with such companies would be infringed. This is also a requirement of compliance with competition rules, which requires equal treatment between those operating within the same market, with the same forms and the same manners (Court of Cassation, 7 February 2017, No. 3196).

4 Protection for large financial institutions

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 competent authority may choose the specific tool to adopt in the circumstances.

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 in 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.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

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 offices are abroad may be declared bankrupt in Italy even if they have not been declared bankrupt abroad (subject to international agreements and EU legislation). Similarly, any transfer of registered office abroad does not preclude Italian jurisdiction if it occurs after 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. Since June 2018, pursuant to the amendments brought about by the Legislative Decree No. 54/2018, the bankruptcy receiver must lodge with the appointing court a declaration whereby he or she guarantees the non-existence of any of the obstacles to the appointment provided by the law. The bankruptcy receiver must complete his or her obligations within the prescribed deadlines, under penalty of revocation.

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 movable or immovable 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 movable or immovable property owned or possessed by the individual or entity undergoing insolvency proceedings; and
- the bankruptcy receiver.

This 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 movable or immovable property either admitted or excluded from the statement of liabilities.

This 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 dependant 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 proceeding have to be paid by the appellant.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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 dissolved voluntarily by passing a resolution in the shareholders' general meeting, on any one of the following events:

- 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 7) 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.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary 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 representing 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 (such as a lawyer, a business consultant or an accountant) and he or she must be appointed by the debtor and entered in the register of auditors. 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. As regards the approval thresholds, please see question 8.

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. 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 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, a 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. Any 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 claw-back actions.

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 extraordinary 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 extraordinary 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 rarely 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.

This is a procedure whereby a company is admitted to extraordinary administration and an extraordinary commissioner is appointed. The Ministry of Economic Development can admit large enterprises to extraordinary administration and appoint an extraordinary 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 extraordinary commissioner and may fix the conditions of the appointment, even in derogation of the applicable provisions.

The role of special extraordinary 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 extraordinary 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 extraordinary commissioner, make a bankruptcy order and open judicial liquidation proceedings.

As an alternative to the procedure above, the extraordinary 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 extraordinary 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 licence or concession are sold, such licences and concessions are transferred to the purchaser.

If the extraordinary commissioner is willing to dispose of certain business assets to protect the economic and commercial value of the group, the extraordinary commissioner and the purchaser shall enter into a consultation procedure with the unions to agree on the transfer of the employees; in particular, the extraordinary 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 extraordinary 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 extraordinary 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 extraordinary 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 extraordinary commissioner is not required to file any of the following:
 - the aforementioned restructuring plan with the Ministry of Economic Development;
 - the detailed report of the reasons underlying the insolvency of the company or the group with the Ministry of Economic Development; and
 - 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.

8 Successful reorganisations

How are creditors classified for purposes of a reorganisation 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 to 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 court 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 court. 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 email. Failing that, they are regarded as consenting and taken into account to calculate the majority.

After the creditors vote on the plan, the composition must also be approved by the court. The court 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 the majority of classes vote in favour. However, the Insolvency Act provides for the possibility of cramdown in that the court may approve the plan notwithstanding that one or more classes of creditors voted against it, if the terms of the petition allow the dissenting creditors to be satisfied to the same extent as they would have been following a practical alternative procedure.

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 (chosen by the debtor) (see question 7), 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 and 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.

In case of extraordinary administration of large enterprises, the extraordinary commissioner, after obtaining the relevant authorisation from the Ministry for Economic Development, may file an arrangement with the court.

Such arrangement may provide for:

- the division of creditors into classes, according to their legal position and uniform economic interests;
- different treatment for creditors belonging to different classes;
- the restructuring of debts and satisfaction of creditors' claims through any technical or legal means, including assumption of debts, mergers or other corporate transactions (in particular, the arrangement can allow for the allocation to creditors or classes of creditors, or companies in which they have holdings, of stock/shareholdings, quotas or bonds, including bonds convertible into shares, or other financial instruments and debt instruments); and
- the transfer of the assets of the debtor to a contracting party.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

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.

The differences from proceedings opened voluntarily consist of the fact that:

- voluntary liquidation is initiated by the directors of the company and (if need be) revoked by the shareholders' meeting, while involuntary bankruptcy procedure is initiated by a judgment of the competent court;
- during the voluntary liquidation, the corporate bodies retain some powers and, in particular, the directors retain the power to manage the company, even for the sole purpose of the preservation of the assets; and
- voluntary liquidation is governed by one or more liquidators appointed by the shareholders' meeting, while the bankruptcy procedure is governed by the bankruptcy receiver appointed by the court with the bankruptcy order.

In addition, in the voluntary liquidation the typical effects of bankruptcy are not produced. In particular:

- the entrepreneur is not deprived of its business and assets;
- the payments of debts and liabilities are not suspended; and
- payments made, securities given or transactions entered by the entrepreneur cannot be clawed back.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Only 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 extraordinary 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 that is subject to joint control) may only file a petition for 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.

In voluntary reorganisation proceedings, as opposed to the involuntary one:

- the directors of the company start the procedure and the shareholders' meeting (if needed) revokes it, while in case of involuntary reorganisation the judgment of the competent court addresses these issues;
- if the proceedings are voluntarily started, the corporate bodies retain some management powers and, in particular, directors retain their management power, even for the sole purpose of the preservation of the assets, while in the extraordinary administration proceedings, one or more extraordinary directors can be entrusted with the management of the enterprise and the administration of the assets of the company; and
- in case of voluntary liquidation, the shareholders' meeting appoints one or more liquidators who govern the procedure, while in the extraordinary administration, the Minister of the Economic Development or, in case of inertia, the competent court, appoints the extraordinary directors.

Moreover, the typical effects of extraordinary administration are not produced in case of voluntary liquidation. In particular, the payments of debts and liabilities are not suspended, while in the extraordinary administration, the effects of the declarative judgment of the insolvency state are:

- the inability to initiate or pursue individual enforcement actions;
- the inability to acquire pre-emption rights, unless authorised by the court;
- the ineffectiveness against third parties of the acts made after the declaration of insolvency; and
- the opening of the competition between the creditors and the constraint on the concurrence of claims.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' 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). For further detail see question 7.

12 Unsuccessful reorganisations

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, then 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, it 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.

With regard to extraordinary administration, when, at any time during the procedure, it appears that it cannot be usefully continued, the court may, upon request of the extraordinary commissioner or ex officio, order the conversion of the procedure into an insolvency proceedings. Before submitting the request for conversion, the extraordinary commissioner has to report to the Minister of Industry.

Moreover, the court may, upon request of the extraordinary commissioner or ex officio, order the conversion of the extraordinary administration procedure into an insolvency proceedings:

- (i) when, despite the authorisation of a plan providing for the sale of business assets, such sale has not yet taken place, in whole or in part, after the expiry of the programme, unless an extension has been granted; or
- (ii) when, once a restructuring plan has been authorised, at the end of the programme the entrepreneur has not recovered the ability to regularly meet their obligations.

The conversion of the extraordinary administration procedure into an insolvency proceedings is ordered by the court, after consultation of the Minister of Industry, the extraordinary commissioner and the insolvent entrepreneur. Anyone who has an interest can lodge a complaint before the court of appeal within 15 days against such decree.

With regard to extraordinary administration of large enterprises, the court, after consultation of the extraordinary commissioner, orders the conversion of this procedure into an insolvency proceedings when the adoption of any programmes that are one of the conditions for the admission to the extraordinary administration is not possible or when the Minister does not authorise them. The same occurs when the requirements in (i) and (ii) above are not met.

13 Corporate procedures

Are there corporate procedures for the 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 6).

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.

14 Conclusion of case

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.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

Article 5 of the Bankruptcy Law stipulates that the entrepreneur pays insolvency when he or she 'is no longer able to regularly meet his or her obligations'.

The insolvency status can be defined as a pathological and irreversible situation that involves the entire patrimony of the company and that does not allow it to satisfy, in due course and by normal means, the obligations assumed. It is usually manifested by the non-fulfilment of one or more obligations, but it can also be manifested by other circumstances that reveal the company's disruption, such as:

- payments with non-customary means (ie, *datio in solutum*);
- unavailability of the entrepreneur;
- closure of the premises of the undertaking; or
- fraudulent substitution or divestment of assets by the entrepreneur.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

From the analysis of the Insolvency Act it is unclear whether companies have a right or an obligation to start the insolvency proceedings in case of collapse. A real duty to report the insolvency status appears to be linked only to the case where the delay in insolvency reporting further worsens the company's serious financial stability. In this case the entrepreneur can be charged with simple bankruptcy, see question 18.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Directors who delay the beginning of the insolvency proceedings while aggravating the further the collapse of the company can be charged with simple bankruptcy (see question 18).

Moreover, breach of the directors' duties (to avoid preferential payments and not worsen the financial position of the company) may result in criminal liability and in personal civil liability for the loss suffered by the company (see question 18).

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. Furthermore, a director who has carried out transactions falling under articles 216 and 217 of the Insolvency Act (fraudulent or simple bankruptcy), or who has applied or continued to apply for funding by concealing the serious financial instability or the insolvency status of the company can be charged with criminal liability.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? 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 companies.

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 as a result of failure by the directors 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 held 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 as well as payments and financing transactions authorised by the court. These provisions apply to both simple and fraudulent bankruptcy offences.

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.

Criminal liability may also occur if directors and general managers, for the sole purpose of being admitted to the composition with creditors or obtaining the approval of a restructuring agreement with financial intermediaries, attribute themselves non-existent assets, or, in order to influence the formation of the majorities, simulate credits wholly or partially non-existent. The same sanctions applicable in case of simple and fraudulent bankruptcy apply.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

No, they do not. Italian law does not admit any shift of the director's duties to creditors when the company looks to be in crisis.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

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.

With the beginning of the extraordinary administration and of the extraordinary administration of large enterprises proceedings, the directors lose all powers of administration and the extraordinary commissioner manages the company and the company's assets.

By contrast, following a composition with creditors, the directors retain some powers and, in particular, they:

- file the proposal with the competent court;
- continue to manage the company (administering the assets and exercising the business), under the supervision of an extraordinary commissioner; and
- with the written authorisation of the supervising judge, apply for loans, enter into transactions, sell real estate, grant mortgages or pledges, and, in general, perform activities that go beyond the ordinary administration.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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. The same provision applies to assets admitted to extraordinary administration and extraordinary administration of large enterprises proceedings.

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 7)).

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.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

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 used, as outlined in question 7. 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 be 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 the continuation of the business is in 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 it has 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.

In an ordinary insolvency proceedings, the debtor may carry on business only if the court orders in its insolvency declaration the provisional continuation of the business activities, even limited to some specific company's branches. It can be decided if the interruption of business activities may result in serious damage, provided that their continuation does not cause any prejudice to creditors.

Subsequently, the supervising judge, upon receiving the bankruptcy receiver's proposal and after obtaining the favourable opinion of the creditors' committee, by means of a motivated decree,

will authorise the debtor to temporarily carry on business, even if restricted to specific company branches, and will set its duration.

During this interim period, the creditors' committee is convened by the bankruptcy receiver at least every three months to be informed about the performance of the management and to decide on the opportunity to continue the business. If the creditors' committee does not consider it is appropriate to carry on business, the supervising judge orders to cease it.

Every six months, or at the end of the interim period, the bankruptcy receiver has to file a business report with the court. In any case, the bankruptcy receiver has to promptly inform the supervising judge and the creditors' committee of all supervening circumstances that may affect the temporary carrying-on of business.

The court may order the termination of the business activities at any time whenever it is deemed appropriate. It is decided by means of a non-challengeable decree, after the bankruptcy receiver and the creditors' committee have been heard.

During the interim period, pending contracts continue to have effect, unless the bankruptcy receiver decides to suspend their execution or to terminate them. Finally, debts arising during such a period have priority status.

23 Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be 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 7), 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. In both extraordinary administration and extraordinary administration of large enterprises, the management of the company is carried out by an extraordinary commissioner, who can obtain loans or credit (which acquire priority status) in order to continue the business activity.

24 Sale of assets

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 the context of an insolvency procedure, the bankruptcy receiver has to comply with the main criterion of block selling the entire business, its branches, its assets or its legal relationships when it turns out that this option allows creditors a better satisfaction. Otherwise, the bankruptcy receiver must carry out the liquidation of individual assets.

If the bankruptcy receiver considers the sale of the entire business to be more appropriate, he or she may alternatively evaluate, in the liquidation plan: the immediate sale of the business; or the continuation

of the business and the subsequent sale of it (eg, if this option allows them to sell the business at a higher price).

If the bankruptcy receiver decides to carry out the liquidation of individual assets, there are different procedures for the sale of the debtor's immovable or movable assets: an auction sale of immovable assets to protect creditors' interests in bankruptcy proceedings and a private sale for movable 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 court can identify and utilise the best methods to determine price, publicity and award criteria for the most economically advantageous tender. The court will order the sale by auction when, according to its evaluation, the auction price of the assets could exceed half of their market value. The court can authorise the purchaser to pay in instalments. In this case, if the purchaser requests, the court can also authorise his or her possession of the assets. An independent, irrevocable and on demand guarantee must 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 from 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 business debts arising before the transfer; and
- the bankruptcy receiver or the extraordinary 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 transfer of business as a going concern (the consultations), the extraordinary 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 extraordinary 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 extraordinary 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.

The assessment made by the extraordinary commissioner's experts takes into account the business profitability, even if negative, at the time of the estimate and in the next two years. In order to make the block sale of the company's assets easier, the business' price is not fixed on the basis of its market value, but net of restructuring costs.

Certain Italian employment provisions setting out a favourable and protective regime for employees in the event of any transfer of business concerns will 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 to be 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 discretionary 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.

In the case of composition with creditors, the debtor may sell its assets to its creditors, provided that the unsecured creditors are satisfied at least for 20 per cent of their credits.

As a result of the sale, creditors must be satisfied with the proceeds of it ('composition with creditors by means of liquidation'); otherwise, if the composition with creditors provides for a business continuity, the debtor may partially sell his or her assets and continue the business activity with the non-transferred assets (also known as mixed composition with creditors).

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

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, because the bankrupt and the mass of creditors are separate entities, compensation in such a situation would breach the principle of *par condicio creditorum*.

As regards 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.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

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 or she is exercising his or her right of subrogation and replaces the bankrupt party as party to the agreement, thereby assuming all the obligations thereunder, or that he or she 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, such as contracts awarded as a result of a tender, contracts of commission, current account contracts, etc.

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 are paid, namely, 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.

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 extraordinary commissioner 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.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

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 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.

28 Personal data

Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information 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) which is still in force and of the General Data Protection Regulation (Regulation (EU) 2016/679) of the European Parliament and of the Council of 27 April 2017 (the GDPR), applicable since 25 May 2018, 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), Legislative Decree No. 196/2003 provided some notifications related to the change in the entity that owns and manages customer data:

- before the end of the data processing, the assignor or seller has to notify the Italian Data Protection Authority of the end of the processing;
- the change of the data controller; and
- before beginning the data processing, the assignee or purchaser must notify the Italian Data Protection Authority that it will take on the processing if it had not already notified the Italian Data Protection Authority in relation to a similar processing. Article 37 of the Legislative Decree No. 196/2003 has yet to be formally repealed, but the GDPR does not provide for the above-mentioned notifications anymore.

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 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).

The code of professional ethics and good conduct for the processing of personal data for the purpose of commercial information states that information coming from public sources and related to bankruptcy or insolvency proceedings is retained by the supplier for the purpose of providing the commercial information service for a period not exceeding 10 years from the date of the beginning of the insolvency proceedings. Once this period has expired but there is other information that is referred to a subsequent insolvency proceedings or to a new insolvency proceedings concerning the same person or another related party, such information may be further used by the supplier but the treatment can last for up to 10 years from their beginning of the new proceedings. A decree to implement the provisions of the GDPR is expected to be adopted by the Italian parliament shortly. We cannot exclude that such a decree might introduce new rules concerning the processing of personal data collected by a company in liquidation or during its reorganisation.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

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. 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 may 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 bankruptcy receiver is not entitled to avoid its effects.

Creditor remedies

30 Creditors' enforcement

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 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 of insolvency proceedings, the assets of a business can be seized only within judicial proceedings.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Any unsecured creditor may, before the debtor becomes insolvent, initiate individual proceedings to enforce his or her 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 submitted before the distribution plan is approved 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.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

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.

33 Creditor representation

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.

Since 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.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

There are no procedures by which the creditors can pursue the estate's remedies if the insolvency administrator is without funds to pursue a claim.

35 Claims

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? 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 – 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 Insolvency 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 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 to 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 or her claim and the court upholds the claim.

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 this rule, a creditor cannot claim interest accrued after the opening of the insolvency proceedings.

36 Set-off and netting

To what extent may creditors 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, provided that they have not expired before the declaration of insolvency.

Set-off will not take place where the creditor purchased a claim that is not yet due 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.

37 Modifying creditors' rights

May the court change the rank (priority) 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 ranking is based is null, voidable or invalid.

38 Priority claims

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 movable 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 immovable 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 7), 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 until the date of the decree that allows the procedure. 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 that are 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 Legislative Decree No. 152/2006 (Environmental Code).

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

A liquidation of a company does not automatically terminate employment contracts but instead 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 that is 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 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 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.

Within seven days following receipt of the letter, the unions may request that a meeting be held to discuss the possibility of avoiding or reducing the redundancies. Trade union agreements concluded during procedures that provide for a process of total or partial reabsorption of workers, may establish that they will carry out different tasks than those undertaken before the crisis.

If no agreement is reached, a second meeting has to take place in the following 30 days before the Labour Office, now called *Ispettorato Territoriale del Lavoro*.

In the meantime, if 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 immovable 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.

Furthermore, pursuant to Legislative Decree No. 148/2015, in case of business reorganisation and business crisis (except for cases of business termination), an extraordinary salary wage adjustment may be asked by the employer in the event of suspension or reduction of work activity.

In order to get this benefit, the business reorganisation programme must include a plan aimed at addressing the management or the production inefficiencies and must provide information on any planned investments and workers' training activities. In any case, such a programme has to be suitable for allowing a substantial recovery of the workforce affected by the suspensions or the reductions of working time.

On the other hand, in case of business crisis, the programme must contain a recovery plan aimed at dealing with productive, financial or managerial imbalances. The plan has to indicate the remedial actions to be taken and the goals to be reached with a view to the continuation of business activities and the safeguarding of employment.

In the case of corporate reorganisation, the extraordinary wage subsidies may last for up to 24 months, while in the event of business crisis, such wage subsidies may be granted for up to 12 months. As for the former, Law No. 205/2017 amended Legislative Decree No. 148/2015 introducing the possibility for companies with more than 100 employees and with strategic economic relevance to extend such period if certain conditions are met.

40 Pension claims

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

All pensions-related claims are privileged claims included within the class of liens on immovable 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.

41 Environmental problems and liabilities

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 personally, 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 or her 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 both 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 or she has a right to do so. If he or she chooses to clean up the site, he or she 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. However, with Note 18 January 2018 No. 01495, the Italian Ministry of the Environment clarified that if the party responsible for the environmental problem could not be identified, the owner of the property must reimburse the public authorities for the measures they adopted in order to clean up the property.

Furthermore, the owner of the contaminated site who did not cause the pollution is also subject to the obligation to adopt adequate preventive measures pursuant to article 240, paragraph ii and article 245, paragraph 2 of the Environmental Code.

42 Liabilities that survive insolvency or reorganisation proceedings

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 that 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: 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 must involve at least 60 per cent of the creditors and are only binding upon those creditors who have agreed to its terms, as 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.

43 Distributions

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

After the debtor's assets have been disposed of, the bankruptcy receiver, after consulting the creditors' committee, must prepare a distribution plan that is submitted to the court for approval. Creditors have little room to challenge such a plan. The court 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 movables and real estate; and
- unsecured claims.

Security

44 Secured lending and credit (immovables)

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

Under Italian law, loans are mainly secured by way of a mortgage over immovables. Some types of immovables (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 immovables:

- 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 immovables 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 immovable 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 the loan in 18 monthly instalments will cause the transfer of the immovable 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 including a specific clause, that the transfer of the goods may extinguish the debt even if the immovable is worth less than the outstanding debt.

45 Secured lending and credit (movables)

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

Pledge

The main type of security taken over movable property is a pledge. A pledge may be taken over any movable 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.

To enforce the pledge against third parties or to gain priority in insolvency proceedings, it is essential to prove that the pledge is created in writing on a date certain at law. The Civil Code sets out specific rules governing how the date is determined.

Non-possessory pledge

Law Decree No. 59/2016 introduced the *pegno mobiliare non possessorio*, a new form of security over movable 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 or trade the assets (in contrast to what would happen for ordinary Italian pledges). Furthermore, any proceeds from the use 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 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 with regard to 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 clawback 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 movable assets of the debtor. A special lien is created over specific movable or immovable 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 or her 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 movables concerned (except where the movable assets have been seized by a creditor).

Special liens on movable 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 movables (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.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

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 can only be promoted by the insolvency office-holder and is aimed at obtaining a judgment from the court that declares void and ineffective the acts performed by the insolvent debtor during the period 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 made in the year preceding the bankruptcy judgment 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 made in the year preceding the bankruptcy judgment and was not made with money or other customary payment methods;
- pledges, securities and mortgages wilfully created in the year preceding the bankruptcy judgment that were not yet past due; and
- pledges, securities and mortgages created voluntarily or by court order in respect of debts past due created in the six months preceding the bankruptcy judgment.

Article 67(2) provides a list of transactions that can be clawed back if they have been made in the six months preceding the bankruptcy judgment and 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.

Courts have taken a broad approach in 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; and
- 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 claw back 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 the company was declared bankrupt.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

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 a 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 a 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 an SpA and not an Srl, as there would be no reason for treating the same situation in a different way according to the type of company.

Some exceptions to the above-mentioned rules apply in case of composition with creditors. Indeed, here, receivables arising out of any form of financing acquire a priority status.

Moreover, by way of derogation from the general principle set out in the Italian Civil Code and expressly referred to Srl (and, by way of

interpretation, also to SpA), the priority status also applies to funding granted by shareholders up to 80 per cent of their amount.

Groups of companies

48 Groups of companies

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.

49 Combining parent and subsidiary proceedings

In 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?

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 that court 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.

International cases

50 Recognition of foreign judgments

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?

For procedures opened in a member state of the European Union, the EU Regulation on Insolvency Proceedings Recast (2015/848) (the

EU Insolvency Regulation) applies, which states that 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). For further detail, please refer to the chapter on the European Union.

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 court;
- 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 court;
- 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 public policy.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has not been adopted. Cross-Border Insolvency is regulated in Italy by the EU Insolvency Regulation (see question 50). As regards insolvency proceedings opened after 26 June 2017, and the predecessor to the EU Insolvency Regulation, Regulation (EC) No. 1346/2000 of 29 May 2000 continues to apply to insolvency procedures opened before that date.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors are subject to the same regime applicable to national creditors.

Update and trends

The Italian law of insolvency and restructuring is expected to be fully reformed by 14 November 2018. On 18 October 2017, the Italian parliament passed Law No. 155 whereby it enabled the government to adopt one or more legislative decrees with a view to realising a systematic reform of the procedures set forth by the Insolvency Act (with the sole exception of the procedures of extraordinary administration) as well as amending certain rules of the Civil Code on liquidation, restructuring and insolvency of corporate entities.

According to the explanatory memorandum, the envisaged reform pursues the goal of solving the applicative issues that the current regime poses. The reform is also prompted by the normative developments at EU level, namely EU Regulation No. 15414/15 and the Commission Recommendation No. 2014/135/EU. The specific contents of the reform are still unknown. However, when enacting Law No. 155 the Italian Parliament already identified the general principles that will inform the new legislation (article 2 of Law No. 55/2017), and namely:

- a new procedure called 'judicial liquidation' will be introduced and will replace the current procedure of insolvency;
- a new definition of crisis as likelihood of a future insolvency will be adopted;
- all the judicial procedures aimed at ascertaining the existence of the crisis and of the insolvency will be unified;
- the new procedure will be applicable to all types of debtors, save only for public entities;
- judicial liquidation will be available only if alternative proposals aimed at overcoming the crisis and ensuring business continuity are not viable; and

- the definition of COMI as developed under EU law will be incorporated.

Furthermore, Law No. 55/2017 envisages the introduction of a new, non-judicial and confidential procedure designed to foster the emergence and the resolution of situations of crisis, before the actual insolvency of the debtor (article 4). This new preventive procedure will be administered by organisms to be created in every Chamber of Commerce, Industry, Craftsmanship and Agriculture, which, for a period up to six months, will support the debtor in negotiating with the creditors to reach an agreed solution of the crisis.

To realise this systematic reform, the government will also amend the Civil Code in several parts (article 14 of Law No. 55/2017), including:

- article 2394-bis on civil action against former directors of the company during insolvency proceedings will be repealed;
- the creditors of limited liability companies (Srl) will be authorised to bring civil claims against the company's directors; and
- the entrepreneur and the company management will be subject to the duty to organise the company so that emerging crises can be promptly detected and to the duty to resort, when needed, to the tools offered by the legal system to address situations of crisis.

Finally, it is expected that the government will revise the provisions regarding the composition with creditors (article 6) and regarding privileges and guarantees (articles 10 to 12) and it will fill a gap currently existing in Italian law by adopting specific rules on groups of undertakings (article 3).

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Transfer of assets between related administrations are expressly regulated only regarding member states where related administrations are opened pursuant to the EU Insolvency Regulation. Pursuant to article 49 of the EU Insolvency Regulation, assets may be transferred from the state of the secondary insolvency proceedings to the state where insolvency proceedings are primarily opened as long as all creditors have been satisfied in the secondary member state.

It is reasonable to believe that the same principles would all apply in different sets of circumstances, but the transfer is not likely to be automatic and a court order for seizure of assets may be required.

54 COMI

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 EU Insolvency Regulation provides that main insolvency proceedings are to be opened in the member state in which that company has its COMI. There is a rebuttable presumption that a company's COMI is where its registered office is located – unless the debtor has moved its registered office in the three months preceding the application to open main proceedings. 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 by EU member states and by reference to EU law and not national laws. See further in the chapter on the European Union.

The ECJ further held that, 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 EU Insolvency 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.

This principle has been confirmed by the Joint Chambers of the Italian Supreme Court, which stated that, in case of insolvency, the effective company's headquarters cannot be identified in a merely formal new registered office transferred abroad when it appears that the transfer of the company's registered office has not been followed by the actual carrying on of the business activity at the new office and with the establishment of the administrative and managerial company's core therein. For this reason, the Court of Cassation held that Italian courts have jurisdiction to declare the insolvency of a company which had its actual centre of its interests and its own business in Italy, before the formal transfer of its registered office abroad (Court of Cassation, Joint Chambers, 18 March 2016, No. 5419; see also: Court of Cassation, Joint Chambers, 6 February 2015, No. 2243; Court of Cassation, Joint Chambers, 9 January 2014, No. 265).

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.

55 Cross-border cooperation

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, the EU Regulation on Insolvency Proceedings Recast No. 2015/848 requires cooperation between insolvency office holders as well as courts supervising respective insolvencies. According to article 41 of the EU Recast Regulation,

the administrators of main and secondary proceedings shall exchange all relevant information and shall generally cooperate with each other. Furthermore, cooperation is specifically envisaged among the actors of insolvency proceedings when the latter ones relate to two or more members of a group of companies.

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, as 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; and
- 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.

56 Cross-border insolvency protocols and joint court hearings

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.



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

In Japan, there are mainly four types of legal insolvency proceedings:

- bankruptcy proceeding;
- special liquidation proceeding;
- civil rehabilitation proceeding; and
- corporate reorganisation proceeding.

Bankruptcy and special liquidation are proceedings for liquidation and winding up of the debtor, while civil rehabilitation and corporate reorganisation are proceedings for revitalisation of the debtor's business.

These legal insolvency proceedings do not commence unless they are petitioned to the competent district courts.

This chapter will focus on corporate reorganisation, civil rehabilitation and bankruptcy unless there is a need to refer to other proceedings. The focus will be on companies (corporations), not individuals, as the debtor.

2 Excluded entities and excluded assets

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

Bankruptcy and civil rehabilitation may be utilised by any type of entity, including companies and individuals. Corporate reorganisation and special liquidation are available only to stock corporations. This rule has long been applied to Japanese corporations only; however, in recent cases, overseas corporations established under Panama, Singapore and the Netherlands have been subject to the corporate reorganisation in Japan under the Tokyo District Court. As these overseas corporations are subsidiaries of other reorganisation companies, it was necessary to also involve these overseas subsidiaries under Japanese corporate reorganisation in order to achieve harmonised business reorganisation.

Assets belonging to the trust property of the debtor are not included in the estate of the debtor subject to bankruptcy, civil rehabilitation or corporate reorganisation.

3 Public enterprises

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

There is no special procedure for insolvency of a government-owned enterprise, and hence, such an enterprise is subject to the aforementioned insolvency proceedings.

4 Protection for large financial institutions

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

Yes – the Deposit Insurance Act, etc.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The four legal insolvency proceedings must be petitioned to the district courts that have competent jurisdiction over the case. Practically, most of the important insolvency cases (especially cross-border cases) are handled by the Tokyo District Court.

Once the court issues an order, this order can be appealed against only if a right of appeal is stipulated by the relevant laws. In general, the appeal does not need court permission or security deposit.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Bankruptcy proceedings commence if the court finds that, because of the lack of ability to pay, the debtor is generally and continuously unable to pay its debts as they become due, or the debtor's liabilities exceed its assets.

The trustee is appointed by the court as of the commencement of the bankruptcy proceeding. The power to (i) manage or dispose of the debtor's assets; (ii) elect to assume or reject an executory contract; and (iii) exercise the right of avoidance (against fraudulent transfer, preference, etc) belong solely to the court-appointed trustee. The trustee is appointed by the court from among the insolvency practitioners.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Civil rehabilitation

Civil rehabilitation proceedings commence if the court finds that:

- there is a risk that, because of the lack of ability to pay, the debtor becomes generally and continuously unable to pay its debts as they become due;
- there is a risk that the debtor's liabilities come to exceed its assets; or
- the debtor is unable to pay its debts as they become due without causing significant hindrance to the continuation of its business.

In civil rehabilitation, the debtor-in-possession (DIP) can continue running the business (ie, in principle, the trustee is not appointed by the court). The power to (i) run the business of the debtor company, (ii) manage or dispose of the assets thereof, and (iii) elect to assume or reject an executory contract belongs to the DIP; however, the DIP does not have the right of avoidance. The supervisor is appointed by the court as a watchdog on the DIP and has the power of avoidance if so admitted by the court. Secured creditors are not stayed from exercising their security interests in principle. However, exceptionally, secured creditors may become subject to a suspension order by the court having the effect of a temporary stay. Also, under certain conditions, the security interest may be extinguished by the court.

Corporate reorganisation

Corporate reorganisation proceedings commence if the court finds that:

- there is a risk that, because of the lack of ability to pay, the debtor becomes generally and continuously unable to pay its debts as they become due;
- there is a risk that the debtor's liabilities come to exceed its assets; or
- the debtor is unable to pay its debts as they become due without causing significant hindrance to the continuation of its business.

In corporate reorganisation, the trustee is appointed by the court as of the commencement of the proceedings. The power to (i) run the business of the debtor company, (ii) manage or dispose of the assets thereof, (iii) elect to assume or reject an executory contract, and (iv) exercise the right of avoidance (against fraudulent transfer, preference, etc) belong solely to the court-appointed trustee. Secured creditors are stayed from exercising their security interests, and the value of the collateral as of the commencement will be paid in accordance with the reorganisation plan.

Traditionally, the trustee in corporate reorganisation has been appointed by the court from among the experienced insolvency practitioners. However, since 2010, the Tokyo District Court initiated a 'quasi-DIP' practice in corporate reorganisation, where even a current manager (for example, the representative director (CEO)) may be appointed as the trustee if the following four conditions are met:

- there is no problem in the existing managers as to responsibility for illegal acts, etc in management of the debtor company;
- the main creditors do not oppose the appointment of the current manager as the trustee;
- if there is a sponsor-to-be (ie, a third party that is to acquire the business of, or new shares to be issued by, the debtor company), such a sponsor-to-be agrees and acknowledges the appointment of the current manager as the trustee; and
- there are no circumstances under which fair operation of the corporate reorganisation proceeding will not be prejudiced by involvement in management of the debtor company by the current managers.

Key differences

The key differences between civil rehabilitation and corporate reorganisation are, as in the aforementioned, whether the trustee is always appointed and whether exercise of security interest shall be stayed. Under the corporate reorganisation, the trustee is always appointed, and the exercise of security interest is stayed during the whole proceeding.

8 Successful reorganisations

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

The treatment of creditors differs between civil rehabilitation and corporate reorganisation.

In civil rehabilitation, only one class is permitted under the law – all of the unsecured creditors.

For affirmative resolution of the rehabilitation plan, both of the following is necessary:

- Headcounts: a simple majority (that is, exceeding half of the number of the unsecured creditors (voting right holders)); and
- Amounts: half or more of the aggregate claim amount of the unsecured creditors.

Under civil rehabilitation, there is no cramdown system.

The rehabilitation plan, even if approved by the creditors, becomes effective only when the court's confirmation order thereon becomes final and non-appealable.

In corporate reorganisation, theoretically many classes may be established; however, under the prevalent practice, only two classes are established by the court for the plan voting: a class of all the secured creditors and a class of all the unsecured creditors.

The requirements for approval of the reorganisation plan are as follows:

- class of unsecured creditors: a simple majority (that is, exceeding half) of the aggregate claim amount of the unsecured creditors.
- class of secured creditors:
 - two-thirds or more of the aggregate claim amount of the secured creditors, if only the maturity dates of their claims are modified by the plan;
 - three-quarters or more of the aggregate claim amount of the secured creditors, if their rights are affected by the plan by means of a discharge of a part or all of the secured claim amount or otherwise, other than mere alteration of the maturity dates; and
 - nine-tenths or more of the secured creditors, in the event the plan contemplates liquidation.

Under corporate reorganisation, there is a cramdown system. If the plan is voted down by either of the classes, then the court may terminate the corporate reorganisation proceeding and convert the case to straight bankruptcy. However, if the court deems it appropriate, the court may amend and confirm the plan in the following manner:

- with respect to a secured creditor, keep the lien in place to secure the secured claim, or pay the secured claim with the net sales proceeds upon sale of the collateral for not less than the court-determined fair market value (as evaluated free and clear);
- pay to an unsecured creditor an amount equivalent to the distribution in the event of straight bankruptcy; and pay to a shareholder an amount equivalent to the distribution in the event of liquidation;
- pay the fair market value of the claim as determined by the court; or
- provide other fair and equitable protection to the creditors.

The reorganisation plan, if approved by the creditors and confirmed by the court, becomes immediately effective even before the court's confirmation order thereon becomes final and non-appealable.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

A creditor may file petition for bankruptcy and the court may commence bankruptcy if it finds that, because of the lack of ability to pay, the debtor is generally and continuously unable to pay its debts as they become due, or the debtor's liabilities exceed its assets.

A shareholder may not file for bankruptcy.

After the commencement of bankruptcy, there is no material difference between a voluntary case and an involuntary case.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

A creditor may file petition for civil rehabilitation and the court may commence civil rehabilitation if it finds that, there is a risk that, because of the lack of ability to pay, the debtor becomes generally and continuously unable to pay its debts as they become due, or there is a risk that the debtor's liabilities come to exceed its assets.

A shareholder may not file for civil rehabilitation.

A creditor or creditors holding aggregate claims equal to 10 per cent or more of the paid-in capital of the debtor may file for corporate reorganisation and the court may commence corporate reorganisation if it finds that there is a risk that, because of the lack of ability to pay, the debtor becomes generally and continuously unable to pay its debts as they become due, or there is a risk that the debtor's liabilities come to exceed its assets.

A shareholder or shareholders holding 10 per cent or more of the total voting rights may also file petition for corporate reorganisation.

After the commencement of civil rehabilitation or corporate reorganisation, there is no material difference between a voluntary case and an involuntary case.

11 Expedited reorganisations**Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?**

Yes. Under Japanese recent practice, there are many cases (especially civil rehabilitation cases) where the acquirer of the debtor's business (under Japanese prevalent practice, called a 'sponsor') is selected by the debtor (in most cases, through a bid process) before or right after the petition for civil rehabilitation and the debtor's business is sold to the sponsor on an expedited basis before formulation or voting of the draft of the rehabilitation plan. This mechanism is much different from the 'prepacked' or 'prearranged' filing or the 363 sale under the US Chapter 11 in many aspects; however, business rehabilitation through business transfer (asset sale) outside of the rehabilitation plan is common under Japanese practice.

12 Unsuccessful reorganisations**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?**

As described above, even if the plan is not approved, the cramdown system would work under corporate reorganisation (civil rehabilitation does not have a cramdown system).

If the debtor fails to perform the plan during corporate reorganisation or civil rehabilitation proceedings, the case will be converted to bankruptcy. However, in some cases, (the trustee of) the debtor will try to amend the plan (propose a revised plan to the creditors and have the plan voted for) in order to avoid the conversion to bankruptcy.

13 Corporate procedures**Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?**

Yes. Special liquidation is used when, after a shareholders' resolution for dissolution of the company has been passed, it is found or suspected that the company has an excess of debts over assets and will not be able to complete a normal dissolution. Special liquidation is not suitable for a company where the resolution for dissolution in the shareholders' meeting may not be easy to obtain considering the number of shareholders. Under special liquidation, the debtor will enter into an amicable settlement with the respective creditors, or, have a plan of payment approved by the creditors (exceeding a simple majority of the headcount and two-thirds of the claim amount) and confirmed by the court. If the special liquidation fails, the proceeding will be converted to bankruptcy.

14 Conclusion of case**How are liquidation and reorganisation cases formally concluded?**

Bankruptcy proceedings are concluded when the court orders termination of bankruptcy after completion of the final distribution to the creditors (or, if the distribution is no longer possible, the court orders discontinuance of bankruptcy and the order becomes final and non-appealable).

Civil rehabilitation proceedings are concluded when the court issues an order of termination, which shall be issued when the rehabilitation plan is all performed, or three years have passed since the court's confirmation order becomes final and non-appealable.

Corporate reorganisation proceedings are concluded when the court issues an order of termination, which shall be issued when (i) the reorganisation plan is all performed, (ii) two-thirds or more of the monetary claims under the reorganisation plan have been paid to the creditors without payment default, or (iii) the court confirms that the reorganisation plan will definitely be carried out.

Insolvency tests and filing requirements**15 Conditions for insolvency****What is the test to determine if a debtor is insolvent?**

The concepts of cash-flow insolvency and balance-sheet insolvency are important here. As explained above, bankruptcy proceedings commence if the court finds that (i) because of the lack of ability to pay, the debtor is generally and continuously unable to pay its debts as they become due or (ii) the debtor's liabilities exceed its assets. Civil rehabilitation and corporate reorganisation commence if the court finds that there is a risk of either (i) or (ii) happening. The inability to pay debts is related to cash-flow insolvency and the excess of liabilities is related to balance-sheet insolvency.

16 Mandatory filing**Must companies commence insolvency proceedings in particular circumstances?**

Under Japanese law, companies are not statutorily obligated to file for commencement of the insolvency proceedings even if they become insolvent. However, there is a theory that, under certain circumstances, directors of an insolvent company owe a duty of care to consider filing for formal insolvency proceedings for the purpose of mitigation of the creditors' losses.

Directors and officers**17 Directors' liability - failure to commence proceedings and trading while insolvent****If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?**

Under Japanese law, directors and officers of a company are not statutorily obligated to file for commencement of the insolvency proceedings even if the company becomes insolvent. However, there is a theory that, under certain circumstances, directors and officers of an insolvent company owe a duty of care to consider filing for formal insolvency proceedings for the purpose of mitigation of the creditors' losses.

Exceptionally, a director of a medical corporation must file for commencement of bankruptcy if the obligations of the medical corporation exceed its assets.

18 Directors' liabilities - other sources of liability**Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?**

The corporate officers and directors owe a duty of care to their corporation, and if the corporation incurs loss caused by breach of the duty, then the officers and directors are personally liable for the loss. Such liabilities of the officers and directors will be examined by the trustee in bankruptcy, the DIP (or the trustee) in civil rehabilitation, or the trustee in corporate reorganisation.

If a third party incurs loss caused by wilful misconduct or gross negligence of the officers and directors, then they will be personally liable to the third party.

The officers and directors of a debtor corporation will incur criminal sanctions, for example, if they hide or destroy any assets of the debtor corporation with the intention of jeopardising the interests of the debtor's creditors.

19 Shift in directors' duties**Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?**

See question 7.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

See question 7.

Matters arising in a liquidation or reorganisation**21 Stays of proceedings and moratoria**

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?

Generally speaking, once bankruptcy, civil rehabilitation or corporate reorganisation has commenced, unsecured ordinary creditors are precluded from collecting their claims, including attachment or injunctions, no matter whether or not they are provisional.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

In civil rehabilitation and corporate reorganisation, the debtor can continue business immediately after the commencement and throughout the proceedings.

23 Post-filing credit

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

Yes, and the post-filing credit (DIP finance) is ranked as the administrative claim that must be paid when it becomes due.

24 Sale of assets

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?

The most common method is to sell the business of the debtor to the acquirer (or 'sponsor'). The encumbrances to the assets belonging to the business will not automatically become free and clear by the sale.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Stalking horse bids are permissible. Credit bids are not permitted.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

Under Japanese law, the trustee in bankruptcy and corporate reorganisation, or the DIP (or the trustee) in civil rehabilitation may elect to assume or cancel an executory contract. An executory contract under Japanese law is a bilateral contract the obligations of which are linked to each other by consideration and yet to be performed by each party as of the commencement of the insolvency proceedings.

In corporate reorganisation and civil rehabilitation, for the trustee or DIP to cancel the executory contract, the court's permission is required, which is non-appealable by any party. On the other hand, in case of assuming the executory contract, the court permission is unnecessary. In contrast, in bankruptcy, the court's permission is necessary for the trustee to assume the executory contract, while it is unnecessary for the trustee to cancel the contract.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Taking corporate reorganisation and patent for example, the following is a summary.

Licensor's corporate reorganisation

The licence agreement is usually treated as an executory contract. However, if the licence is based on patent under the Patent Act of Japan, then the provision of the executory contract under the Corporate Reorganisation Act will not be applicable and hence the trustee of licensor cannot cancel the licence agreement. Consequently, the licence agreement will continue without cancellation by the trustee.

Licensee's corporate reorganisation

The licence agreement is usually treated as an executory contract. The trustee of the licensee may elect to assume or cancel the agreement. If the trustee of the licensee needs to continue to use the patent, then the trustee will assume the agreement and the loyalty claim will become an administrative claim (common benefit claim) that will be paid when it becomes due.

If the trustee of the licensee does not need to continue to use the patent, then the trustee will cancel the agreement and the licensor will file a proof of claim (unsecured ordinary claim), which will be paid on a pro-rata basis in accordance with the reorganisation plan.

28 Personal data

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

The Act on the Protection of Personal Information prohibits a company from transferring personal data as defined in the Act to a third party without consent from the person pertaining to the personal data, except where the company transfers personal data to a third party in accordance with the statutory laws or in the course of business transfer such as statutory merger. Therefore, the trustee in bankruptcy, civil rehabilitation or corporate reorganisation (or the DIP in civil rehabilitation) may access or use the personal data in accordance with the relevant statutory laws and transfer the personal data to an acquirer of business during the insolvency proceedings.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Arbitration is hardly used in Japanese insolvency proceedings; however, mediation is sometimes used for revitalisation of the debtors. Two examples can be raised. First, there is a 'special mediation' proceeding handled by the court, and it is sometimes used for the purpose of making an amicable settlement between the debtor and some of the target creditors that did not give consent to the plan proposed by the debtor in its previous out-of-court workout proceeding. Second, in the case of corporate reorganisation of Spansion Japan Limited, a secured creditors' committee (the first one in Japanese history) was established and a mediation mechanism introduced for reaching settlement with the reorganisation trustee on various important terms and conditions

of the reorganisation plan, which led to full recovery of the claims of the secured creditors' committee.

Creditor remedies

30 Creditors' enforcement

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 bankruptcy, civil rehabilitation or corporate reorganisation has commenced, unsecured ordinary creditors are precluded from seizing assets belonging to the debtor. With respect to civil rehabilitation and corporate reorganisation, it is an established practice for the court to issue an order prohibiting the creditors from collecting pre-petition claims, including any seizure.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

With respect to civil rehabilitation and corporate reorganisation, once petition for commencement of these proceedings has been filed with the court, the court will issue an order prohibiting the creditors from collecting pre-petition claims. Exceptionally, in such an order, the court sometimes allows the debtor to pay small amount claims.

After the petition, the court issues an order commencing bankruptcy, civil rehabilitation or corporate reorganisation (note that, even in the voluntary petition, there is a gap period between petition and commencement). Once these proceedings commence, unsecured ordinary creditors are precluded from collecting their claims outside the proceedings. Exceptionally, small amount claims may be paid in full if the court finds that prompt payment of such small amount claims would facilitate smooth progress of civil rehabilitation or corporate reorganisation, or significant hindrance would be caused to the continuation of the debtor's business unless small amount claims are promptly paid. Furthermore, very exceptionally, under certain circumstances, the court may permit payment of the pre-commencement claim if the trustee (or DIP under civil rehabilitation) and the creditor make a settlement (in that event, the nature of the claim will be turned to an administrative claim).

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Once bankruptcy, civil rehabilitation or corporate reorganisation have commenced, a notice on the commencement, the form and bar date of filing the proof of claim, and the date of the creditors' meeting will be sent to all the creditors known to the debtor. A statutory creditors' meeting will be held and the creditors will be called by the notice. In the creditors' meeting in bankruptcy, the trustee reports the financial status of the debtor, the reasons for bankruptcy, whether there are any circumstances that require a court order to assess the liabilities of the officers of the debtor or a court order to freeze the officers' assets, and any other matters necessary for the bankruptcy proceeding.

In civil rehabilitation and corporate reorganisation, the trustee (or the DIP under civil rehabilitation) must, without delay after commencement of the proceeding, submit to the court and the creditors' committee (if one exists) a report on the reasons why the debtor became insolvent, the past and present status of the business and assets of the debtor, whether circumstances require a court order to assess the liabilities of the officers of the debtor or a court order to freeze the officers' assets, and any other matters necessary for the proceeding.

33 Creditor representation

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 Japanese insolvency proceedings have been recognised as debtor-friendly proceedings in general. There is no statutory requirement of forming a creditors' committee, and in fact, there have seldom been cases where the creditors' committee was formed and recognised by the court. One of the reasons for this result is that creditors may formulate a creditor group respectively, and it sometimes suffices for collection purposes. However, as illustrated below, the creditors' committee may greatly contribute to the revitalisation of the debtor's business, and it would lead to maximisation of recovery for the creditors. Personal experience leads to the conclusion that creditors' committees should be utilised more often in Japanese insolvency proceedings.

Under Japanese law, creditors' committees may participate in the relevant insolvency proceedings if the court recognises this. The court may recognise only if (i) the number of the committee members is between three and 10, (ii) a majority of the creditors that have submitted claims consent to the committee's participation in the proceeding, and (iii) the committee fairly represents the interests of all creditors. The committees are not prohibited from retaining advisers. Each committee is given certain powers, which include the right to (i) state its opinion to the court, the debtor or the trustee regarding the proceeding, (ii) convene creditors' meetings, and (iii) supervise implementation of the proceeding. If a committee has contributed to the smooth progress of bankruptcy or rehabilitation or reorganisation of the debtor's business, and has incurred necessary expenses for such activities, the court may, following a creditor's petition, permit reimbursement of a reasonable amount of the necessary expenses, from the property of the debtor.

The most successful case of a creditors' committee began in 2009, when Spansion Japan filed for corporate reorganisation with the Tokyo District Court, and 10 secured creditors corresponding to 99 per cent of secured claims in value formulated a statutory secured creditors' committee, which was approved by the court for the first time in Japan. The committee took every imaginable measure possible in order to maximise recovery, including participating in the US Chapter 11 proceedings of Spansion LLC, which is the parent company of Spansion Japan, which nevertheless gave up on the idea of rescuing its Japanese subsidiary.

After long and tough negotiations among the committee, Spansion Japan and Spansion LLC reached a settlement agreement that provided Spansion Japan with more funds (ie, payment resources for the secured creditors) than it had originally expected. In addition, the committee served as the court-approved agent of Spansion Japan to remarket its assets, and it finally brought Texas Instruments not only as an asset purchaser but also as a viable sponsor of Spansion Japan. The committee also negotiated the terms and conditions of the reorganisation plan through a unique scheme of mediation where the committee and Spansion Japan submitted both arguments and information relevant to the arguments before the three mediators, two of whom were selected by both parties and the remaining one was selected by the two appointed mediators, all three being insolvency practitioners. The mediation went through 11 iterations, during which both parties separately filed reorganisation plans with the court, and finally reached a settlement on the terms and conditions of the plan (the debtor's plan was amended to reflect the settlement, and the committee's competing plan was withdrawn).

Through these endeavors, the creditors belonging to the committee enjoyed full recovery of ¥27.5 billion in total, this being an unusual case in the history of Japanese corporate reorganisation. Moreover, the Tokyo District Court, admitting that the committee contributed to reorganisation of the debtor's business, issued an unprecedented order approving payment of ¥500 million in total from the estate of Spansion Japan to the committee, which led to the successful recovery of ¥28 billion (corresponding to US\$280 million, assuming that ¥100 equals US\$1) in total by the committee.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

No.

35 Claims

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

Payment of a pre-commencement unsecured claims is generally prohibited after commencement of bankruptcy, civil rehabilitation and corporate reorganisation. Such a claim will be paid in accordance with the distribution process under bankruptcy, the rehabilitation plan under civil rehabilitation, or the reorganisation plan under corporate reorganisation. To be eligible for the payment, a creditor must file a proof of its claim within the period prescribed by the court. With respect to any proof of claim duly filed, the trustee (or DIP under civil rehabilitation) is to prepare and file with the court a schedule that indicates whether the debtor allows or disallows the content of such claim and the voting right of the relevant creditor. Under civil rehabilitation only, if the debtor is aware of any rehabilitation claim, for which no proof has been filed, the debtor must indicate in the schedule whether it allows or disallows such a claim.

Any creditor who has filed a proof of claim is entitled to object to a claim indicated in the schedule of allowance or disallowance during the period prescribed by the court. A claim that is allowed by the trustee (or DIP) and is not objected to by any creditor is considered final. A court clerk inserts all final claims in the schedule of creditors. The entry of claims into that schedule has the same effect as a final and binding judgment with respect to the finalised claims. If the debtor or any creditor objects to a proof of any claim, the creditor whose claim is objected to may file a petition with the court for assessment of the existence or the amount of the claim in a fast-track proceeding. A party who disagrees with the court's decision regarding a claim assessment can file a lawsuit within one month of its receipt of the court order.

With respect to secured claims, under bankruptcy and civil rehabilitation, the secured creditors may exercise the security interest outside the proceedings and it is not subject to the claim determination process above. That being said, a secured creditor whose claim is not or unlikely to be fully covered by the security interest should file the proof of the claim to be eligible for the payment of the unsecured portion.

Under corporate reorganisation, payment of a secured claim (ie, a claim secured by the collateral belonging to the debtor company's estate) is stayed by the commencement order (and even before the commencement, prohibited by the comprehensive prohibition order, if issued by the court), and a secured claim can be paid only in accordance with the reorganisation plan. The trustee makes the valuation of the collateral based on the present value as of the date of the commencement. To the extent a claim amount exceeds the value of the collateral, the exceeding part (the deficiency claim) is dealt with as an unsecured ordinary claim. The holder of a secured claim has the right to challenge the trustee's valuation of the collateral.

36 Set-off and netting

To what extent may creditors 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?

Generally speaking, creditors can exercise the right of set-off. In a typical set-off, it is necessary for the obligations of each party to be mutual, due and owing. In civil rehabilitation proceedings and corporate reorganisation proceedings, creditors can only exercise the right of set-off before the expiry of the period of the filing of their claims. Under certain circumstances, set-off is prohibited by the law.

Close-out netting clause set out in the International Swaps and Derivatives Association (ISDA) master agreement in respect of instruments traded by reference to market prices is effective under Japanese law and the balance as a result of the close-out netting will be recognised as a single claim (or a single debt, as applicable) under relevant insolvency proceedings.

37 Modifying creditors' rights

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

See question 31.

38 Priority claims

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

Under Japanese law, the rank and priority of creditors varies depending on the type of claims and proceedings involved.

Under bankruptcy proceedings

Administrative claims will be paid when they become due to the extent that the bankruptcy estate is sufficient to satisfy such claims, and security interests are independent from the proceedings and are therefore enforceable.

Other claims will be distributed in the following order:

- preferred bankruptcy claims;
- ordinary bankruptcy claims (ie, ordinary unsecured claims);
- subordinated bankruptcy claims; and
- contractual subordinated bankruptcy claims.

Residual funds after all of the above have been satisfied in full will be distributed to shareholders. Such a scenario is, however, very rare.

Under civil rehabilitation proceedings

- Administrative claims will be paid in full when they become due;
- Security interests are independent from the proceedings and are therefore enforceable. In many cases, the debtor (DIP) and secured creditors will reach agreement on the value of the collateral, the repayment schedule thereof, and enjoinder in respect of enforcement to the extent that such repayment is duly performed;
- General preferred claims (such as pre-commencement tax claims and pre-commencement labour and retirement allowance claims) will be paid in full when they become due;
- Ordinary rehabilitation claims (ie, ordinary unsecured claims) will be paid in accordance with the plan of rehabilitation; and
- Contractual subordinated claims will be assigned the lowest priority.

Shareholders will not be paid and will usually be extinguished under the plan of rehabilitation.

Under corporate reorganisation proceedings:

- Administrative claims will be paid in full when they become due;
- Security interests will be unenforceable once an order has been issued for commencement of the corporate reorganisation proceedings. (If a special order prohibiting enforcement is issued, then security interests will be unenforceable even before commencement of the corporate reorganisation proceedings.) Instead, claims in respect of security interests will be treated as secured up to the value of the collateral as of the commencement of the case, and will be repaid in accordance with the reorganisation plan. The remaining portion not covered by the value of the collateral will be treated as ordinary reorganisation claims;
- Preferred reorganisation claims (such as certain types of tax claims and a certain range of labour and retirement allowance claims) will be subject to the plan of reorganisation;
- Ordinary reorganisation claims (ie, ordinary unsecured claims) will be paid in accordance with the plan of reorganisation; and
- Contractual subordinated claims will be assigned the lowest priority.

Usually, shareholders will not be paid and will be extinguished under the plan of reorganisation.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Under Japanese law, a labour agreement is treated as an executory contract, and the trustee (or DIP under civil rehabilitation) may elect to assume or terminate the labour agreement. In termination of the labour agreement (ie, dismissal), the trustee must abide by a rule that a dismissal shall, where the dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as a misuse of that right and invalid.

Collective redundancies sometimes become necessary for revitalisation of a debtor company. Under Japanese court precedents and prevalent practice, in case of dismissal as a means of employment adjustment (ie, collective redundancies), the following four requirements shall all be satisfied: (i) necessity of reduction; (ii) effort to avoid dismissal; (iii) rationality in selection of target employees; and (iv) procedural appropriateness. According to prevalent views, even during the insolvency proceedings, the four requirements above are applicable but they are not so strictly applied as before the insolvency petition. For example, validity of collective redundancies during the corporate reorganisation of Japan Airlines has been disputed in several lawsuits, and the courts held it valid in most of the cases.

40 Pension claims

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

With respect to pensions, there are several kinds of pension schemes in Japan and treatment of pension obligation varies depending upon the types of insolvency proceedings. In general, treatment of defined-benefit (DB) corporate pensions with underfunded portions in the corporate reorganisation proceedings has often been at issue. DB is a system whereby pension benefits payable in the future to participants are predetermined. There are two types of DB pensions – agreement type and fund type. The former was at issue in the *Spansion Japan (SPJ)* case, and the latter was at issue in the *Japan Airline (JAL)* case. In the *SPJ* case, SPJ (ie, the employer) and its employees entered into a pension agreement, and SPJ executed a trust agreement with a trust bank. The pension to retirees had been paid from the trust asset, and not from the estate of SPJ. Based on the pension agreement, the employees had a claim against SPJ whereby SPJ had to pay the pension premiums to the trust bank, and thereby SPJ made installment payments of the premium to the trust bank. The pension was underfunded and hence there existed a deficiency in the pension asset. There are two kinds of premiums, one is a standard premium for the purpose of funding for the future service liability and the other is a special premium for the purpose of funding for the past service liability (ie, making up for the underfunded portion). Under these facts, in the *SPJ* case, the standard premium was treated as an administrative claim that would be paid in full as it became due. As to the special premium, it was treated similarly to a retirement allowance claim, and hence one-third was treated as an administrative claim, while two-thirds of it was treated as a preferred reorganisation claim that was subject to stay and would be paid in accordance with the reorganisation plan (in the *SPJ* case, it was fully paid in accordance with the plan). In the *JAL* case, because the premium claim was held by an independent body corporate and not by the employees, the claim was treated as an ordinary unsecured claim. Treatment of pensions under the Japanese insolvency proceedings is very complex, as illustrated above.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The trustee (or the DIP under civil rehabilitation) is primarily responsible for taking care of the environmental issues during the insolvency proceedings.

42 Liabilities that survive insolvency or reorganisation proceedings

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

In civil rehabilitation, once the court's order confirming the rehabilitation plan becomes final and non-appealable, the debtor will be discharged from every unsecured claim other than claims stipulated in the rehabilitation plan, claims that have not been filed within the filing period because of grounds not attributable to the relevant creditors or certain other liabilities set out in the Civil Rehabilitation Act. Common benefit claims, preferred claims and security interests will survive the rehabilitation proceeding.

In corporate reorganisation, once the court confirms the reorganisation plan, the debtor will be discharged from every secured and unsecured claim other than claims stipulated in the reorganisation plan, claims for retirement benefits of the debtor's officer (such as directors, auditors, representative directors and executive officers) and the debtor's employees who took office or were employed after the commencement of the reorganisation proceeding or certain other liabilities set out in the Corporate Reorganisation Act. Common benefits claims will survive the reorganisation proceeding.

43 Distributions

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

In bankruptcy, distribution will be made when (or each time) the trustee collects sufficient funds to be distributed by liquidating the debtor's assets.

In civil rehabilitation, distributions to creditors will be made in accordance with the rehabilitation plan, within 10 years.

In corporate reorganisation, distributions to creditors will be made in accordance with the reorganisation plan, within 15 years.

Security

44 Secured lending and credit (immovables)

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

With respect to real property such as a land or a building (please note that they are different property and could belong to different persons under Japanese law), a mortgage is the most typical security interest.

45 Secured lending and credit (movables)

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

With respect to movables, retention right, statutory lien, pledge, assignment as security and title retention are typical security interests.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

The trustee in bankruptcy or corporate reorganisation and the supervisor in civil rehabilitation (if granted such power by the court) are

Update and trends

This chapter has focused on the court insolvency proceedings; however, out-of-court workouts (ie, out-of-court debt-restructuring through agreements among the target creditors and the debtor) are also common in Japan.

In recent years, there has been a significant drop in the number of corporate reorganisation and civil rehabilitation proceedings. By contrast, recent years have seen a rise in the number of out-of-court workouts where debtor companies and lender banks reach agreement on a plan of reorganisation under which debt repayment is rescheduled or discharged.

This trend is attributable to several factors. First, the Japanese government has enacted several statutes that facilitate systematised out-of-court proceedings such as the Turnaround ADR scheme, the REVIC scheme, and the SME Rehabilitation Support Association scheme. Second, out-of-court workout proceedings provide lender banks with more information and transparency than court proceedings. Third, the value of a debtor's business will not be impaired by out-of-court workouts because trade creditors are not involved in such workouts and the existence of such workouts are known only to the lender banks. For the above reasons, banks are also more likely to enjoy better recovery rates than they would under court insolvency proceedings.

The prevalence of workouts is also due to the after-effects of the so-called Moratorium Law (precisely, the Act Concerning Temporary Measures to Facilitate Financing for Small to Medium-sized Enterprises), which was enacted in 2009 and expired in 2013. Under the Moratorium Law, Japanese banks were obliged to endeavour to lessen the burden of debts owed by SMEs to the extent possible by taking measures such as change of terms and conditions of debts, refinancing of debts, debt-to-equity swap and so forth, if so proposed by the SMEs. Notwithstanding the expiration of the Moratorium Law, the Japanese government still enjoined banks to continue with the same approach toward SMEs as if the law were still in effect. This has helped distressed SMEs, which would otherwise have gone bankrupt, continue in operation. Accordingly, the Moratorium Law is often criticised as protecting 'zombie' companies.

The most noteworthy recent development in the area of insolvency is the government's plan to take a step to introduce majority rule to

out-of-court workouts. As discussed above, out-of-court workouts have been increasing in recent years, and are generally preferred over court insolvency proceedings. However, in light of the right to property, which right is guaranteed as inviolable under the Constitution of Japan, there has been general understanding that, in out-of-court workouts, a reorganisation plan involving re-scheduling or discharge of claims shall be approved by unanimous consent by the creditors involved in the plan (in most cases, banks and other financial creditors). Accordingly, even if only one creditor is against a reorganisation plan in an out-of-court workout, the workout will result in failure, such that the debtor would have to file for court insolvency proceedings instead. This result is often criticised by insolvency professionals as harmful to business reorganisation.

Given this background and as a result of a series of considerations, it is concluded that the majority rule shall not be adopted in the out-of-court workout regime itself; however, the reorganisation plan of the failed workout should be utilised in the immediately following court insolvency proceeding so that the plan will be approved by the majority of the creditors.

For the purpose of achieving the goal above, treatment of trade claims is an important issue. Trade claims (most of which are small amount claims) are usually not involved in or affected by the out-of-court workout, but they would be affected by the court insolvency proceedings if no measures were taken. From this viewpoint, the Act on Strengthening Industrial Competitiveness has been amended and enforced in July 2018 to implement special rules in civil rehabilitation proceeding and corporate reorganisation proceeding after the failure of out-of-court workouts, which will request the court to take account of the decisions relating to treatment of the small amount claims made in the preceding certain out-of-court workouts, and it is expected that such rules will support the continuity relating to the treatment of small amount claims between the out-of-court workouts and the following court insolvency proceedings.

In addition, Tokyo District Court has announced a 'fast-track' schedule of civil rehabilitation proceedings for the case following the failure of out-of-court workouts and it is expected to proceed quickly and smoothly by utilising the financial analysis, business plan and the reorganisation plan prepared in the preceding out-of-court workout.

entitled to exercise the right of avoidance if such an act is found to be fraudulent conveyance or granting a preference to a specific creditor, etc.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There exists a concept similar to (but, not the same as) equitable subordination; however, it is exceptional and not automatic. In short, a loan extended by a shareholder would not be subordinated simply because the creditor is a shareholder.

The Corporate Reorganisation Act and the Civil Rehabilitation Act contain provisions permitting differentiation of payment in the plan of reorganisation or rehabilitation on the basis of equity between the same kinds of claims. As a result, there are the reorganisation plans where intercompany claims have been subordinated. Taking some high court precedents for example, (i) the Fukuoka High Court held that a reorganisation plan that subordinated a claim of the parent company that wholly controlled the subsidiary (the reorganisation debtor) and was responsible for the subsidiary becoming insolvent was reasonable and equitable under the circumstances, and (ii) the Tokyo High Court held that a reorganisation plan that subordinated a claim of a director who was responsible for letting the company become insolvent was equitable under the circumstances. However, it is generally understood that the trustee (or DIP under civil rehabilitation) does not owe duty to subordinate a claim unless it is extremely unjust not to do so.

There is no similar provision in the Bankruptcy Act, and hence, generally speaking, most of the court precedents do not support the argument of equitable subordination in the bankruptcy proceedings.

Groups of companies

48 Groups of companies

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

Any insolvency proceedings must be petitioned with respect to each company respectively, and the court would look at each company separately. The general rule is that it is not permissible to make a distribution of group company assets on a pro-rata basis without regard to the assets of the individual corporate entities involved. Under Japanese prevalent practice, substantive consolidation without relevant creditors' consent is not permissible.

49 Combining parent and subsidiary proceedings

In 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?

For example, if the parent and the subsidiaries are all under corporate reorganisation proceedings, the court and the trustee (usually, the same court and the same trustee will handle all the group companies) may think of merging all or a part of the companies for the purpose of reorganisation, and the trustee may draft the reorganisation plans to that effect.

International cases**50 Recognition of foreign judgments**

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?

Japanese courts will recognise a foreign judgment in Japan if (i) the foreign court is recognised as having jurisdiction over the case according to Japanese conflict-of-laws principles or relevant treaties, (ii) the defendant has been properly notified of the commencement of the proceedings or has not been properly notified but nevertheless assumed that proceedings had been commenced, or (iii) the judgment or the procedure of the lawsuit is not against public policy in Japan (for example, punitive damages are against Japanese public policy and not enforceable) and there is reciprocity of recognition between Japan and the country where the judgment was rendered.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Japan has long adopted a rigid territoriality principle under which insolvency proceedings commenced in Japan do not extend to the debtor's assets outside Japan, and, correspondingly, insolvency proceedings commenced outside Japan do not extend to the debtor's assets in Japan.

This principle was, however, abolished in 1999 and 2000, and replaced with the extra-territoriality principle.

Accordingly, under current Japanese laws, the power of the trustee/DIP extends to the debtor's assets located outside Japan.

On top of that, taking account of the UNCITRAL Model Law on Cross-Border Insolvency, Japan has also enacted the Act on Recognition of and Assistance for Foreign Insolvency Proceedings (Recognition and Assistance Act) in 2001, which sets out measures to extend foreign insolvency proceedings to the debtor's assets in Japan. Japan was one of the earliest countries to adopt the UNCITRAL Model Law. The Act did not purely adopt the Model Law as it modified it in some respects.

There have been 15 foreign insolvency proceedings to date that have been recognised by the Tokyo District Court under the Act. In rendering the recognition, examination of COMI is sometimes at issue.

Although the extra-territorial principle has been adopted under Japanese insolvency law, it is up to foreign courts whether to stay or give effect to Japanese insolvency proceedings. Accordingly, a debtor with important assets outside Japan would have to consider whether to file for recognition of Japanese insolvency proceedings with the relevant foreign court. For example, filing for Chapter 15 proceedings in the US as bankruptcy trustee for a Japanese company in order to halt a lawsuit in the US against the company and prevent foreclosure against the company's asset in the US. Chapter 15 filings have been quite common recently in global cases, including those involving Spansion Japan, Japan Airlines, Elpida Memory, Sanko Steamship, Mt. Gox and Takata.

In the case of *Elpida Memory* (where cash injection by the sponsor contemplated under the reorganisation plan was conditional upon the US court's recognition of the plan), the Japanese reorganisation plan was recognised by a US court for the first time in the history of Chapter 15 filings.

A further issue is how to deal with the assets in the foreign country where UNCITRAL-type recognition systems have not been introduced. In one case, the Japanese lawyer visited Hong Kong as bankruptcy trustee for a bankrupt individual for the purpose of investigating the bank accounts he might have maintained there. Because UNCITRAL-type recognition proceedings are not available in Hong Kong, and it was uncertain whether or not the bank would accept the Japanese bankruptcy trustee, the trustee had to take the bankrupt individual and his own attorney to Hong Kong, together with the trustee, and conducted the investigation with them at the banks concerned. Such issues are common in cross-border cases.

In 2015, Anderson Mori & Tomotsune represented creditors in filing for corporate reorganisation proceedings against about 40 special purpose companies in Panama and Singapore. This is a landmark case because it was the first corporate reorganisation case where the foreign entities were deemed equivalent to Japanese stock companies, which are subject to corporate reorganisation. In the *Spansion Japan* case in 2009, the semiconductor manufacturer filed for corporate reorganisation in Japan and its US parent company filed for Chapter 11 soon after that. This case was unique because the two insolvency cases proceeded in Japan and in the United States, and there occurred many cross-border insolvency issues between them. In this case, the secured creditors' committee was admitted by the Tokyo District Court for the first time in Japanese history and participated in US Chapter 11 proceedings, which ultimately resulted in successful recovery by the creditors.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

A foreign creditor will be treated in the same way as a Japanese creditor under any of the insolvency proceedings.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Generally speaking, no.

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54 COMI

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?

Under the Recognition and Assistance Act, there exists the concept of the 'debtor's principal business office' which is essentially equivalent to the COMI under the UNCITRAL Model Law. Although the debtor's principal business office is not defined under the Act, a recent court precedent (*Think 3 Inc* case) held that, in order to decide the location of a debtor's principal business office, the Japanese court would take into account the various elements of the debtor as a whole, in particular the location of the debtor's headquarters or centre of business management and strategy, and the debtor's major asset and business operation. There is no explicit test or court precedent to determine the location of the principal business office of a corporate group of companies, but a similar approach should be taken as described above.

55 Cross-border cooperation

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?

Under the Recognition and Assistance Act, a foreign trustee may file a request to the Tokyo District Court (which has the exclusive jurisdiction) to recognise the foreign proceedings and take necessary measures including the foreclosure of assets and appointment of a domestic trustee in Japan.

To date, the following 15 cases have been recognised by the Tokyo District Court.

- *Jinro (Hong Kong) International Ltd* (Hong Kong);
- *Azabu Building* (the United States);
- *Lehman Brothers Asia Holdings Ltd* (Hong Kong);
- *Lehman Brothers Asia Capital Company* (Hong Kong);
- *Lehman Brothers Commercial Corporation Asia Limited* (Hong Kong);
- *Lehman Brothers Securities Asia Limited* (Hong Kong);
- *Korea Line* (South Korea);
- *Alitalia - Linee Aeree Italiane SPA* (Italy);
- *Think 3 Inc* (Italy and the United States);
- *Samho Shipping* (South Korea);
- *STX Pan Ocean* (South Korea);
- *Song Won PCS* (South Korea);
- *Terrafix Suedafrika* (South Africa);
- *Daebo International Shipping Company* (South Korea); and
- *Hanjin Shipping* (South Korea).

56 Cross-border insolvency protocols and joint court hearings

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?

To date, there has been no case where a Japanese court has entered into a protocol with overseas courts.

Jersey

Jared Dann

Appleby

General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The Companies Law as amended is applicable to corporate insolvencies. In particular, part 21 of the Companies Law sets out a variety of winding-up procedures: summary winding up (voluntary solvent winding up), creditors' winding up (voluntary insolvent winding up, which can only be instigated by shareholders rather than creditors) and just and equitable winding up, which is a court-led process. Part 18 of the Companies Law allows for compromises and arrangements to be entered into with creditors or other persons. The Bankruptcy Law applies to both personal insolvency situations and also incorporated bodies. *Désastre* is the procedure for the winding up of the affairs of a company or individual, and is the only process that can be instigated by a creditor. It is administered by the Viscount, who is an officer of the Royal Court in Jersey.

2 Excluded entities and excluded assets

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

The Companies Law applies to all bodies incorporated under the Companies Law in Jersey. Article 1(2) of the Companies Law specifically states that the Companies Law applies to bodies corporate incorporated outside Jersey but does not include a corporation sole. Certain incorporated associations are excluded, as are Scottish firms, limited liability partnerships registered under the Limited Liability Partnerships (Jersey) Law 1997 and incorporated limited partnerships under the Incorporated Limited Partnerships (Jersey) Law 2011. Article 1 of the Companies Law specifically defines an 'external company' as a body corporate that is incorporated outside of Jersey and that carries on business in Jersey or has an address in Jersey used regularly for the purposes of its business. No assets are generally excluded under the Companies Law. For the Bankruptcy Law to apply, the entity or person concerned must have a connection to Jersey.

3 Public enterprises

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

Not relevant.

4 Protection for large financial institutions

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

Yes, the Bank (Recovery and Resolution) (Jersey) Law 2017 (Resolution Law) was passed earlier in 2017. However, it is not yet in force and the date for bringing it into effect remains unconfirmed. It reflects the legislation enacted elsewhere, in particular the EU Bank Recovery and

Resolution Directive (2014/59) and (in the UK) the Banking Act 2009. Its principal objectives are: to ensure that Jersey can assist a foreign jurisdiction in respect of resolution action being taken on a failing bank conducting business in Jersey; and to deal with the scenario where a bank in Jersey fails and additional powers are needed to resolve the local banking business, either where the home jurisdiction does not take sufficient action or where Jersey is the home jurisdiction of the bank.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The Royal Court of Jersey (Samedi Division) is the court of first instance. An appeal lies to the Court of Appeal and onwards to the Privy Council. Permission to appeal is not generally required, save from a procedural decision.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

There are three relevant mechanisms. A summary winding up under article 145 of the Companies Law is used where the company is solvent. A special resolution must be passed by shareholders, together with a declaration of solvency, which is made by the directors. Once these are filed with the Registrar of Companies, the powers of the directors of the company are then restricted to gathering in and realising assets in order to discharge liabilities through distribution of proceeds. Finally, the directors are required to make a statement that the company has no assets and no liabilities. Upon registration of that statement with the registrar, the company is dissolved.

An insolvent company may commence a voluntary liquidation by way of a creditors' winding up under article 156 of the Companies Law. In spite of the name, this process can only be instigated where shareholders pass a special resolution to this effect. The company must, however, give 14 days' notice to the creditors of the day on which it intends the special resolution to be considered. Following the passing of the resolution, a meeting of creditors occurs, at which point a liquidator is appointed by the creditors to administer the winding-up procedure.

Alternatively, a company may apply under the Bankruptcy Law to have its affairs placed *en désastre*. The effect of this is to vest the assets of the company in the Viscount, who acts as Jersey's Official Receiver.

A Jersey company (but not a creditor), be it solvent or insolvent, can also apply to the Royal Court under article 155 of the Companies Law to be wound up on the grounds that it would be just and equitable to do so. This court has a wide discretion in such cases to make whatever orders may be appropriate in the circumstances.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

The usual means of effecting a voluntary reorganisation in Jersey is by way of a scheme of arrangement. A solvent company and its creditors can reach compromises and arrangements by virtue of article 125 of the Companies Law. A company may look to implement a scheme of arrangement as a pre-insolvency procedure, in the hope of avoiding a *désastre* or a creditors' winding up. If a 75 per cent majority in number representing 75 per cent in value of the creditors or class of creditors agree to an arrangement or compromise, providing that it is sanctioned by the court, it is binding on all creditors or class of creditors. If the required number and representation of creditors or (as the case may be) members of the company agree to the scheme, then the Royal Court has discretion to sanction the scheme. Such a scheme is binding on all the creditors (or class of creditors) or on all the shareholders (or class of shareholders), as well as on the company itself and, where the company is in the course of being wound up, on the liquidator and all contributories. A scheme is concluded when the court order sanctioning the scheme is filed with the Jersey Companies Registry.

It has also proved possible to effect a reorganisation of an insolvent company's affairs by way of the just and equitable winding-up jurisdiction, but this is an evolving area. Jersey law does not have a specific 'rescue' jurisdiction such as administration, although the Royal Court has shown a willingness to fashion creative and flexible solutions where necessary, as noted in question 11.

8 Successful reorganisations

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

Identifying classes of creditors for the purposes of calling meetings of those classes in the early stages of proposing a scheme of arrangement can pose a challenge. The obvious distinctions are between secured creditors, unsecured creditors and trade creditors. It may also be necessary to draw a distinction between contingent and actual liabilities. It is important that the question is considered in detail at the outset, with expert advice, to avoid the risk of the process having to be re-run. The thresholds of creditor votes required are as set out in question 7. With regard to release of non-debtor parties, this very much depends on the terms of the proposed compromise, arrangement or scheme document itself.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

An involuntary winding up commences on the making of a declaration by the court under article 6 of the Bankruptcy Law that the debtor's property is *en désastre*. An application for a declaration may be made either by a creditor with a claim against the company of not less than £3,000, by the company itself or, in certain circumstances, by the Jersey Financial Services Commission. The application must state that the company is insolvent and that it has or is believed to have realisable assets. On the making of the declaration, all of the company's property immediately vests in the Viscount. The company may apply to the court for an order recalling the declaration at any time during the course of the *désastre*, but the court must refuse such an application unless it is satisfied that the property of the company vested in the Viscount is sufficient to pay all claims in full. Once a declaration of *désastre* has been made, creditors may not commence or, without consent, continue any action to recover the debt. The Viscount is then responsible for determining the validity of creditor claims and realising and distributing the assets accordingly.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

It is open to a creditor or a class of creditors to apply under article 125 of the Companies Law to propose a scheme of arrangement.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

As noted in question 7, Jersey does not have a formal 'rescue' jurisdiction, and as such there are no formal procedures for pre-packaged or other expedited reorganisations. However, in certain cases the Royal Court has shown itself willing to fashion creative solutions where necessary. For example, in *In re Collections Group 2013* (2) JLR N a pre-packaged sale of the business to a third party was effected under the aegis of a joint and equitable winding up. Where insolvent Jersey companies have assets in England, it has also proved possible to bring about the appointment of English administrators by way of a letter of request (*HSBC Bank plc v Tambrook Jersey Ltd* [2013] EWCA Civ 576).

12 Unsuccessful reorganisations

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?

If a particular class of creditors, but not all creditors of the debtor, have been bound by a sanctioned scheme of arrangement, it remains open to another creditor, or class of creditors of the debtor, to take such enforcement action as they wish. This is why due consideration should be given to the classes of creditors, how those creditors are to be split into different classes and calling meetings of the relevant classes (see question 8). If the debtor company becomes subject to a creditors' winding up, this does not necessarily defeat the scheme. Article 167 of the Companies Law provides that an arrangement entered into between a company and its creditors immediately preceding the commencement of or in the course of a creditors' winding up is binding on the company if sanctioned by special resolution and on the creditors if acceded to by three-quarters in number and value of them. While creditors will remain bound, it is open to a creditor, within three weeks of the arrangement being approved, to appeal to the Royal Court against the arrangement and the Royal Court may amend, vary or confirm the arrangement as it thinks just.

13 Corporate procedures

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

See summary winding up in question 6.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In a summary winding up, if the directors' statement of solvency shows that the company has no assets and no liabilities, the company will be dissolved on registration of the statement. In a creditors' or just and equitable winding up, following the discharge of any liabilities and the distribution of all remaining assets, each of the directors (or the liquidator if one has been appointed) must sign and deliver to the Registrar of Companies a statement that having made full enquiry into the company's affairs, he or she is satisfied that the company has no assets and no liabilities. The company will then be dissolved upon registration of this further statement. Under the Bankruptcy Law, when the Viscount has realised all the company's property or as much as can be realised without, in his or her opinion, needlessly protracting the *désastre*, the Viscount must supply all creditors and the Judicial Greffier with a report and accounts relating to the *désastre* and pay the creditors whatever final dividend is due. The Viscount must notify the Registrar of

Companies in writing of the date on which the final dividend is paid. The company will be dissolved with effect from the date on which the Registrar receives the notice.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

Under both the Companies Law and the Bankruptcy Law, a cash flow test is adopted rather than a balance sheet test. Accordingly, the debtor must be unable to pay its debts as they fall due.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

No. However, see question 17 in relation to the potential liabilities for failing to do so where the company is or may be insolvent.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

If a company trades while insolvent, transactions entered into at the time in question are at risk of being set aside. Its directors will also be at risk of personal liability. Other potential risks are as follows:

Wrongful trading (article 44 of the Bankruptcy Law): if, before the commencement of winding up, a director of the company knew that there was no reasonable prospect that the company would avoid insolvent winding up, or was reckless as to whether it would do so and failed to take reasonable steps with a view to minimising the potential loss to the company's creditors, the Viscount or the liquidator may apply to the court for an order that such person (whether or not he or she is still a director of the company) should be personally responsible for all or any of the debts or other liabilities of the company arising after the relevant time.

Fraudulent trading (article 45 of the Bankruptcy Law): if, on an insolvent winding up, it appears to the court that any business of the company has been carried on with intent to defraud creditors of the company or of any other person, or for a fraudulent purpose, the court may on the application of the Viscount or the liquidator order that any persons who were knowingly party to the carrying on of the business in that manner should be liable to make a contribution to the company's assets.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

A director who signs a certificate delivered to the Registrar of Companies as is required for the purposes of the winding-up procedure under the Companies Law without having reasonable grounds for believing that the statements in it are true is guilty of an offence. The promoters, officers and employees of the company (and the officers and employees of any other company who were officers of the company within one year of the commencement of winding up) are also under a duty to cooperate with the liquidator of the company in a creditors' winding up. Failure to do so without reasonable excuse is an offence punishable by a fine or imprisonment for up to six months. A company whose property is *en désastre* must supply the Viscount with such information and do everything possible to assist the Viscount in the realisation of its property and the distribution of the proceeds among its creditors. Failure to comply is a criminal offence and the company and any officer or manager of the company to whom the failure is attributable will be liable to a fine or six months imprisonment. Where a company is *en*

désastre, it is an offence: to fail to keep proper accounts in respect of any business carried on by the company for the two years prior to the commencement of winding up; to fail to appear before the Viscount on a summons; and to obtain credit in excess of £250 without disclosing to the intending creditor the fact that the company is *en désastre*. The Attorney General and the Minister for Economic Development have power to apply to the court for an order that any company director be disqualified from acting as a director if his or her conduct in relation to the company makes that director unfit to be concerned in managing a company. Disqualification may be for up to 15 years. A person who acts as a director while disqualified is guilty of an offence punishable by imprisonment for up to two years or a fine and may be declared personally responsible for the debts of any company of which he or she acts as a director while disqualified.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Directors of a company that is, or is near to becoming, insolvent will be held to owe a duty to safeguard the interests of the company's creditors. The precise point at which this occurs will depend on the circumstances of each case.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Article 149(2) of the Companies Law states that in a summary winding up on the appointment of a liquidator the directors cease to be authorised to exercise their powers in respect of the company and those powers may be exercised by the liquidator, subject to any contrary provision in the relevant resolution. Article 163(2) of the Companies Law states that on the appointment of a liquidator in a creditors' winding up, all of the powers of the directors cease, except insofar as the liquidation committee (or, if there is no committee, the creditors) sanction their continuance. During the period prior to the appointment of the liquidator, the powers of the directors should not be exercised other than with the sanction of the court, to facilitate a meeting of the creditors or to protect the company's assets.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

Leave of the court is required to commence or to continue legal action against a debtor that is *en désastre*, or that is subject to a creditors' winding up.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

There is no concept of corporate rescue in Jersey that would allow a business to continue to trade once a creditors' winding up under the Companies Law has commenced or a declaration *en désastre* under the Bankruptcy Law has been made. In exceptional circumstances it may be possible to bring this about under the just and equitable winding-up procedure, or by way of a letter of request to the English Court to appoint administrators, as noted in question 11.

23 Post-filing credit

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

It is an offence under article 25 of the Bankruptcy Law to obtain credit in excess of £250 without disclosing to the intending creditor the fact that the company is *en désastre*.

24 Sale of assets

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 *désastre* proceedings, the Viscount has extensive powers to deal with the assets of the debtor, including a power to carry on the debtor's business for beneficial disposal and to sell the whole or any part of the property of the debtor. On the sale of immovable property by the Viscount during *désastre* proceedings, all hypothecs (charges) secured against it are extinguished, but the holders of the hypothecs have preferential rights in relation to the sale proceeds.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

In the context of a creditors' winding up or *désastre* proceedings, the liquidator or Viscount as appropriate would have discretion to consider other offers or bids, notwithstanding that negotiations had been entered into with a prior bidder for the assets of the debtor. The liquidator or Viscount would seek to achieve best value upon any sale for the benefit of creditors and as such, would consider better offers received. In terms of credit bidding, there is nothing to prohibit this, although previous cases that have come before the Jersey courts focus on arm's-length sales to unconnected third parties rather than credit bid scenarios. In general, the approach has been to obtain an initial valuation by an appropriately qualified professional and to market the property or assets at the estimated price. This approach has been neither endorsed nor criticised by the Jersey courts. In a credit bid scenario where a sale may be to a connected entity or affiliate, the standard required of the secured party is likely to be higher than in an arm's-length transaction. The principal issue here will be one of valuation, as it is important to demonstrate a thorough and robust assessment of the market.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 liquidator in a creditors' winding up may, within six months after the commencement of the winding up, by the giving of notice to each person who is interested in or under any liability in respect of the property disclaimed, disclaim on behalf of the company any onerous property of the company. Onerous property is defined at article 171 of the Companies Law to mean movable property, a contract lease or other immovable property situated outside Jersey that is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act. It therefore follows that contracts for immovable property situated in Jersey cannot be disclaimed. A disclaimer operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed and discharges the company from all liability in respect of the property as of the date of the commencement of the creditors' winding up. A person sustaining loss or damage in consequence of the operation of a disclaimer shall be deemed to

be a creditor of the company to the extent of the loss or damage and accordingly may prove for the loss or damage in the winding up.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

If a licence to use IP provides that in the event of the licensee entering a formal insolvency process, such as a creditors' winding up or a *désastre*, the licence is immediately terminated, or the licensor has the right to terminate the licence, then it is possible the debtor will lose the right to continue to use the IP upon entering such a process. Such a provision is, however, likely to offend the anti-deprivation principle and may therefore be open to challenge. There is no specific Jersey authority on the point, but the above would be consistent with the Jersey insolvency regime. In a reorganisation or restructure of the debtor, on a solvent basis, it is likely that the licensee debtor will retain the ability to continue to use the IP for the purposes of its trade. If use of the IP is key to the continued trading activities of the debtor, it is likely the debtor will be keen to retain the use of this valuable asset. One of the main benefits of a scheme of arrangement is a lack of publicity and as such, it is possible a 'business as normal' stance could be adopted by the debtor and there may be no need to discuss the reorganisation with the licensor (subject, of course, to the licensor not being a creditor of the debtor or indeed to the method or reorganisation used).

28 Personal data

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

Not relevant.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Arbitration is not used in liquidation or reorganisation proceedings in Jersey.

Creditor remedies**30 Creditors' enforcement**

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?

See question 31.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Unsecured creditors are able to pursue judgment against a debtor in the same manner as a secured creditor and are not restricted from doing so. As such, the time frame involved will be the same for both secured and unsecured creditors to obtain a judgment. At the enforcement stage, an unsecured creditor may, of course, find it harder to satisfy their judgment debt. In terms of interlocutory remedies, any creditor can seek to obtain a freezing order against the assets of a debtor if it can satisfy the court that it is appropriate to do so. Alternatively, a caveat may be lodged with the court against a particular debtor to prevent him or her from transacting in relation to immovable property. An *ordre provisoire* could also be sought, which involves the seizure by the Viscount of the debtor's assets.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

If a company has passed a resolution for a creditors' winding up, or is deemed to have done so, the company must within 14 days give notice of that fact by advertisement in the *Jersey Gazette*. Not less than 14 days before the meeting at which the resolution for a creditors' winding up is to be proposed, the company must give notice to creditors that a meeting of creditors will be held in Jersey on the same day as, and immediately following the conclusion of, the company meeting. Such notice must also be given by advertisement in the *Jersey Gazette* not less than 10 days before the meeting. During the period before the creditors' meeting, the company must furnish creditors free of charge with such information concerning the company's affairs as they may reasonably require. The directors shall make out a statement as to the affairs of the company, verified by affidavit by some or all of the directors; lay that statement before the creditors' meeting; appoint a director to preside at that meeting, and the director so appointed shall attend the meeting and preside over it. Either the company or the creditors may nominate a liquidator; the choice of the creditors overrides that of the company.

33 Creditor representation

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?

Article 162 of the Companies Law allows a creditors' meeting to appoint a liquidation committee consisting of not more than five persons. If a committee is appointed, the company may, in general meeting, appoint such number of persons not exceeding five as they think fit to act as members of the committee. The creditors may, however, resolve that all or any of the persons so appointed by the company ought not to be members of the committee. On an application to the court, the court may also appoint other persons to act as members in place of the persons mentioned in the resolution. The liquidation committee has oversight of the liquidator's functions and sanctions certain of the liquidator's activities as well as determining the liquidator's remuneration and the manner in which documents should be disposed of following dissolution of the company.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

There is no specific authority on the point. However, in our experience it is usual in these circumstances for the creditors to agree to fund the costs of the liquidator, so that the liquidator may pursue claims accordingly. The fruits of the remedies will depend on the terms of such an agreement, which may also need to be blessed by the court.

35 Claims

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

All debts and liabilities, present or future, or contingent, to which the debtor is subject at the time of the declaration, or to which the debtor becomes subject before payment of the final dividend by reason of any obligation incurred before the time of the declaration, shall be debts

provable in the *désastre*. In the case of a debt which, by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value, the creditor shall make an estimate of its value. Every creditor shall prove the creditor's debt at the time and in the manner prescribed by the court. If the Viscount rejects proof of a debt in whole or in part, the Viscount shall serve notice of rejection in the manner prescribed by the court on the person who provided the proof. If the Viscount rejects a statement opposing admission of a debt in whole or in part, the Viscount shall serve notice of rejection in the manner prescribed by the court on the person who provided that statement. If a person upon whom notice has been served is dissatisfied with the decision of the Viscount and wants the decision reviewed by the court, he or she must, within the time prescribed by the court, request the Viscount to apply to the court for a date to be fixed for the court to review the decision.

36 Set-off and netting

To what extent may creditors 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?

Article 34 of the Bankruptcy Law provides for set-off where there have been mutual credits, mutual debts or other mutual dealings between the debtor and a creditor such that the balance of the account, and no more, shall be claimed or paid on either side. This is a mandatory rule.

37 Modifying creditors' rights

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

The court does not possess jurisdiction either under the Companies Law or the Bankruptcy Law or otherwise to change the rank of a creditor.

38 Priority claims

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

Under article 32 of the Bankruptcy Law, debts are paid in the following order of priority:

- in payment of the Viscount's or liquidator's fees and emoluments and all costs, charges, allowances and expenses properly incurred by or payable by either the Viscount or the liquidator;
- where under the Banking Business (Depositors Compensation) (Jersey) Regulations 2009 the debtor is a bank in default and a right of an eligible depositor in respect of an eligible deposit held by the debtor is vested in the Jersey Bank Depositors Compensation Board, in payment to that board of the total amount due to the board by virtue of all such vested rights in relation to that debtor, but not exceeding the total amount payable by the board in respect of that debtor as compensation to depositors under those regulations;
- in payment of all sums payable to the Health Insurance Fund under article 25 of the Health Insurance (Jersey) Law 1967 and to the Social Security Fund under article 41 of the Social Security (Jersey) Law 1974, all amounts due as described in article 45(3) of the Income Tax (Jersey) Law 1961 and all amounts due as described in article 47(8) of the Goods and Services Tax (Jersey) Law 2007;
- any amount due by the debtor to his or her landlord for the payment of rent due to the extent, if any, that his or her claim qualifies for preference by virtue of customary law;
- parochial rates (local property taxes) due to any parish in Jersey for a period not exceeding two years; and
- in payment of all other debts proved.

Update and trends

The dominant trend remains that of the willingness of the court to overcome such constraints as may exist in Jersey's insolvency system (for example, the absence of a dedicated 'rescue' jurisdiction along the lines of administration) by fashioning flexible solutions. These include the use of just and equitable winding up or the issuing of a letter of request for the appointment of insolvency practitioners in England or elsewhere. One particularly hot topic is that of insolvent trusts (which is to say, trust structures where the liabilities exceed the assets, but where under the law of Jersey the trustee is not personally liable to make up the shortfall). The decision in *The matter of the Representation of Rawlinson & Hunter SA* [2018] JRC119 has shed new and important light on the ranking of competing creditor claims in an insolvent trust. The newly introduced Companies (Demerger) (Jersey) Regulations 2018 are also likely to facilitate new options for restructuring.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Employees will be entitled to notice and potentially statutory redundancy pay upon termination, as well as any accrued but untaken annual leave. The Employment (Jersey) Law 2003 sets out the minimum statutory entitlement to all three.

Where an employer is proposing to dismiss as redundant at one establishment 12 or more employees, such dismissals taking place within a period of 30 days or less, then there is a duty to collectively consult for at least 30 days before the first of the dismissals takes effect. In addition, there is a further obligation to notify the Minister for Social Security in respect of any such dismissals. Where a complaint is well-founded, the Tribunal will award four weeks' pay.

Employees who have been terminated in such circumstances may be able to make a claim for Insolvency Benefit of up to a maximum of £10,000, in respect of unpaid wages, holiday pay, statutory redundancy pay and notice.

40 Pension claims

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

No specific remedies exist; such claims will rank with the other unsecured creditors.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Not relevant.

42 Liabilities that survive insolvency or reorganisation proceedings

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

No. However, claims may be revived if a company is reinstated to the register, which can take place at any time within 10 years of the date of dissolution by order of the court upon application by a liquidator or any other person (including a creditor) appearing to the court to be interested. Upon reinstatement, the company is liable to claims as if it had not been dissolved.

43 Distributions

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

The Companies Law requires a liquidator to apply a company's property (or proceeds from the sale thereof) in a winding up on a *pari passu* basis in order to satisfy the company's liabilities. The timing and manner of distributions is determined by reference to the terms of the liquidator's appointment. Where the debtor is *en désastre* under the Bankruptcy Law, the Viscount is required to transfer the assets or distribute the proceeds of sale to the creditors as soon as practicable, which may entail interim distributions being made.

Security

44 Secured lending and credit (immovables)

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

Security over immovable property in Jersey is taken by way of one of three varieties of hypothec (mortgage). A legal hypothec is relatively rare and arises by operation of law. A conventional hypothec is created by agreement between two or more parties as to the granting and taking of security expressed in the form of a contract passed before the Royal Court. A judicial hypothec occurs when an Act of Court acknowledging debt of a defined sum (for instance, monies advanced by a bank to purchase a property) is registered in the Jersey Public Registry. The latter is the usual form of mortgage in Jersey.

45 Secured lending and credit (movables)

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

Other than in relation to ships, the only method of creating security over tangible movables in Jersey is by way of pledge. Specific charges or chattel mortgages do not exist in Jersey. To pledge property there must be actual physical (as opposed to constructive) delivery of the tangible movable property pledged into the creditor's possession. There is a right of retention. As a matter of customary law (absent any Jersey judicial authority on this point) the creditor should have an implied right of sale when the grantor is in default and there is likely to be an express power of sale in the pledge document. In terms of formalities, the security is created by the delivery of tangible movable property by or with the grantor's consent.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

The principal types of transactions that can be set aside in liquidations are extortionate credit transactions, transactions at an undervalue and preferences. The court may, on the application of the liquidator in a creditors' winding up, set aside or vary an extortionate credit transaction entered into within three years of the commencement of the winding up or order a party to the transaction to make payment to the liquidator or surrender property to him or her. A credit transaction is deemed to be extortionate unless it can be proved that its terms were not such as to require grossly exorbitant payments to be made in respect of the provision of the credit and that it did not otherwise grossly contravene ordinary principles of fair dealing. A company is deemed to enter into a transaction at an undervalue if it makes a gift to any person or enters into a transaction with a person on terms for which either there is no 'cause' or the value of the 'cause' given by the other party is significantly less than the value of the 'cause' provided by the company ('cause' is analogous to but somewhat wider than the English concept of consideration).

A company gives a preference if it does anything or allows anything to be done that has the effect of putting one of its creditors or a surety or guarantor for any of its debts or other liabilities into a position that, in the event of insolvency, would be better than would otherwise have

been the case (and where there was an intention to achieve such an effect).

If a company has entered into a transaction at an undervalue during the five years immediately preceding the date of the winding up, and at that time the company was either insolvent when it entered into the transaction or it became insolvent as a consequence of the transaction; or has given a preference to any person during the 12 months immediately preceding the date of the winding up, and at the time the preference was given the company was insolvent when it entered into the transaction or it became insolvent as a consequence of the preference, then the Viscount or the liquidator (as appropriate) may apply to the court for an order setting aside the transaction or preference.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

No, under the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 the effects of contractual subordination provisions are protected.

Groups of companies

48 Groups of companies

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

A contractual right of recourse is required in the form of a guarantee, third-party security or other agreement allowing the creditor to pursue a parent or affiliated party of the debtor. Save for in exceptional circumstances where pooling is deemed appropriate (see below) group company assets would not otherwise be available to meet the liabilities of the debtor company. Guarantees are, however, commonly used in Jersey.

49 Combining parent and subsidiary proceedings

In 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?

No statutory provisions exist for the combination of parent and subsidiary companies' assets into one pool for insolvency purposes. That said, the Royal Court has made orders pooling the insolvent estates of companies in circumstances where it would be impossible, impracticable and disproportionate to seek to identify individual rights and to unravel asset and liability positions between the companies, and when it is in the best interests of the creditors for there to be such a pooling. Some schemes that have the effect of consolidating the assets of a group have in certain circumstances been approved by the Royal Court where the interests of creditors so require.

International cases

50 Recognition of foreign judgments

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?

Certain foreign judgments may be registered in Jersey under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 if they originate from one of the following jurisdictions: England & Wales, Scotland, Northern Ireland, the Isle of Man and Guernsey, after which they are enforceable as if they were a domestic judgment. Judgments from other jurisdictions may be enforced by way of a fresh action in Jersey.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

No.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

There is no distinction between the manner in which foreign creditors and Jersey creditors are treated under either the Companies Law or the Bankruptcy Law.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

There is no Jersey authority on the issue, and accordingly at present it is assumed that this is not possible in Jersey.

54 COMI

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 COMI concept does not exist in Jersey law. The Companies Law applies to all companies incorporated in Jersey. The Bankruptcy Law applies to all companies incorporated in Jersey or that have carried on business in Jersey in the preceding three years, or that own immovable property in Jersey.

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55 Cross-border cooperation

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?

Under article 49 of the Bankruptcy Law, the court may assist the courts of designated territories (presently the United Kingdom, the Isle of Man, Guernsey, Finland and Australia) in all matters relating to the insolvency of any person or entity. The court has power, on receiving a request from such a country for assistance, to exercise any jurisdiction that either it or the requesting court could exercise if the matters in respect of which assistance is requested fall within its jurisdiction. For other jurisdictions, the Jersey court may agree to assist under its inherent jurisdiction and under principles of comity, on a case-by-case basis. For a good recent illustration of this, see *Smith v Nedbank Wealth* [2018] JRC 156, which concerned an application in Jersey by a US Trustee-in-Bankruptcy for a disclosure of documents by a Jersey financial institution.

56 Cross-border insolvency protocols and joint court hearings

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?

Not relevant.

Kenya

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MMAN Advocates

General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

In Kenya, the Insolvency Act No. 18 of 2015 (the Act) consolidated and amended the various laws relating to the insolvency of natural persons, incorporated and unincorporated bodies. Subsidiary legislation, the Insolvency Rules, 2016, supplements the provisions of the Act.

2 Excluded entities and excluded assets

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

The Act applies to natural persons, partnerships, limited liability partnerships, companies and other corporate bodies established by any written law. This application is inclusive and encompasses entities and bodies established under statute laws, incorporated and unincorporated entities.

Excluded assets for companies include assets where the company has no beneficial interest, assets held or obtained by way of bailment or hire purchase and assets held in trust for third parties. With regard to insolvency of natural persons, excluded assets include the bankrupt's necessary tools of trade; necessary household furniture and personal effects (including clothing) for the bankrupt and the bankrupt's relatives and dependants; and a motor vehicle valued at 1 million Kenya shillings.

3 Public enterprises

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 insolvency procedures for government-owned enterprises in Kenya. The customary insolvency procedures under the Act apply. However, the dissolution of the state corporation is an executive decision subject to the advice of the State Corporations Advisory Committee under the State Corporations Act No. 25 of 2015. The creditors of government-owned enterprises have the same remedies as are available in the customary insolvency proceedings.

4 Protection for large financial institutions

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

Notably, Kenya has no specific legislation to deal with institutions that are considered 'too big to fail'. The government's financial bailout of such institutions is often discretionary, pegged on political and economic factors and is never guaranteed. Kenyan industry legislation has gradually moved to remove factors that make certain entities large and powerful enough to hold the state economy to ransom. These subsidiary laws provide for uniform regulations and restrictions that ensure industry players operate in a level playing field, promoting fair competition.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The High Court of Kenya (Commercial & Admiralty Division) handles bankruptcy and insolvency proceedings. Appeals from the High Court lie in the Court of Appeal in some instances with leave of the court and in some instances, without leave of the court – depending on the specific decision being challenged. The Court of Appeal requires that the appellant posts security of costs that are assessed based on the value of the appeal and the nature of the reliefs sought.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Voluntary liquidation procedures may be commenced by the company's members, directors or creditors. When the majority of directors of the company make a statutory declaration under section 398 of the Act, it is deemed to be a members' voluntary liquidation. Voluntary liquidation under the Act should be sought: when a period fixed by the articles for the company's existence expires or when the articles prescribe that in the occurrence of a certain event the company is to be dissolved and such an event occurs, and the company in general meetings has passed a resolution providing for its voluntary liquidation; and if the company by way of special resolution resolves to be voluntarily liquidated.

The debtor must pass the resolution to undergo the voluntary liquidation. The requirement to pass the resolution is that the company must give notice to all members eligible to participate passing in the resolution and must notify any holder of any qualifying floating charge in respect of the company's property. The meeting where such resolution is passed must fulfil certain conditions: a notice period of seven days must pass from the date the notice of the meeting is issued; the persons receiving the notice must give written consent to passing of the resolution; and the decision must be made by a special resolution constituting of majority of not less than 75 per cent of the members (a class of members).

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

The voluntary arrangement procedure for companies may be commenced by several persons (the proposers); the directors of the company, the administrator of a company under administration or the liquidator of a company under liquidation. The proposers when making such a proposal must propose a supervisor to oversee the voluntary arrangement. They must publish notice of the meeting where the proposal is to be presented to the creditors or members in a newspaper of wide circulation as well as notifying the proposed supervisor specified in the proposal. They must also provide the proposed supervisor with the document setting the terms of the proposal and the financial statement of the company.

The effect of the voluntary arrangement is that it binds every creditor or member of the company who is entitled to vote at the meeting of creditors or members including persons who would have voted had they received the notice of the meeting of the proposed arrangement.

8 Successful reorganisations

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

There is no provision for distinct classification of creditors in a successful reorganisation that is not done for the purposes of reorganisation. However, the secured and preferential creditors must give their written consent. The approval of the proposal for reorganisation as aforementioned is subject to the court's approval as per section 630 of the Act. Reorganisations depend on the terms specified in the proposal. Arrangements such as compromise may release non-debtor parties from liability. A compromise agreement in this context referring to where the creditors agree to terms that have the effect of fully and absolutely extinguishing the debt owed in its entirety, irrespective of whether the actual amount set in the terms is less than the actual debt owed.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

A creditor must prove to the court that the company owes them at least 400,000 Kenya shillings and that they served a statutory demand. If the creditor is a holder of an execution or other process in respect of debt on a judgment or order of court that execution or process must have been returned wholly or partly unsatisfied. The material difference between the involuntary liquidations and voluntary liquidations is that the creditor institutes the involuntary proceedings and such proceedings must be based on the inability of the company to pay debt owed to which a statutory demand has been issued.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Involuntary reorganisation of companies by creditors is not provided for under the Act.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Expedited reorganisations are only available to natural persons under Part IV, division 1, subdivision 2 of the Act. The procedure is available when the debtor is an undischarged bankrupt; the official receiver is specified in the proposal as the provisional supervisor in relation to the proposal; and no application for an interim order for voluntary arrangement has been made as per section 304 of the Act.

12 Unsuccessful reorganisations

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 to the proposed organisation can challenge the proposal by making an application in court under section 629(4) of the Act. The application should be lodged within 30 days of the day of the meeting of the company and the creditors. What the court considers is whether the proposal was approved by a majority of the secured creditors' group; whether the proposal discriminates among the members of the dissenting group or groups of creditors to an extent that they will be

no worse off than they would have been if the company had been liquidated; and whether the proposal respects the priorities of preferential creditors over unsecured creditors.

13 Corporate procedures

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

The Act outlines corporate procedures for the dissolution of corporations and such procedure differs from bankruptcy proceedings in several ways. Dissolution of corporations is under the office of an official receiver and must be supervised by an appointed liquidator. Decision-making process during dissolution must be by way of resolution, which must be lodged for registration at the companies' registry. The Registrar of Companies must also be served with all court orders relating to the bankruptcy of the corporations for registration. Bankruptcy proceedings on the other hand are conducted by the bankruptcy trustee and decision-making majority vote.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Insolvent companies may be placed under administration under a qualified professional in the industry for the purpose of guiding the entity to financial turnaround. In circumstances where it is fair and just to wind up the insolvent company, the court can make a winding-up order against the company. This order is then required to be submitted to the Registrar of Companies, who in turn enters the name of the company in the register of wound-up companies, thus bringing the process to a close.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

A debtor is deemed to be insolvent when they are unable to pay their debts as they fall due and upon issuance of a statutory demand or where value of assets is proven to be less than its liabilities (including prospective and contingent liabilities).

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

There are no mandatory requirements in law to commence insolvency proceedings and certain entities continue to conduct business, albeit balance sheet or cash flow insolvency.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Company directors and officers are not customarily held personally liable for the obligations of the company unless they are found to have made decisions in breach of their fiduciary duties towards the company; have participated in fraudulent trading; or wrongful trading; or where they have given personal guarantees. If found liable by court, directors may be ordered to compensate the company or third parties. The new Act has, however, enhanced personal direct liabilities of directors.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

The Act outlines offences relating to conduct before and during liquidation and criminal proceedings relating to those offences. These offences include, but are not limited to, concealing property of the company; concealing and falsifying any company document; fraudulent removal of any part of the company's property; disposing, pledging or pawning property of the company. Civil suits to recover company property or assets can also be instituted against the directors and officers of a company.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

No. The director duties to the company are paramount during a company's insolvency and reorganisation and at no time do they shift to creditors.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

The powers of the directors vest in the liquidator or provisional liquidator when court makes the liquidation order against a company and the directors cannot make decisions over the affairs of the company. They do, however, retain a residual right to challenge the liquidation process.

Matters arising in a liquidation or reorganisation**21 Stays of proceedings and moratoria**

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?

Pursuant to section 428 of the Act, at any time after the making of a liquidation application, and before a liquidation order has been made, any creditor may, if legal proceedings against the company are pending in the court, apply to the court for the proceedings to be stayed; and if proceedings relating to a matter are pending against the company in another court, apply to the court to restrain further proceedings in respect of that matter in the other court.

A moratorium on the other hand can be obtained by a debtor on debt payments when a company's directors propose voluntary arrangement. Notably, a company that is in liquidation is ineligible to obtain a moratorium.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

The debtor, through the liquidator, can carry on business for the purpose of winding up the business of the debtor. Creditors who supply goods or services after the filing have priority over other creditors as their cost is a cost or expense borne by the liquidator. The court and the creditors have supervisory powers to query, through motions filed in court, business activities of a liquidator.

23 Post-filing credit

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

A debtor in a liquidation or reorganisation may not obtain secured or unsecured loans or credit. Under the Act the liquidator, with the creditor's approval, however, has power to borrow money for the beneficial realisation of the company and give security for the borrowing over whole or part of the property comprised in that estate's assets. Such a loan or credit shall be prioritised under the preferential creditors group.

24 Sale of assets

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?

The Act provides for power of the liquidator to sell any of the company's property by public auction or private treaty with power to transfer the whole of it to any person or sell the same in parcels. Ordinarily, the purchaser acquires the assets 'free and clear' of all claims. However, in a voluntary arrangement where the property being disposed is subject to a security or held under credit purchase transaction, the transfer shall be as if it was not subject to the security but only if the holder of the security consents or if the court approves.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Under the Act, the liquidator has the power to sell any of the company's property as stated in question 24. The sale procedures are not provided for in the Insolvency Act. The sale procedure, therefore, is at the liquidator's discretion by virtue of the said powers vested upon him or her and as such is at liberty to employ the 'stalking horse' bids or credit bidding in the sales procedure.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

Under the Act, the debtor has no right to reject or disclaim an unfavourable contract. Contracts that have been fully performed are incapable of being rejected as there are no outstanding obligations. Further, the Act provides that the bankruptcy trustee may disclaim onerous property. Onerous property has been defined as: an unprofitable contract; property of the bankrupt that is unsaleable, or not readily saleable, or that may give rise to a liability to pay money or perform an onerous act; and a litigation right that, in the opinion of the bankruptcy trustee, has no reasonable prospect of success or cannot reasonably be funded from the assets of the bankrupt's estate.

Within 14 days after the disclaimer, the bankruptcy trustee shall send a notice of the disclaimer to every person whose rights are, to the bankruptcy trustee's knowledge, affected by it.

The Act provides that effect of the disclaimer is such that it terminates, on and from the date of the disclaimer, the rights, interests and liabilities of the bankruptcy trustee and the bankrupt in relation to the property disclaimed; and does not affect the rights, interests or liabilities of any other person, except in so far as is necessary to release the bankruptcy trustee or the bankrupt from a liability.

Where the debtor breaches a contract after the insolvency case is opened, the affected party may claim breach of contract and pursue damages in the liquidation.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

In the event of liquidation or re-organisation, the licensor or owner of the intellectual property may terminate the debtor's right to intellectual property, but this will, however, depend on the terms of the licence agreement between the licensor and the debtor.

In liquidation of a company, intellectual property may be rendered as onerous property by the liquidator. In this regard, the Act provides that the liquidator may disclaim any onerous property and the disclaimer operates so as to terminate the rights, interests and liabilities of the company or in respect of the property disclaimed.

28 Personal data

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

The Act does not provide for restrictions to the use of personal information or customer data collected or their transfer to purchaser by a company in liquidation or reorganisation. Kenya does not have data protection legislation in place. There may, however, be a limit in use of the data on the basis of terms and conditions under which those data were collected in the first place.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

The use of arbitration in liquidation is not that common and may feature in certain matters relating to disputes arising from the purchase of members' shares. All disputes are subject to arbitration with consent of parties or by order of the court.

Creditor remedies

30 Creditors' enforcement

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?

Commencement of liquidation proceedings does not bar creditors secured by charges from enforcing their securities.

In the Act, a landlord who claims rent arrears as against a debtor may levy distress for the recovery of rent. The landlord shall be successful in this manner if the landlord has distrained the goods or effects of the bankrupt during the 30-day period before commencement of the bankruptcy.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Unsecured creditors can pursue their claims through the normal court process, which is time consuming, costly and in most cases, uncertain. Pre-judgment attachments are available through the Civil Procedures applicable in Kenya, but only if certain conditions are met.

Pursuant to the Act, a liquidator shall make available for the satisfaction of unsecured debts such portion of the company's net assets where a floating charge relates to the company's property.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

The Act provides that, where a company has passed a resolution for its voluntary liquidation, a notice shall be published setting out that resolution. Thereafter, the company that is in the course of liquidation shall convene a meeting of the company's creditors. There are two kinds of creditors' meetings: first meeting of creditors and subsequent creditors' meeting.

In the case of liquidation by the court, the official receiver may appoint a qualified person as liquidator instead. The official receiver shall send a notice of the appointment of the liquidator to the company's creditors.

The directors of the company in the course of liquidation shall prepare a statement setting out the financial position of the company that shall specify the details of the company's assets, debts and liabilities, names and addresses of the company's creditors, the securities held by them respectively, and the dates when the securities were given.

The liquidator shall lay before each of the creditors' meetings an account of the liquidator's acts and dealings, and of conduct of liquidation during the preceding year. The liquidator has a duty to share information and the creditors have a right to access information in the hands of the liquidator by, if necessary, moving to court to compel the liquidator to share the information.

33 Creditor representation

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 creditors on the first meeting, if they think appropriate, appoint a liquidation committee of not more than five members who shall inspect the accounting records, the company's financial statement and carry out the necessary inquiries on behalf of the creditors. The representatives are selected by consensus of creditors, but normally the value of the debt plays a role in the vote that the creditor has. The creditors may retain advocates or certified public accountants to inspect the documents on their behalf. The remuneration of those experts is recoverable under the Insolvency Act, if the amount is incurred in protecting, preserving the value of, or recovering those assets.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

The creditors may contribute towards or pursue a claim on behalf of the liquidator from the estate. Although the power to assign rights to pursue a claim are not expressly provided for under the Third Schedule of the Act, the liquidator may assign such right or where the company may not have funds to pursue the claim under provisions 13 and 14, power to appoint an agent to do any business that the liquidator is unable to do personally and power to take all other action that may be necessary for the beneficial liquidation of the company. The fruits of the remedies belong to the company and shall be vested in the liquidator for the benefit of the creditors and can be assigned to third parties as long as such assignment is for the benefit of the liquidation of the company.

35 Claims

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

A creditor (including a creditor who has a preferential claim) who wishes to claim in the bankruptcy shall submit a creditor's claim to the bankruptcy trustee before the deadline for submitting claims. The deadline is either the time specified by the bankruptcy trustee in a notice given to the creditor or the time specified in an advertisement published by the bankruptcy trustee in a newspaper widely circulating in the area in which the creditor normally resides or carries on business.

On the hearing of an application by the official receiver, the bankrupt or a creditor on the grounds that the bankruptcy trustee improperly allowed a creditor's claim, the court may make an order cancelling the creditor's claim or reducing the amount claimed, if it considers that the claim was improperly allowed or was improperly allowed in part.

If a creditor's claim is subject to a contingency or the amount of the claim is uncertain, the bankruptcy trustee may estimate the amount of the claim.

The debtor has to disclose transfers that were effected just before liquidation to avoid mischief.

36 Set-off and netting

To what extent may creditors 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?

Under the Act, the court may, in the case of an unlimited company, allow to the contributory as a set-off money due to the contributory or the estate that the contributory represents from the company on any independent dealing or contract with the company (but not money due to the contributory as a member of the company in respect of a dividend or profit). If, in the case of a company (whether limited or unlimited), all the creditors have been paid in full (together with interest at the official rate), money due on an account to a contributory from the company may be allowed to the contributory as a set-off against any subsequent call. There are no statutory provisions for circumstances when then the creditors' right of set-off is deprived.

37 Modifying creditors' rights

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

Pursuant to the provisions of the Act, if the court makes an order against officers of the company and others found to have participated in fraudulent trading by the company in liquidation, it may direct that the whole or any part of any debt owed by the company to that person, and any interest on the debt ranks in priority after all other debts owed by the company and after any interest on those debts.

38 Priority claims

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

Apart from employee-related claims, other major privileged and priority claims in liquidations and reorganisations, as provided in the Act, include: the expenses of the liquidation such as the liquidator's remuneration; costs for the person who applied to the court for an order placing the company under liquidation; and amount of costs incurred by that creditor in protecting, preserving the value of or recovering those assets (this has priority over the secured creditors), and outstanding taxes due to the Kenya Revenue Authority.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

The employee claims that may arise where employee contracts are terminated during a restructuring or liquidation include any compensation for redundancy. For termination on account of redundancy, the following conditions as stipulated under the Employment Act, 2007 must be met:

- where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
- where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
- the employer has, in the selection of employees to be declared redundant, had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy, the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- the employer has, where leave is due to an employee who is declared redundant, paid off the leave in cash;
- the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- the employer has paid to an employee declared redundant severance pay at the rate of not less than 15 days' pay for each completed year of service.

Employee claims are likely to be increased where large numbers of employees' contracts are terminated.

40 Pension claims

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

Section 615(6)(e) of the Act provides that the occupational pension schemes from company's property have priority over holders of floating charges. This is because it is classified under liability arising under a contract of employment adopted by the former administrators or predecessors before the termination or adoption and the salaries and wages due under such contracts that unpaid contributions to occupational pension schemes. In effect, if there is a deficiency in the occupational pensions scheme of a company immediately before the insolvency of such company, it is a preferential debt ranking ahead of the holders of floating charges of the company. The priority in employee claims under plans and schemes during liquidation and restructuring, however, depends on the type of scheme in question.

Actuarial variations of pension schemes are provided for under the Retirement Benefits Act, Number 3 of 1997. The Retirement Benefits Authority requires that defined contribution schemes to be valued by an actuary from time to time unless all benefits are secured by an insurer or if all benefits equal to an accumulated contribution. The said Authority ensures regulation of pension schemes to reduce pension liabilities and promote accountability and good faith by employers. Therefore, claims arising from defined contribution schemes can be brought against the insurance or the employer will rank as a secured debt during insolvency. The Retirement Benefits (Minimum Funding Level and Winding Up of Schemes) Regulation 2000 provides that members of a scheme (employees) in liquidation and insolvency shall be treated as deferred creditors in their claims as members and shall not be settled until after the debts of the ordinary creditors have been settled during restructure and liquidation. They have the same remedies as those of unsecured creditors in customary insolvency procedures.

Update and trends

The enactment of the Insolvency Act has seen the introduction of corporate rescue mechanisms for companies that would previously have been forced into liquidation, which often resulted in losses for both the creditors and the shareholders. More particularly, insolvency does not serve as a death sentence for companies and two such general rescue mechanisms have been advanced as follows: Administration and Company Voluntary Arrangements.

Notably, Administration seems to be the preferred method at the moment and in that regard one of Kenya's largest retailers, who once controlled the lion's share of the local retail market for several years, successfully applied to go into administration, which provides among others, the following benefits:

- maintaining the company as a going concern;
- achieving a better outcome for the company's creditors than liquidation would offer; and
- helping to realise the property of the company to make distributions to secured or preferential creditors.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The liability arising from environmental problems may be civil or criminal in nature. Where there are environmental problems within the company's premises, the 'polluter pays' principle shall apply, meaning that liability is imposed on the party who caused the pollution. Therefore, if the company is found responsible, resulting from its operations, it shall be liable to remediate the damage caused as appropriate, whether it is by paying a penalty or undertaking a clean-up process. This obligation falls on the liquidator once he or she is in place, as environmental damage is usually a continuing injury.

If a secured creditor enforces a mortgagee and becomes a mortgagee, he or she shall be liable for the environment liabilities accruing thereto. Where the environmental problem is caused by a third party, they shall be held personally liable.

42 Liabilities that survive insolvency or reorganisation proceedings

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

No further claim can be brought against a debtor once a liquidation process has been concluded. An example of such a liability is a person seeking to execute a judgment or award that is issued once a winding-up order has been granted.

43 Distributions

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

The distribution is made by the liquidator once debts have been proven and the liquidator has recovered funds from sale of assets of the debtor. The liquidator of course has to take into account the order of priority as set out under the Act. In reorganisations, the payments are made as per the terms of the scheme of arrangement as approved by the court.

Security

44 Secured lending and credit (immovables)

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

The principal securities on immovables are equitable mortgages (are also known as charges) and legal mortgages.

45 Secured lending and credit (movables)

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

The principal securities on movables are liens (a possessory right to retain the debtor's asset until the debt is repaid), fixed charges (providing security over a particular asset, for example, bank accounts or insurance proceeds) and an equitable mortgage.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

A transaction that is undervalued can be annulled. This is when a company makes a gift to a person or otherwise enters into a transaction with a person on terms that provide for the company to receive no consideration or a company enters into a transaction with the person for a consideration the value of which in money or money's worth is significantly less than the value in money or money's worth of consideration provided by the company.

An extortionate credit transaction can be annulled. This would be a situation where the insolvency office holder notes that a credit was overpriced or a transaction was entered into during the three years immediately preceding the date on which the company entered administration or where a liquidator was appointed in respect of the company.

A transaction may be annulled if it is based on certain preferences. For example if the person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities or the company does not act or allows an act to be done that (in either case) has the effect of placing the person in a position that if the company were insolvent liquidation is better than the position the person would have been in had the act not been done.

The court or a creditor can challenge any such transaction. The application must be made without unreasonable delay and the end result if successful is that the entire transaction is reversed.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

The Act provides for what is referred to as first priority claims and it then follows that there are restrictions on claims by related parties or non-arm's length creditors as the first priority claims take precedence.

Groups of companies

48 Groups of companies

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

This would be applicable in instances where the corporate veil is lifted but is in very exceptional circumstances. This lifting of the corporate veil means a situation in which the courts put aside the limited liability and hold a corporation's shareholders or directors personally liable in the corporation's actions or debts.

It should be noted this would also apply in cases where fraud is proved and also in instances where there is, or it is shown there was, a direct or deliberate intention to put assets beyond the reach of the creditors by the parent or affiliated corporation.

49 Combining parent and subsidiary proceedings

In 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?

No, and it would not be in the best interests of the company to combine the assets in one pool for distribution.

International cases

50 Recognition of foreign judgments

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?

Yes, foreign judgments or orders are recognised. There is a law in Kenya that is the Foreign Judgments (Reciprocal Enforcement) Act, which allows enforcement of judgments given in countries outside Kenya that accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith. In the absence of the reciprocal arrangement, a foreign judgment is enforceable in Kenya as a claim in common law.

The countries known to enjoy this reciprocal arrangement are Australia, Malawi, the Republic of Rwanda, Seychelles, Tanzania, Uganda, the United Kingdom and Zambia. It should be noted that the same law does allow the Minister in charge at the time of foreign affairs to extend application of the Act to other countries that have made or will make reciprocal arrangements for the enforcement of Kenyan judgments.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Yes, the UNCITRAL Model Law adopted by the United Nations International Trade Law on 30 May 1997 and approved by the General Assembly of the United Nations on 15 December 1997 has been adopted in Kenya.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

With the adoption of the UNCITRAL Model Law by Kenya, which simply provides for internationally recognised and accepted guidelines on cross-border insolvency and also provides for cooperation and coordination between jurisdictions, the Insolvency Act 2015 allows foreign creditors to access foreign courts in Kenya.

The foreign creditor would therefore apply to commence insolvency proceedings in Kenya and would equally be allowed to participate in the proceeding under the law as creditors in Kenya would.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

An administrator is usually appointed to manage the company affairs and property of the insolvent company. The law provides that an

administrator may take any action that contributes to or is likely to contribute to the effective and efficient management of the affairs and property of the company.

The assets may therefore be transferred if the administrator has determined that the asset did not or does not form part of the company's property. It should be noted also that, because the objective of the administrator is to ensure the best return to creditors, they cannot consent to transfer without evidence that the asset did not form part of the company's property or that there was a sale of assets for value.

54 COMI

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 Kenya, there is no test to determine the COMI provided in the legislation governing insolvency; however, as the COMI concept forms part of the UNCITRAL Model Law, which Kenya has adopted, it may be an option for parties to consider forum shopping to move the COMI of a debtor company to a jurisdiction with a more favourable restructuring or insolvency regime.

55 Cross-border cooperation

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, Kenya provides a system for recognition of foreign insolvency proceedings. The law provides that an application may be made in court for recognition of the foreign proceeding in which the foreign representative has been appointed.

It should be noted that the application may, however, be rejected on the following grounds:

- if a certified copy of the decision commencing the foreign proceeding is not attached to the application;
- if a certificate from the foreign court affirming the existence of a foreign proceeding and the foreign representative is not attached to the application;
- if any other evidence that is acceptable to the court of the existence of the foreign proceeding is not attached to the application; or
- if there is no statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.



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56 Cross-border insolvency protocols and joint court hearings

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?

Kenya is yet to enter into cross-border insolvency protocols as there first needs to be harmonisation in terms of cooperation and communication of interests between states before this area of law can become a reality, though it would be important to note that with the enactment of the Insolvency Act No. 18 of 2015, Kenya can be said to be moving in the right direction.

Korea

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The Debtor Rehabilitation and Bankruptcy Act (DRBA) governs reorganisation and bankruptcy proceedings in Korea.

As a law with an expiry date, the Corporate Restructuring Promotion Act (CRPA), which was enacted to facilitate constant corporate restructuring, is now in effect as from 16 October 2018 until 15 October 2023.

2 Excluded entities and excluded assets

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

All legal entities are eligible for reorganisation or bankruptcy proceedings, which include legal entities established pursuant to the Civil Act, Commercial Act or other special laws. Organisations that do not have legal personality may apply for reorganisation or bankruptcy proceedings.

Assets that are prohibited from being seized under articles 195 and 246 of the Civil Execution Act are generally excluded from insolvency proceedings. In bankruptcy proceedings, the holders of right to foreclose outside bankruptcy, usually the secured creditors, may exercise their right on the assets without resorting to bankruptcy proceedings.

3 Public enterprises

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

The DRBA does not have special regulation on the insolvency of a government-owned enterprise. The rights of creditors of insolvent public enterprises are the same as those of creditors of insolvent private companies.

4 Protection for large financial institutions

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

The Structural Improvement of the Financial Industry Act (SIFIA) has special regulation on insolvent financial institutions. Under SIFIA, the financial institutions include banks, insurance companies, mutual savings banks, investment traders or brokers, and other kinds of financial institutions under the Financial Investment Services and Capital Market Act. SIFIA deals with merger and conversion of financial institutions, reorganisation of insolvent financial institutions and liquidation and bankruptcy of financial institutions.

On the other hand, since 2001, the Korean government has enacted the CRPA as a law with an expiry date several times. The reorganisation proceedings under CRPA had been applied mainly to large companies. The fifth CRPA, enacted on 18 March 2016, expired on 30 June 2018,

but recently the sixth CRPA has been in effect from 16 October 2018 to the expiry date on 15 October 2023.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Each district court has bankruptcy divisions that handle reorganisation and bankruptcy proceedings. In Seoul, the largest city in Korea, the Seoul Bankruptcy Court was founded on 1 March 2017, which replaced the role of the Seoul Central District Court's bankruptcy divisions.

Generally, interested parties, including an administrator in a reorganisation proceeding, a trustee in a bankruptcy proceeding and creditors, have the right to appeal the bankruptcy court's order. When an appeal is filed against a decision of non-authorisation for a reorganisation plan, the court with pending rehabilitation cases may order the appellant to deposit, by way of bonds, fund or securities recognised by the court within the scope that is prescribed by the rules of the Supreme Court for a fixed period.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

A debtor may voluntarily file for bankruptcy when it is unable to pay debts as they fall due. With respect to a corporation, it may file for bankruptcy when the total amount of its liabilities exceeds the total amount of its assets.

When the court declares bankruptcy of a debtor, the bankruptcy proceeding will be commenced. The declaration of bankruptcy of a debtor has the following effects:

- the trustee appointed by the bankruptcy court takes control and possession of the bankruptcy estate;
- creditors are prohibited from collecting their bankruptcy claims individually, but can be paid only through distribution under the bankruptcy proceeding; however
- secured creditors can exercise their rights without being restricted by bankruptcy proceedings.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

A debtor may voluntarily file an application with the court for commencing the reorganisation proceeding when:

- the debtor finds it impossible to repay its obligations due and payable without any serious hindrance to the continuation of its business; or
- facts leading to bankruptcy are likely to arise with respect to the debtor.

Upon the court's order of commencement of a reorganisation proceeding, the reorganisation proceeding for the debtor will be commenced and have the following effects:

- the administrator or debtor in possession manages the business and the assets of the debtor;
- creditors, including secured creditors, are prohibited from collecting their claim individually; and
- creditors will be paid according to the reorganisation plan approved by the court.

8 Successful reorganisations

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

In a reorganisation proceeding, creditors are classified into secured creditors and unsecured creditors. In the reorganisation proceeding practice, each creditors group may be classified into sub-classes based on the nature of claims; for example, secured or unsecured financial institution creditors, secured or unsecured commercial creditors, guaranteeing creditors, etc.

The bankruptcy court has the authority to approve a reorganisation plan. In general, before the approval of the court, the reorganisation plan should be adopted by each of the following creditor groups:

- unsecured creditors: consent of the persons holding the voting rights equivalent to at least two-thirds of the total amount of the voting rights;
- secured creditors: consent of the persons holding the voting rights equivalent to at least three-quarters of the total amount of the secured creditors; with respect to the reorganisation proposal under article 222 of the DRBA, consent of the persons holding the voting rights equivalent to at least four-fifths of the total amount of the secured creditors; and
- shareholders or equity right holders: consent of the persons holding the voting rights equivalent to at least half of the total number of the voting rights of shareholders or equity right holders. In this regard, shareholders or equity right holders cannot have voting rights on the reorganisation plan when the debtors' total obligations exceeds its total assets at the time of the commencement of the reorganisation proceeding or the submission of the reorganisation plan to the interested parties' meeting.

When any group of creditors fails to reach agreement on the reorganisation, the bankruptcy court may amend and approve the reorganisation plan by prescribing provisions aimed at protecting the rights of the secured or unsecured creditors, shareholders and equity right holders of such group pursuant to section 1 of article 244 of the DRBA.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Any creditor, regardless of the amount of claims, has a right to file a petition for bankruptcy of a debtor. When a creditor files a petition for bankruptcy, he or she has to explain the existence of his or her claims and the facts leading to bankruptcy. Once the bankruptcy proceeding is commenced upon the creditor's application, the rest of the proceeding is the same as that of voluntary bankruptcy.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

When facts leading to bankruptcy are likely to arise with respect to the debtor, an application for commencement of the reorganisation proceeding may be filed by a creditor or a shareholder who meets the following requirements:

- when the debtor is a stock company or a limited-liability company: a creditor who holds a claim equivalent to not less than a tenth of the capital; a shareholder or the equity right holder who holds the share or the equity share equivalent to not less than a tenth of the capital; or
- when the debtor is not a stock company or a limited-liability company: a creditor who holds a claim equivalent to not less than 50 million won; an equity right holder who holds an equity share of not less than a tenth of the total amount of investment of any unlimited partnership, any limited partnership, any corporation or anyone equivalent thereto.

Once the reorganisation proceeding is commenced upon the creditor's or shareholder's application, the rest of the proceeding is the same as that of voluntary reorganisation.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

The DRBA introduced the prepacked reorganisation proceeding to expedite reorganisation proceedings on 30 August 2016. A creditor who holds a claim corresponding to at least half of the debtor's obligations or a debtor who has obtained the consent of such creditor may apply the prepackaged reorganisation proceeding by submitting a reorganisation plan to the court from the time of filing of the reorganisation proceeding before the commencement of such proceeding.

12 Unsuccessful reorganisations

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?

If a reorganisation plan is not adopted at the interested parties' meeting, the bankruptcy court would not approve the reorganisation plan. However, the bankruptcy court may at its discretion approve the reorganisation plan pursuant to section 1 of article 244 of the DRBA (see the third paragraph of question 8).

If a debtor fails to perform the reorganisation plan, the reorganisation proceeding shall be terminated.

13 Corporate procedures

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

The procedures for the dissolution of a corporation are prescribed in Commercial Act. If the corporation is found bankrupt, the liquidator has to file for a bankruptcy proceeding. Compared to a bankruptcy proceeding, a dissolution procedure is less often supervised by the competent court.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

A reorganisation proceeding is concluded by the decision of the court. The decision is usually rendered when a debtor commences repayment according to the reorganisation plan.

When a trustee in bankruptcy distributes final dividends and an accounting report meeting is closed, the bankruptcy court renders a decision on the termination of the bankruptcy proceeding.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

In reorganisation proceedings, a debtor is regarded as insolvent and may file for a reorganisation proceeding:

- where the debtor finds it impossible to repay his or her obligations due and payable without any serious hindrance to the continuation of his or her business; or

- where facts leading to bankruptcy are likely to arise with respect to the debtor.

In a bankruptcy proceeding, a debtor is regarded as insolvent when:

- the debtor is unable to make his or her payment;
- the debtor suspends making his or her payment; or
- with respect to the corporation, the total amount of its liabilities exceeds the total amount of its assets.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

When a company is under a dissolution procedure and the company's liquidator finds that the company is insolvent, he or she must file for bankruptcy with the competent court that is required to protect the company's creditors.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

The DRBA does not prescribe filing a proceeding as mandatory except when a company is under dissolution and it is insolvent. If the proceedings are not commenced, it may result in breach of fiduciary duty of directors or officers. While a company is insolvent, carrying on business, especially without notification of the company's precarious financial position, may constitute a fraud.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

In general, corporate officers and directors are not personally liable for the corporation's obligation whether it comes from corporate pre-insolvency or pre-reorganisation actions. If officers or directors breach their fiduciary duty, then they will be liable for the corporation's damage. In this regard, when it is deemed necessary after the commencement of the reorganisation proceeding for a corporate debtor, the court may, at the request of an administrator or ex officio, render a judgment in claim allowance proceedings whereby it confirms the existence and details of the right to make a capital call to the directors, etc, or the right to seek damages based on the responsibility of directors.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

The duties that directors owe to the corporation do not shift to the creditors.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

When a bankruptcy or reorganisation proceeding is commenced, a trustee or an administrator appointed by the court has an authority to manage and dispose of the debtor's assets under the court's supervision if required. Directors and officers are not allowed in the management or disposal of the debtor's business or assets.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

When bankruptcy proceedings or reorganisation proceedings are commenced, creditors are prohibited from filing a lawsuit, executing judgment, or petitioning for a provisional attachment against the debtor's assets. They will be repaid through distribution or the debtor's performance of the reorganisation plan. However, secured creditors in bankruptcy proceedings are not affected by the bankruptcy proceeding, and they can exercise their secured rights fully.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

In bankruptcy proceedings, as the main purpose of the proceeding is to close the debtor's business and distribute dividends to creditors, doing new business is not allowed. A trustee may perform the existing contracts. Creditors who supply goods or services after the filing of bankruptcy proceedings are protected as holders of 'estate claims' pursuant to articles 476 and 477 of the DRBA.

In reorganisation proceedings, an administrator may carry on new business as well as the debtor's existing business. Creditors who supply goods or services after the filing of reorganisation proceedings are protected as holders of 'priority claims' pursuant to article 180 of the DRBA.

In both proceedings, the creditors receive reports from a trustee or an administrator at the interested parties' meeting. The bankruptcy court also supervises the performance of duty of a trustee or an administrator.

23 Post-filing credit

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

After the commencement of bankruptcy proceedings or reorganisation proceedings, a trustee or an administrator may obtain new loans or credit. Those claims are classified into 'estate claims' in bankruptcy proceedings or 'priority claims' in reorganisation proceedings.

In bankruptcy proceedings, estate claims are satisfied at any time without going through bankruptcy proceedings and have priority in repayment over bankruptcy claims.

In reorganisation proceedings, the priority claims are reimbursed at any time without undergoing reorganisation proceedings, in preference to any reorganisation secured or unsecured claims.

24 Sale of assets

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 reorganisation and bankruptcy, the sale of specific assets out of the ordinary course of business generally requires the prior approval of the court. Usually, the court renders, at the commencement of proceedings, a decision on the scope of the transaction that requires a prior approval of the court.

The sale of the entire business requires the court's approval in bankruptcy proceedings or reorganisation proceedings. If the sale of the entire business is stipulated in the reorganisation plan, then the manner of the sale shall comply with the plan.

There is no general rule that the purchaser acquires the assets 'free and clear'. In bankruptcy proceedings, as the secured creditor can exercise its right fully, the burden of security shall be passed to the purchaser.

On the other hand, in reorganisation proceedings, it is likely prescribed on the reorganisation plan whether creditor's security on specific assets will be extinct or not. It is desirable for the purchaser to check the court's approval and the contents of the reorganisation plan.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Recently, 'stalking horse' bids are introduced to the M&A practice in reorganisation proceedings, and some M&A were performed by stalking horse bids.

There is no statute in the DRBA that prohibits credit bidding. It seems to be possible if the assets are assessed fairly for the benefit of all creditors and the court approves it.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

An administrator or a trustee may reject an unfavourable bilateral contract if all parties have not completed their own obligations. When exercising his or her right, an administrator or a trustee is required to receive the prior approval of the court. The right to reject an unfavourable contract is restricted when the contract is a collective agreement between a corporation and employees; or a contract to which the state is a party, concerning a project for improvement of defence capability under article 3 of the Defence Acquisition Programme Act.

When a contract is rejected by an administrator or a trustee, the other party may exercise his or her right as a reorganisation creditor on the compensation for damage, and may claim the refund of such benefit in return when any benefit in return that is paid to the debtor exists among the debtor's properties or may exercise his or her right as a priority creditor to claim the refund of the value of it when such benefit in return does not exist among the debtor's properties.

If a debtor breaches the contract after the insolvency case is opened, the other party may exercise his or her right as 'priority claims' or 'estate claims'.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Under the DRBA, an IP licensor or owner does not have the privilege to terminate the executory IP licensing agreement. The option of right to reject or continue the executory contract belongs to an administrator or a trustee.

If an administrator or a trustee opts to continue the IP licensing agreement, each party will have the same rights as the agreement prescribes.

28 Personal data

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

The 'Personal Information Protection Act', 'Credit Information Use and Protection Act' and 'Act on Promotion of Information and Communications Network Utilisation and Information Protect, etc' are applied to personal information or credit information. Under these statutes, use by the third party or transfer to the third party of personal information or credit information requires the owner's consent.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Under the DRBA, the bankruptcy courts have the exclusive jurisdiction of reorganisation proceedings and bankruptcy proceedings. Therefore, it is very rare to use arbitration in reorganisation proceedings or bankruptcy proceedings. Generally, one of parties in dispute in a reorganisation proceeding or bankruptcy proceeding is an administrator or a trustee. An administrator or a trustee is required to obtain the prior approval of the court before filing a new lawsuit, or other kinds of legal dispute. Disputes that arise after the commencement of the proceedings may possibly be arbitrated if there is a court's approval.

Creditor remedies

30 Creditors' enforcement

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?

When there is a court's decision to commence reorganisation proceedings, compulsory execution by a creditor is prohibited.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

As explained above, it is prohibited to seize or execute a debtor's assets after the commencement of the proceedings. When a reorganisation proceeding is commenced, creditors should report their claims to the court until the deadline designated by the court. If an administrator admits the claims reported by a creditor, then the creditor will be paid through the reorganisation plan. If an administrator or other interested party objects the claims reported by a creditor, the creditor may file an application with the court for a judgment in claim allowance proceedings for the confirmation of his or her claim and rights with all of the objectors; this proceeding may take three months to one year in practice.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

During the bankruptcy or reorganisation proceeding, creditors are given notice of the commencement of the proceeding, the date and venue of the interested parties' meeting or the creditors' meeting, objection against the reported claims, if any, or other statutory proceedings.

The interested parties' meeting or the creditors' meeting is notified to the creditors by mail or email. At the first interested parties' meeting in a reorganisation proceeding, the administrator reports to the creditors (i) situations leading the debtor to the commencement of the reorganisation proceeding; (ii) matters concerning the business affairs and property of the debtor; (iii) whether or not there is any circumstance giving rise to the need for a preservative measure under article 114(1) or a judgment in claim allowance proceeding under article 115(1); and (iv) other matters necessary for the debtor's reorganisation. At the second and third interested parties' meetings, the reorganisation plan is submitted to the creditors to examine and vote on the plan.

In bankruptcy proceedings, the trustee also reports on circumstances leading to the declaration of bankruptcy and the past and current status of the debtors and the bankruptcy estate at the first creditors' meeting. The trustee has to report on the current status of

the bankruptcy estate to the creditors' meeting or members of the audit committee under the conditions prescribed by the creditors' meeting.

33 Creditor representation

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 reorganisation proceedings, the Administrator Committee or the court establishes a creditor's consultative council, which is composed of major creditors. The functions of a creditor's consultative council are:

- the presentation of opinions with respect to reorganisation proceedings and bankruptcy proceedings;
- the presentation of opinions with respect to the selection, appointment or dismissal of an administrator, a trustee and protective custodians;
- the presentation of opinions with respect to the appointment of the auditor (including any member of the audit committee provided for in the provisions of article 415-2 of the Commercial Act) of a debtor who is a corporation;
- a claim brought for the physical inspection of the actual governance of any company after an authorisation is granted for its reorganisation plan;
- other matters concerning the reorganisation proceeding and the bankruptcy proceeding, as required by the court; and
- other acts that are prescribed by the Presidential Decree.

A creditor's consultative council may retain advisers, including lawyers and accountants, under the approval of the court. The court may decide the debtor should bear expenses necessary for the creditors' consultative council to carry out its activities.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

As the authority to manage and dispose the assets of the debtor exclusively belongs to a trustee (ie, a liquidator, as creditors cannot pursue the estate's remedies). If a creditor finds the estate's remedies, he or she may request a liquidator to pursue it. The fruits of the remedies will be distributed to all creditors in proportion to the amount of their claims.

35 Claims

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

In reorganisation proceedings, creditors are required to submit or report their claim no later than the second interested parties' meeting. If the reported claims are objected by an administrator or other creditors, then the claimant may file a lawsuit against the administrator or other creditors who denied the claimant's right one month from the date of objection. Claims for contingent or unliquidated amounts are eligible to report, but, in practice, those claims will be objected by an administrator. In that case, the creditor usually files a lawsuit to decide whether he or she has claims or the amounts of claims.

There is no provision to restrict the transfer of claims under the DRBA. A claim acquired at a discount can be enforced for its full face value. Interest that accrued after the opening of reorganisation proceedings can be claimed, but, in practice, the interest accrued from the opening of the case to the unsecured claims is partially or totally exempted by the reorganisation plan.

In bankruptcy proceedings, there is no time limit for the creditor to report his or her claims. However, if the creditor reports too late, he or she may not be distributed because of the shortage of estates or dividends.

36 Set-off and netting

To what extent may creditors 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 reorganisation proceedings, a secured or unsecured creditor may offset without restriction by reorganisation proceedings when a creditor bears obligations for the debtor at the time that reorganisation proceedings commence, and when both of the claims and the obligations can be offset against each other prior to the expiry of the reporting period.

If a creditor does not exercise his or her right of set-off prior to the expiry of the reporting period, the right of set-off will be deprived permanently.

37 Modifying creditors' rights

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

The court may not change the priority of a creditor's claim. However, article 218 of the DRBA allows some exception (i) when claims are minor in terms of amounts; (ii) when the claims of a small and medium business entrepreneur who is a transaction partner of the debtor are repaid preferentially to other reorganisation claims in fear that the reorganisation claims are likely to cause a clear impediment to the continuation of the business; and (iii) when the principles of equality are not undermined even if persons who hold rights of the same kind are differentiated, etc.

38 Priority claims

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

The DRBA lists priority claims in a reorganisation proceeding. The major privileged and priority claims includes claims for expenses incurred in a judgment for common interest of creditors; claims for expenses incurred in performing the management of the debtor's business; claims for funds borrowed by an administrator in order to manage the debtor's business and properties after the reorganisation proceeding; claims held by other parties when an administrator fulfils obligations pursuant to the provisions of article 119(1); and certain kinds of taxes, etc.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

When employees' contracts are terminated during a restructuring or liquidation, employee salaries and severance pay incurs as priority claims. An administrator or a trustee may terminate employees' contracts with a prior approval of the court. It is not certain whether employee claims as a whole increase where large numbers of employees' contracts are terminated.

40 Pension claims

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

With respect to the employees' contracts, the DRBA prescribes the followings as priority claims:

- wages, severance pay and disaster compensation of the debtor's employees; and
- employees' right to claim for a refund of bailment monies and fidelity guarantee monies, which accrue from causes arising before the reorganisation proceeding commenced.

However, there is no provision for pension-related claims in the DRBA. Because the nature of a pension plan is similar to that of a severance pay plan, the pension-related claims may be interpreted as priority claims.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

If there are environmental problems during reorganisation proceedings, the debtor is responsible for the damage. The administrator may be personally liable for the damage if he or she breaches his or her duty to supervise and manage the debtor's facilities as an administrator. The debtor's officers and directors may be liable to the extent that they are related to the cause of the environmental problems. However, creditors are not likely to be liable for that because they don't have authority to manage the debtor's facilities in general.

42 Liabilities that survive insolvency or reorganisation proceedings

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

The debtor is only liable for the claims that are included in the reorganisation plan. If a claim is not included in the reorganisation plan because of omission of reporting or objection by other interested parties, then the claim is discharged when the court renders a decision to approve the reorganisation plan.

43 Distributions

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

In reorganisation proceedings, payments are made according to the provisions of the reorganisation plan. In practice, the debtor makes payment once a year, usually at the end of the year, within five to ten years' instalments.

In bankruptcy practice, the trustee distributes the dividends to creditors two to three times, including interim distributions and final distribution.

Security

44 Secured lending and credit (immovables)

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

Mortgage is the principal type of security on immovables.

45 Secured lending and credit (movables)

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

Pledge is the principal type of security on movables.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

An administrator or a trustee may avoid the debtor's acts for the debtor's properties. The types of act that may be annulled are as follows:

- an act detrimental to creditors;
- an act of furnishing any security or extinguishing any obligation, which is performed by the debtor after the payment is suspended;
- an act of furnishing any security or extinguishing any obligation, which is performed by the debtor within 60 days before or after the date on which the debtor suspends his or her payment; and

- any gratuitous act or act for valuable consideration that may be deemed identical to the former.

The exercising avoidance act can be by an administrator or a trustee after the commencement of the proceedings. When an administrator exercises the avoidance of power, the debtor's properties are restored to the debtor's original state.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

If a creditor is very close to the corporation, for example a creditor is a director, an officer, or the largest shareholder, the claims of such creditor are not treated equally with other similar kinds of claims. Those claims may be discharged or receive a very small portion of dividends considering his or her liability for deterioration of a debtor's financial status.

When the corporation's total amounts of obligation exceed that of assets, the shareholders are given voting rights at the interested parties' meeting.

Groups of companies

48 Groups of companies

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

In general, a parent or affiliated corporation is not responsible for the liabilities of subsidiaries or those affiliated, as each corporation, including a debtor, is an independent legal entity. However, a parent company that holds 50 per cent or more shares of a debtor may be liable for the debtor's tax as a secondary taxpayer.

In addition, the unsecured reorganisation claims of a parent or affiliated corporation may be unfavourably regulated in the reorganisation plan compared to the rights of other unsecured reorganisation claim holders. This comes from the principle of the basis of good faith and fairness in making a reorganisation plan.

49 Combining parent and subsidiary proceedings

In 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?

When a corporation group commences reorganisation proceedings, the proceedings are not combined. The assets and liabilities of the companies are not pooled for distribution purposes. However, the bankruptcy court may run a parent company's reorganisation proceeding parallel with other companies' reorganisation proceedings for administrative purposes.

International cases

50 Recognition of foreign judgments

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?

Korea is not party to a treaty on international insolvency or on the recognition of foreign judgments. However, Korea adopted the principle to recognise and enforce foreign judgments.

Under the Civil Procedure Act, a final and conclusive judgment rendered by a foreign court may be acknowledged if all of the following requirements are met:

- that the international jurisdiction of such foreign court is recognised under the principle of international jurisdiction pursuant to the statutes or treaties of Korea;
- that a defeated defendant is served, by a lawful method, a written complaint or document corresponding thereto, and notification of a date or written order allowing him or her sufficient time to defend (excluding cases of service by public notice or similar), or that he or

she responds to the lawsuit even without having been served such documents;

- that the approval of such final judgment, etc does not undermine sound morals or other social order of Korea in light of the contents of such final judgment, etc and judicial procedures; and
- that mutual guarantee exists, or the requirements for recognition of final judgment, etc in Korea and the foreign country to which the foreign country court belongs are not far off balance and have no actual difference between each other in important points.

If the final judgment for damage gives rise to a result being markedly against the basic order of the Acts of Korea or international treaties, a court may not approve the whole or part of the relevant final judgment.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Korea has adopted the UNCITRAL Model Law on Cross-Border Insolvency to the DRBA with very few changes to the original Model Law.

Chapter 5 of the DRBA provides recognition and support of foreign insolvency proceedings, appointment of an international administrator or trustee, cooperation with a foreign court or a representative of foreign proceeding, distribution of dividends, etc.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors may take part in the bankruptcy or reorganisation proceedings by reporting their claims and they will not be discriminated in the proceedings.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

In cross-border insolvency cases, a Korean court may appoint an international administrator or trustee to protect the debtor's business and properties or the creditor's profit when the court approves the foreign bankruptcy proceeding or after approving of it.

The court-appointed administrator or trustee may transfer the debtor's assets from Korea to other countries under the permission of the Korean bankruptcy court.

54 COMI

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 Korean court considers the main address of a debtor, the place of the debtor's properties or business with respect to the jurisdiction of cross-border insolvency.

The address of shareholders may be considered, but if there is no address for the debtor's properties and business in Korea, the Korean court is likely to refuse to recognise a foreign proceeding.

55 Cross-border cooperation

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?

As explained above, the DRBA adopted the UNCITRAL Model Law on Cross-Border Insolvency to the DRBA with very few changes. Chapter 5 of the DRBA provides detailed stipulations on cooperation with a foreign court or a representative of foreign insolvency proceedings.

The DRBA prescribes the requirements for the application for foreign insolvency proceedings. The Korean court may not approve a foreign insolvency proceeding when:

- expenses determined by the court are not prepaid;
- each written statement provided for in each subparagraph of article 631(1) is not submitted or the establishment and contents of any such written statement are not bona fide; or
- approving the foreign bankruptcy procedures is contrary to the good public morals and social order of Korea.

56 Cross-border insolvency protocols and joint court hearings

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 Seoul Bankruptcy Court and the US Bankruptcy Court for the Southern District of New York have executed a Memorandum of Understanding to promote cooperation in cross-border insolvency cases on 23 April 2018. The Seoul Bankruptcy Court has also made a



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Memorandum of Understanding with the Supreme Court of Singapore on 16 May 2018 to improve the efficiency and effectiveness of cross-border insolvency cases by encouraging cooperation between the courts.

There are many cases in which the Seoul Bankruptcy Court approved foreign insolvency proceedings. It is expected that the Seoul Bankruptcy Court will have more close cooperation with foreign courts to promote the efficiency of foreign insolvency proceedings and to protect the creditors' interest.

Malaysia

Lee Shih and Nathalie Ker

Skrine

General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

Insolvencies and reorganisations in Malaysia are governed by the Companies Act 2016 (the Act). The Companies Act 2016 replaces the previous Companies Act 1965 (1965 Act) and came into force partially on 31 January 2017. Division 8 of Part III of the Act, which deals with corporate voluntary arrangements (CVA) and judicial management, came into force more recently on 1 March 2018, and Section 241 of the Act, which requires a company secretary to register with the Registrar of Companies before acting as a secretary, is the only section of the Act that has yet to come into force.

2 Excluded entities and excluded assets

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

Although all companies are subject to the insolvency provisions under the Act, there are provisions in industry-specific legislation imposed on the insolvency of certain entities. These include: electricity licensees (Electricity Supply Act 1990), banks (Financial Services Act 2013), licensed investment banks (Financial Services Act 2013), licensed insurers (Financial Services Act 2013), trust companies (Trust Companies Act 1949), the Stock Exchange (Capital Markets and Services Act 2007) and business trusts (Capital Markets and Services Act 2007).

If assets of the company are subject to security (for example, assets subject to a charge), these assets would be excluded from the winding-up process unless the secured creditor surrenders the security.

As for reorganisation proceedings, the provisions on CVA and judicial management exclude certain companies from resorting to such proceedings.

For CVA, public companies, licensed institutions and operators of designated payment systems regulated by the Central Bank of Malaysia, companies subject to the Capital Markets and Services Act 2007 and companies that create a charge over their property or any of its undertaking are excluded.

For judicial management, licensed institutions and operators of designated payment systems regulated by the Central Bank of Malaysia, and companies subject to the Capital Markets and Services Act 2007 are excluded.

3 Public enterprises

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

There are generally no special procedures for the insolvency of a government-owned enterprise. However, the Malaysian Airline System Berhad (Administration) Act 2015 (MAS Act) was specifically established for the administration of Malaysian Airline System Berhad

(MAS). Under the MAS Act, MAS and its subsidiaries were placed under the management of an administrator. Further, a moratorium applied for a period of 12 months upon the appointment of the administrator, which prevented any legal proceedings from being taken against MAS.

4 Protection for large financial institutions

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

There is no legislation in Malaysia that applies specifically to the financial difficulties of institutions on the ground that they are 'too big to fail'. However, certain industry-specific legislation governs the winding up of entities with a 'public interest' element, such as electricity licensees and banks (see the answer to question 2).

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Matters involving the liquidation or reorganisation of companies in Malaysia are dealt with by the High Court.

The unsuccessful party has an automatic right of appeal to the Court of Appeal from the order of the High Court. Under the Rules of the Court of Appeal 1994, the appellant must lodge a sum of 1,000 ringgit as security for the costs of the appeal.

A further appeal to the Federal Court requires leave of the Federal Court and a sum of 1,000 ringgit must be deposited with the Registrar of the Court as security for the prosecution of the appeal.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

The debtor company can initiate two types of voluntary winding up. The first is the members' voluntary winding up and the second is the creditors' voluntary winding up.

In a members' voluntary winding up, the directors must first make a declaration of solvency and lodge this with the Registrar of Companies. The members then pass the resolution for the winding up of the company.

In a creditors' voluntary winding up, the directors must make a declaration that states that the company cannot continue its business by reason of its liabilities. The members will pass the resolution for the winding up of the company and appoint a liquidator. A creditors' meeting is called where the creditors may also vote on their choice of liquidator. The creditors' choice of liquidator would override the members' choice.

The effects of the commencement of a voluntary winding up are as follows:

- the company will cease to carry on its business, except where the liquidator is of the opinion that this is required for the benefit of the winding-up process;

- the corporate state and corporate powers of the company shall continue until the company is dissolved;
- any transfer of shares (unless made with the permission of the liquidator) and any alteration in the status of the members made after the commencement of the winding up will be void; and
- specifically in a creditors' voluntary winding up, there is a stay of legal proceedings against the company unless leave of court is obtained.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

We explain further on the two voluntary reorganisation methods: the scheme of arrangement and the CVA.

Scheme of arrangement

A voluntary reorganisation in Malaysia may be carried out by way of a scheme of arrangement under section 366 of the Act. A scheme of arrangement is a court-approved compromise or arrangement between a company and its creditors (or any class of creditors).

One of the key objectives of a scheme of arrangement is to provide a mechanism to effect a formal compromise to bind dissenting creditors, so long as the statutory majority of votes has been achieved. The scheme will be subject to the approval of the court. It is sometimes common to have an external administrator, known as a scheme administrator, to assist in the scheme of arrangement procedure.

To initiate a scheme of arrangement, either the company, a creditor or a member would have to apply to the court for an order for meeting of the creditors or members to be held. The applicant has the flexibility in deciding which creditors or members to include in the proposed scheme of arrangement. When initiating a scheme of arrangement, the applicant can also seek a moratorium order known as a restraining order. The restraining order will restrain all further proceedings in any action or proceeding against the company, except by leave of the court. Note that section 368(6) of the Act makes it clear that such a restraining order will not apply to any proceeding taken by the Registrar of Companies or the Securities Commission Malaysia.

At the meeting, the creditors or members will vote on the proposed compromise or arrangement. If a 75 per cent majority in value of the creditors or members agrees to the proposed compromise or arrangement, an application must be made to the court to obtain the approval of the court for the proposed compromise or arrangement. The court may grant its approval subject to such alterations or conditions as it thinks just.

Further, section 367 of the Act allows the court to appoint an approved liquidator to assess the viability of the scheme. This provision was introduced in order to safeguard the interests of the creditors.

Once approved by the court, the compromise or arrangement is binding on all the creditors or members of the company expressly included in the scheme, and will be implemented according to its terms. Where the company is in the course of being wound up, the compromise or arrangement is binding on the liquidator and contributories of the company.

Corporate voluntary arrangement

A debtor company will be able to put up a proposal to its creditors for a voluntary arrangement via the CVA under section 396 of the Act. The implementation of the proposal is supervised by an independent insolvency practitioner. There is minimal court intervention in the process.

To initiate a CVA, the directors would have to submit to the nominee, being the insolvency practitioner, a document setting out the terms of the proposed voluntary arrangement and a statement of the company's affairs.

Under section 397(2) of the Act, the nominee shall then submit to the directors a statement indicating whether or not in his or her opinion:

- the proposed CVA has a reasonable prospect of being approved and implemented;
- the company is likely to have sufficient funds available for it during the proposed moratorium to enable the company to carry on its business; and
- that meetings of the company and creditors should be summoned to consider the proposed CVA.

Under section 398 of the Act, once the directors have received a positive statement from the nominee, they can then file this statement with the court together with the other necessary documents, such as the nominee's consent to act and the document setting out the terms of the proposed CVA.

Upon the filing of the relevant documents pursuant to section 398 of the Act, a moratorium commences automatically and remains in force for 28 days during which no legal proceedings can be taken against the company. It is meant to give some breathing room for the company from creditors' legal proceedings.

Upon the moratorium coming into force, section 399 of the Act requires the nominee to summon a meeting of the company and its creditors within 28 days of the date of the filing of the documents in court.

At the company's meeting, a simple majority is required to approve the proposed CVA while at the creditors' meeting, the required majority is 75 per cent of the total value of the creditors present and voting. With such approval, the CVA takes effect and binds all creditors. The aim of the CVA is that it should apply only to the restructuring of unsecured debts of a company and cannot affect the right of a secured creditor to enforce its security.

8 Successful reorganisations

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

In relation to a scheme of arrangement, a class of creditors must be confined to 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 court must also ensure that those whose rights are sufficiently similar to the rights of others should be classified together, such that they can properly consult together. The emphasis of this test is on similarity or dissimilarity of legal rights against the company, and not on similarity or dissimilarity of interests not derived from such legal rights.

For a successful reorganisation by way of a scheme of arrangement, the creditors of more than 75 per cent in value of the creditors or class of creditors present and voting in person or by proxy must agree to the proposed scheme or compromise. In practice, separate meetings for the various classes of creditors (eg, secured, unsecured and preferential) have to be called where the rights of each class under the scheme differ widely, to enable each class to decide on the proposed scheme.

After the approval of the scheme of arrangement by the requisite value of creditors, the scheme will have to be approved by the court. Once the court grants an order approving the scheme of arrangement, the scheme will take effect upon the court order being registered with the Registrar of Companies.

A proposed scheme of arrangement may release non-debtor parties from liability, subject to the approval of the creditors and the court.

In relation to a CVA, the meeting of the creditors would only involve the unsecured creditors. Further, where a company is under judicial management, there appears to be only a single class meeting of all the creditors.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Creditors may apply for involuntary liquidation of a company (ie, winding up by the court) under section 432(1)(a) of the Act. The circumstances under which a company may be wound up by the court are set out in section 465 of the Act, with the most common being the inability of the company to pay its debts (section 465(1)(e) of the Act). The creditor must establish that the company is unable to pay its debts. The most common method is the service of a written statutory demand, where if the company fails to pay the sum demanded within 21 days of the service of the demand, the creditor can then file the winding-up petition. The sum demanded must exceed the sum prescribed by the Minister, and this is currently fixed at 10,000 ringgit, which is a significant increase from the threshold of 500 ringgit under the previous 1965 Act.

If the court grants the winding-up order, the winding up is deemed to have commenced from the date of the order for winding up.

After the presentation of the winding-up petition:

- any disposition of the property of the company, including shares, shall be void, unless the court orders otherwise;
- proceedings against the company may be stayed on an application by the company or any creditor or contributory; and
- any attachment, sequestration, distress or execution put in force against the estate or effects of the company shall be void.

Once the winding-up order has been made, no legal proceedings shall be continued or commenced against the company except with leave of the court.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Under section 404 of the Act, a company or its creditors may apply to the court for an order to place the company under judicial management. This allows the management of a company to be taken over by an insolvency practitioner, known as a judicial manager. A moratorium would give the company temporary respite from legal proceedings by its creditors. The moratorium applies automatically from the filing until the disposal of the judicial management application and while the judicial management order is in force.

The court is empowered under section 405 of the Act to grant a judicial management order if and only if:

- it is satisfied that the company is or will be unable to pay its debts; and
- it considers that the making of the order is likely to achieve one or more of the following purposes:
 - the survival of the company or the whole or part of its undertaking as a going concern;
 - the approval of a compromise or arrangement between the company and its creditors; or
 - a more advantageous realisation of the company's assets would be effected than on a winding up.

The judicial management order shall, unless discharged, remain in force for six months and may be extended on the application of the judicial manager for another six months. During the period for which a judicial management order is in force:

- the company may not be wound up;
- no receiver and manager may be appointed;
- there will be a moratorium on legal proceedings and on any steps to enforce security over the company's property except with the consent of the judicial manager or leave of the court; and
- no steps will be taken to transfer any share of the company except with the leave of the court.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

There are no procedures under the Act that provide for expedited reorganisations. However, the creditors and the company may pre-agree a reorganisation or restructuring to be effected by way of a scheme of arrangement. This may be carried out by the company entering into an agreement that binds creditors to vote in favour of the proposed scheme of arrangement.

12 Unsuccessful reorganisations

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?

Scheme of arrangement

A proposed scheme of arrangement cannot succeed if the requisite approvals from the creditors and the court are not obtained. If the debtor company fails to carry out an approved scheme, the creditors

may institute proceedings to enforce their rights under the binding order granting approval for the scheme.

Corporate voluntary arrangement

A proposed CVA cannot succeed if the requisite approvals from the members and creditors are not obtained. A CVA may come to an end prematurely if it is not implemented.

Judicial management

A judicial management appointment may be terminated prematurely if:

- the requisite approval from the creditors as to the judicial manager's proposal is not obtained;
- the court orders that the judicial manager be discharged on the ground that he or she has managed the affairs of the company in a manner that is unfairly prejudicial to the interests of its creditors or members; or
- on the application of the judicial manager, the court orders that the purpose of the order for judicial management is incapable of achievement.

13 Corporate procedures

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

There are corporate procedures for the winding up of a company. See the answer to question 6 where we have set out the members' voluntary winding-up and the creditors' voluntary winding-up processes. The conclusion of the winding-up process would lead to the dissolution of the company.

A company may be struck off the register, which would result in the company being dissolved. Where the Registrar has reasonable cause to believe that a company is not carrying on business or is not in operation, he or she may send to the company a notice to that effect, stating that if an answer showing cause to the contrary is not received within thirty days from the date thereof a notice will be published in the Gazette with a view to striking the name of the company off the register. A director, member or liquidator of the company may also apply to strike the company off the register.

For bankruptcy proceedings in Malaysia, these refer to bankruptcy of individuals. An individual is declared bankrupt upon the issuance of the adjudication and receiving orders by the court.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In a compulsory winding up, the process is concluded when the liquidator applies to the court for an order that he or she be released and that the company be dissolved when he or she has realised the property of the company and issued a final dividend, if any.

A scheme of arrangement is concluded when all the obligations under the scheme have been discharged.

A CVA is concluded when the approved CVA has been fully implemented.

A judicial management order may be discharged upon the application of the judicial manager to the court if it appears to the judicial manager that the purpose specified in the order has been achieved.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

For a compulsory winding up, there are various grounds to wind up a company on grounds of insolvency. The most common ground is the inability of the company to pay its debts (section 465(1)(e) of the Act). Under section 466 of the Act, a company is deemed unable to pay its debts if:

- it has failed to comply with a statutory demand (being a demand served on a company by a creditor requiring payment of a sum exceeding the amount of 10,000 ringgit within 21 days of service of that demand);

- execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- it is proved to the satisfaction of the court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Under the Act, there are no provisions that compel companies to commence insolvency proceedings in particular circumstances. However, as companies become insolvent, directors may risk personal liability for trading while insolvent or fraudulent trading (see the answer to question 17).

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

When a company is in winding-up proceedings, any officer of the company who is knowingly a party to a transaction, with no expectation that the company would be able to pay the resulting debt, can be subject to civil and criminal liability (section 539(3) of the Act). The officer can be subject to criminal prosecution for insolvent trading. Upon conviction, the officer may be subject to civil proceedings where the court may declare the officer personally responsible for the repayment of the whole or any part of that debt (section 540(2) of the Act).

Further, where directors and officers are knowingly a party to the carrying on of the business of the company with the intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose, they may be liable for fraudulent trading under section 540 of the Act and made personally responsible for all or any of the debts or other liabilities of the company as the court directs.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Corporate officers and directors are generally not liable for their corporation's obligations. However, if these officers or directors are guilty of insolvent trading or fraudulent trading, the court may declare that they be made personally liable for the whole or part of the debts of the company.

Insolvent trading is where a director or other officer of the company, who was knowingly a party to the contracting of a debt, had no reasonable or probable ground of expectation (after considering the other liabilities of the company) of the company being able to pay that debt. The officer can be subject to criminal prosecution for insolvent trading.

Fraudulent trading is where any person, including a director or officer, is a party to the carrying on of the business of the company with the intent to defraud creditors of the company (see question 17). Further, when a company is insolvent or in a near-insolvent state, the directors' fiduciary duties extend to a duty to have regard to the interests of the company's creditors. The company (acting through its liquidator) may be able to sue a director for a breach of this duty.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Although there are no express statutory provisions to this effect, it may be argued at common law that upon the insolvency of the company, the interests of the creditors would override those of the shareholders. Thus, there may be a breach of directors' duties to the creditors of the company where, for example, the directors commit acts that jeopardise the financial position of the company in liquidation.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Where a winding-up order has been made in relation to a company, this would suspend the directors' and officers' powers of management over the company. However, the directors would still retain the residual power to appeal against the winding-up order.

In a scheme of arrangement, the directors and officers continue to manage the company. However, any disposition of the property of the company, other than those made in the ordinary course of business, shall be void unless the court otherwise orders. Where a company disposes of or acquires any property, other than in the ordinary course of business, without leave of the court, every officer of the company who is in default shall be guilty of an offence.

In a corporate voluntary arrangement, the directors and officers continue to manage the company subject to the moratorium that would take place upon filing of the requisite documents pursuant to section 398 of the Act. Thus, no meeting of the company may be called or requisitioned except with the consent of the nominee or the leave of the court and subject to such terms as the court may impose, no resolution may be passed for the winding up of the company, no application for judicial management may be made against the company, and no steps may be taken to transfer any share of the company or to alter the status of any member of the company except with the leave of the court and subject to such terms as the court may impose.

Where a company has been placed under judicial management, the management of the affairs, business and property of the company would be taken over by the judicial manager. Thus, the powers of the directors and officers would be suspended. After an application for judicial management has been filed, the court may also grant an order for an interim judicial manager on the application of the person applying for the judicial management order, and it is likely that the powers of the directors would also vest in the interim judicial manager.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

Scheme of arrangement

There is no automatic moratorium in a scheme of arrangement and a restraining order would have to be obtained to stay legal proceedings against the company. See question 7 for more details.

Winding up

In a compulsory winding up, there is no automatic stay of proceedings against the company after the presentation of the winding-up petition. However, at any time after a winding-up petition is presented, the company or any creditor or contributory may make an application to the court to stay further proceedings against the company.

Once a winding-up order is made or an interim liquidator has been appointed, an automatic stay operates on proceedings against the company, unless the court grants leave for the continuation of the proceedings.

In a creditors' voluntary winding up, there is an automatic stay of proceedings against the company upon the commencement of winding

up. This is unless the court allows the continuation of the proceedings, subject to such terms as imposed by the court.

Corporate voluntary arrangement

For a compulsory CVA, there is an automatic moratorium upon the filing of the relevant documents pursuant to section 398 of the Act (see question 7) that remains in force for 28 days, during which no legal proceedings can be taken against the company, including winding-up proceedings. Further, no right of forfeiture may be exercised save with leave of the court, and no other steps may be taken to impose any security over the company's property or to repossess goods in the company's possession under any hire-purchase agreement except with leave of the court.

Judicial management

Upon the filing of an application for judicial management, there will be an automatic moratorium on legal proceedings and on any steps to enforce security over the company's property except with leave of the court. Once an order for judicial management has been made, no legal proceedings or steps to enforce security over the company's property may be taken during the period that the order is in force, except with the consent of the judicial manager or leave of the court. Further, once the order is in force, no resolution shall be passed or order made for winding up of the company, no receiver may be appointed, and no steps shall be taken to transfer any shares or to alter any status of the members of the company except with leave of the court.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

Winding up

Where the company is being wound up, the company would ordinarily no longer be able carry on business. However, the liquidator can decide to carry on the business of the company if it is beneficial to the winding up. The liquidator will be able to do so without the authority of the court or the committee of inspection for 180 days after the date of the winding-up order, but will subsequently need to obtain the requisite authority if he or she wishes to continue the business.

Scheme of arrangement

In a scheme of arrangement, the company's management continues to operate the business during the scheme of arrangement procedure. Where there is no restraining order in place, the company can continue to incur debts and obligations, raise funding and sell its products and services in the ordinary course of business.

There is no special treatment given to creditors who supply goods or services after the commencement of the scheme of arrangement, provided that the goods and services are supplied in the ordinary course of business.

As for the roles of the creditors and the court, creditors are given no statutory role in the supervision of the debtor company's business activities. However, one of the requirements for the grant of a restraining order is that the court must approve a person nominated by a majority of the creditors to act as a director of the company.

Corporate voluntary arrangement

In a CVA, the company would be able to carry on business subject to the moratorium that would take place upon filing of the requisite documents pursuant to section 398 of the Act (see question 20). When the moratorium is in force, the nominee's name and a statement that the moratorium is in force for the company should be stated on its business correspondence and documentation, websites and cheques.

Like the situation in a scheme of arrangement, there is no special treatment given to creditors who supply goods or services after the commencement of the CVA, provided that the goods and services are supplied in the ordinary course of business. Further, creditors are given no statutory role in the supervision of the debtor company's business activities.

Judicial management

Where the company is under the management of a judicial manager, the judicial manager will carry on the business of the company in accordance with the proposal approved by the creditors.

Creditors may apply to the court for an order under section 425 of the Act that the company's affairs, business and property are being managed in a manner that is unfairly prejudicial to the interests of its creditors or members generally or of some part of its creditors or members, or of a single creditor representing 25 per cent in value of the claims against the company. This power would also apply to any proposed act or omission of the judicial manager.

Upon the application of the creditors under section 425 of the Act, the court may make an order to regulate the future management by the judicial manager, require a meeting of creditors or members to consider such matters as the court may direct, or discharge the judicial management order.

In relation to the provision of supplies, including water, electricity, gas or telecommunications to the company, where this is requested by the judicial manager after the making of the judicial management order, the supplier may make it a condition of the giving of the supply that the judicial manager personally guarantees the payment of any charges.

23 Post-filing credit

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

After the presentation of the winding-up petition (in winding-up proceedings by the court), certain transactions entered into by the company may be void if it amounts to a disposition of the property of the company. Thus, if the charging of property falls under a 'disposition of property', this may be void. However, the court may exercise its discretion to validate such a transaction, for example if it can be shown that the transaction would be beneficial to the company and its creditors and if the court considers that the disposition is reasonable. Such loans or credit obtained would be subject to the same common law rules on priorities in liquidation.

Once the winding-up order has been granted, the liquidator has the power to raise any money required on the security of the assets of the company.

For a company undergoing a scheme of arrangement, there is no prohibition in obtaining secured or unsecured loans or credit. If there is a restraining order in place, it may be prudent to then obtain leave of the court before obtaining such loans.

In a CVA, where the moratorium is in place, no steps may be taken to impose any security over the company's property. However, there are no statutory prohibitions as to the obtaining of unsecured loans or credit.

When a company is under judicial management, the powers of the judicial manager include obtaining loans and granting security for loans over the property of the company.

24 Sale of assets

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 a scheme of arrangement and where there is no restraining order in place, the company may continue to sell its assets in the ordinary course of business. However, where a restraining order has been granted by the court, no disposition of property may be made out of the ordinary course of business, except with leave of the court. Under section 370(2)(a) of the Act, the court may also order the transfer of the whole or any part of the undertaking and of the property or liabilities of any company in the scheme to the designated transferor company. The purchaser of the assets will acquire the assets under the conditions specified in the scheme of arrangement.

In a winding up, any disposition of the company's property after the presentation of the winding-up petition is void unless ordered otherwise by the court. After the grant of the winding-up order and the

appointment of the liquidator, the liquidator has the power to sell the assets of the company by private auction, public tender or private contract (paragraph (c) of the Twelfth Schedule of the Act). Generally, the assets will pass free of liabilities, unless otherwise agreed between the liquidator and the purchaser.

A judicial manager has wide powers over a company under judicial management, including the power to sell or otherwise dispose of the property of the company by public auction or private contract (paragraph (b) of the Ninth Schedule of the Act).

There are no such specific provisions in relation to a CVA.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

'Stalking horse' bids and credit bidding are not common, but it is possible to carry out these procedures.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

Scheme of arrangement

The right of the debtor company in the midst of a scheme of arrangement to reject or disclaim an unfavourable contract would depend on the terms imposed by the compromise or arrangement. Where there is a restraining order in place, no proceedings may be brought against the company for breach of a contract except with leave of the court.

Winding up

Where any part of the property of company consists of unprofitable contracts, the liquidator may, with leave of the court or the committee of inspection, disclaim such contracts, at any time within 12 months after the commencement of the winding up or such extended period as is allowed by the court. Where such property only came to the attention of the liquidator 30 days after the commencement of the winding up, he or she may disclaim such a contract within 12 months after becoming aware of the contract or such extended period as allowed by the court.

If a person interested in a contract makes an application to the liquidator requiring him or her to decide whether to disclaim the contract, the liquidator has 28 days from the receipt of the application or such further period as is allowed by the court or the committee of inspection to give notice to the applicant that he or she intends to obtain leave to disclaim the contract. The liquidator will be deemed to have adopted the contract if he or she fails to disclaim the contract within that period.

If a debtor breaches a contract after winding-up proceedings have commenced and is sued for breach of contract, the debtor company may apply for a stay of the action. Where a winding-up order has been granted, no proceedings may be brought against the debtor company unless leave of the court is obtained.

Corporate voluntary arrangement

In a CVA, as in a scheme of arrangement, the right of the debtor company to reject or disclaim an unfavourable contract would depend on the terms imposed by the CVA. No proceedings may be brought for breach of contract by the company where the moratorium is in force.

Judicial management

Where a company has been placed under judicial management, the judicial manager shall be personally liable on any contract, including any contract of employment, entered into or adopted by him or her in the carrying out of his or her functions. However, the judicial manager has the ability to disclaim any personal liability under any contract adopted by him or her by providing notice to the other party.

Further, the judicial manager has a period of 30 days from the date of the judicial management order to decide whether to adopt a contract or not.

Upon the filing of an application for judicial management, there will be an automatic moratorium on legal proceedings and no action may be brought for breach of contract except with leave of the court. However, once the order for judicial management is in force, an aggrieved creditor may apply for an order that the affairs of the company are being managed in a manner that is unfairly prejudicial to the interests of the creditors or members. Where the judicial manager has not disclaimed personal liability, the opposing party may seek a remedy against the judicial manager.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

There are no statutory provisions for the termination of a debtor's IP rights upon the commencement of winding up, a scheme of arrangement, CVA or judicial management.

However, parties commonly agree for such a termination in the agreement granting the licence in the event of winding up. If there is no such clause, the debtor company may continue to benefit from the IP rights.

Similarly, a company subject to a scheme of arrangement, CVA or judicial management order may continue to use the IP rights granted under an agreement with the company if this is not contrary to the scheme, CVA or approved proposal in judicial management.

28 Personal data

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

The collection and use of personal data in Malaysia is governed by the Personal Data Protection Act 2010 (PDPA). Under the PDPA, companies incorporated in Malaysia must issue a written notice to the data subject setting out certain information, including the purposes for which the personal data is being processed and the class of third parties to whom the company discloses or may disclose the personal data. Quite commonly, such notices would inform the data subject that his or her personal information may be shared in the context of a winding up.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Matters that fall within liquidation or reorganisation proceedings are unlikely to be arbitrable in Malaysia.

Creditor remedies

30 Creditors' enforcement

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 debenture holder may have the power to appoint a receiver or receiver and manager over the charged assets. Even after the winding up of the company, the receiver or receiver and manager would have possessory powers over such charged assets.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

The main remedies and enforcement actions available to unsecured creditors in respect of unpaid debts include:

- filing a suit in the appropriate court to obtain judgment for the unpaid debt. Following judgment, a creditor may seek to enforce the judgment in a number of ways. These include applying to a court for a warrant of seizure and sale, and issuing garnishee proceedings; and
- issuing a statutory demand against a company. Where the debt exceeds 10,000 ringgit, a statutory demand may be issued against the company, requiring the company to pay the debt within 21 days of service. There is no strict requirement to obtain judgment before issuing the statutory demand. If the company fails to respond to the statutory demand, it will be deemed to be insolvent. Winding-up proceedings can then be initiated against the company (see question 9). The process of applying for a winding-up order until grant of the order may take between three to six months. Once the winding up order is issued, the process of liquidation may take another six months to two years, depending on the complexity of the matter.

Under section 19 of the Debtors Act 1957, a creditor may apply for the seizure of a judgment debtor's property before judgment if the creditor can show a good cause of action and that, among others, the debtor has removed or is about to remove his or her property with the intent to delay the execution of judgment.

Further, creditors may apply for freezing orders if there is a risk of the judgment debtor dissipating his or her assets before judgment.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Winding up

In the winding-up process, the directors and other officers listed in the Act shall submit a statement of affairs to the liquidator within fourteen days after the date of the winding-up order. This statement will essentially contain particulars of the assets, debts and liabilities of the company.

As soon as practicable after the receipt of this statement of affairs, the liquidator shall submit a preliminary report to the court on:

- the amount of capital issued, subscribed and paid up and the estimated amount of assets and liabilities;
- if the company has failed, as to the causes of failure; and
- whether in the liquidator's opinion, further inquiry is desirable as to any matter relating to the promotion, formation or failure of the company or the conduct of the company's business.

The liquidator may, from time to time, call for meetings of the creditors or contributories to ascertain their wishes in all matters relating to the winding up.

There may be circumstances where the court may direct that meetings of the creditors or contributories be held to ascertain their wishes.

The liquidator may, and shall, if requested by any creditor or contributory, summon separate meetings of the creditors and contributories for the purpose of determining whether or not the creditors or contributories require the appointment of a committee of inspection to act with the liquidator, and if so, who are to be members of the committee.

After a period of six months from the date of his or her appointment, the liquidator shall within one month, and for every subsequent period of six months, lodge with the Registrar of Companies and the Official Receiver an account of his or her receipts and payments and a statement of the position in the winding up. The liquidator shall give notice that the account has been made up to every creditor and contributory when next forwarding any report, notice of meeting, notice of call or dividend. This notice shall inform creditors and contributories at what address and between what hours the account may be inspected.

Scheme of arrangement

Once the court has granted the order for the summoning of meetings under a scheme of arrangement, the meetings of the different classes of creditors will be held. The notice summoning the court convened meeting must be accompanied by an explanatory statement explaining the effect of the compromise or arrangement and stating any material interests of the directors, and the effect on the interests of the directors so far as this is different from the effect on similar interests of other persons.

The company should provide the creditors with such information as is necessary to make a meaningful choice and information that is reasonably necessary to enable the recipients to determine how to vote.

Corporate voluntary arrangement

After the moratorium is in force, the nominee in a CVA shall summon a meeting of the company's creditors to approve the proposed voluntary arrangement. The meeting must be conducted in accordance with the rules of meetings under division 5 of Part III of the Act. Thus, such a meeting must be called with a minimum of 14 days' notice (or such longer period as provided for by the company's constitution). The notice of the meeting shall state the place, date and time of the meeting and the general nature of the business of the meeting.

Judicial management

Where a judicial management order has been made, the judicial manager shall send a notice of the order to all creditors of the company, so far as the judicial manager is aware of the addresses, within 30 days from the date of the order, unless the court otherwise directs.

The judicial manager may summon a meeting of the creditors if he or she thinks fit, and the court may also direct the judicial manager to summon the meeting.

In any case, the judicial manager is required to summon a meeting of the creditors within 60 days after the making of the judicial management order, or such longer period as the court may allow. No less than 14 days' notice should be given of the meeting. At this meeting, the creditors will decide on whether to approve the proposal of the judicial manager. The proposal shall be approved by 75 per cent of the total value of creditors whose claims have been accepted by the judicial manager, present and voting at the meeting either in person or by proxy.

33 Creditor representation

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?

Winding up

Following on from question 32, in a compulsory winding up, the creditors and contributories can require the appointment, and decide on the composition, of a committee of inspection. Any difference between the determination of the meetings of the creditors and contributories shall be decided upon by the court.

In administering the assets of the company, the liquidator must have regard to the directions given by the committee of inspection.

Further, the liquidator may only exercise the following powers with the approval of the committee of inspection (or of the court):

- carry on the business of the company more than 180 days after the date of the winding-up order;
- pay any class of creditors in full;
- make any compromise or arrangement with creditors;
- compromise any calls and liabilities and any claims in relation to the company; and
- compromise any debt due to the company other than calls and liabilities for calls and a debt where the amount claimed by the company to be due to the company exceeds 10,000 ringgit.

No member of a committee of inspection shall, except under and with the sanction of the court, directly or indirectly obtain any profit or payment for any services or for any goods supplied to the liquidator. The court sanction will only be given where the service performed is of a special nature.

Judicial management

Where the creditors have approved the judicial manager's proposals, they may establish a committee of creditors. This committee may require the judicial manager to provide updates to the committee on the carrying out of the judicial manager's functions.

Corporate voluntary arrangement

Under a CVA, a moratorium committee may be established where the creditors and members have decided to extend the period of the moratorium. An estimate of the expense to be incurred by the committee shall be approved by the same meeting.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

It is possible for the creditors to directly or indirectly pursue the wound-up company's remedies. Firstly, creditors may agree to provide funding to the liquidator for the costs of litigation. After assets have been recovered through such litigation, the court may make an order granting those creditors a priority in the distribution of assets in order to recover those costs of litigation. Therefore, the fruits of the litigation will be recovered for the general benefit of the unsecured creditors, but the creditors who provided the funding may obtain priority for the repayment of the funding.

Secondly, it is possible for the liquidator to obtain a court order approving the assignment of the proceeds from any litigation to repay the costs of the funding provided by creditors.

35 Claims

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

A creditor will have to submit an affidavit to the liquidator immediately after the making of a winding-up order, once the creditor has had notice of the order. The affidavit should verify the debt, be made by the creditor him or herself or any person authorised by the creditor, refer to a statement of account showing the particulars of the debt, and state whether or not the creditor is or is not a secured creditor.

All debts payable on a contingency and all claims against the company, present or future, certain or contingent or sounding only in damages shall be admissible to proof against the company. Demands in the nature of unliquidated damages arising otherwise than by reason of breach of contract, promise or breach of trust shall not be provable in winding up.

A creditor proving his or her debt shall deduct therefrom all trade discounts, but shall not be compelled to deduct any discount, not exceeding 5 per cent on the net amount of the claim, which he or she may have agreed to allow for payment in cash.

Secured creditors have three options under the Act upon the winding up of a company:

- (i) realise a property subject to a charge, if entitled to do so;
- (ii) value the property subject to the charge and claim in the winding up as an unsecured creditor for the balance due; or
- (iii) surrender the charge to the liquidator for the general benefit of creditors and claim in the winding up as an unsecured creditor for the whole debt.

The liquidator, by notice in writing, may require a secured creditor to elect which of the options referred to above that the creditor wishes to exercise within 21 days of the notice. If the secured creditor elects to exercise options (ii) or (iii), the liquidator may require the secured creditor to exercise the options within the 21-day period.

In relation to option (i) above, a secured creditor must account to the liquidator for any surplus remaining from the net amount realised after the satisfaction of the debt, including interest payable but not exceeding six months in respect of that debt up to the time of its

satisfaction, and after making any proper payments to the holder of any other charge over the property subject to the charge.

A creditor aggrieved by the decision of the liquidator in relation to his or her claims may apply to the court under section 517 of the Act. The court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

36 Set-off and netting

To what extent may creditors 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 winding up, creditors may set-off credits, debts or other mutual dealings where these are mutual between the creditor and the debtor company. The creditor cannot exercise the right of set-off where he or she had notice of the impending winding up at the time of giving credit to the company.

In a scheme of arrangement or CVA, the right of set-off of a creditor would depend on the terms of the compromise or arrangement, or the approved proposal.

Where a company is under judicial management, a creditor may be able exercise a common law or contractual right of set-off, and this would likely not be caught by the moratorium.

37 Modifying creditors' rights

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

The court may not change the priority of a creditor's claim.

38 Priority claims

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

Liquidation

Secured creditors can enforce their security and they stand outside of the winding-up process. Where their security is inadequate, the secured creditor can submit proof of the remaining debt.

The following claims have priority over unsecured debts:

- the costs and expenses of winding up, which include the remuneration of the liquidator;
- subject to certain limits, all wages or salary (including commissions) of employees;
- all amounts due in respect of workers' compensation;
- all remuneration payable to an employee in respect of vacation leave;
- amounts due in respect of contributions to the employees' provident fund during the 12 months before the commencement of winding up; and
- all federal tax assessed before the commencement of winding up or assessed at any time before the date for proving debts has expired.

Reorganisation

In a reorganisation through a scheme of arrangement, there is no priority of claims per se. The terms of the scheme as approved by the court would determine the manner in which the creditors will be paid.

In a CVA, the terms of the CVA as agreed between the creditors and the company would determine the payment of any claims by the creditors. However, the CVA cannot affect the rights of any secured creditor to enforce his or her security, except with concurrence.

Where a company is under judicial management, the claims of the creditors would be paid out according to the proposal of the judicial manager as approved by the required 75 per cent in value of creditors.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

As set out in the answer to question 38, certain amounts due to employees enjoy priority in the distribution of assets in liquidation.

40 Pension claims

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

As set out in the answer to question 38, amounts due in respect of contributions to the employees' provident fund during the 12 months before the commencement of winding up enjoy priority in the distribution of assets in liquidation.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

There are no specific statutory provisions dealing with insolvency proceedings and environmental issues. The environment-related laws will generally impose personal liability on any person who has committed an offence under the relevant statute. Therefore, personal liability could extend to the insolvency administrator, directors or officers of the company.

42 Liabilities that survive insolvency or reorganisation proceedings

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

In liquidation, no liabilities will survive the dissolution of the company. Similarly, in a scheme of arrangement, CVA and where a company has been placed under judicial management, there will be no further liabilities once the company has discharged all its obligations under the terms of the scheme, CVA or approved proposal of the judicial manager.

43 Distributions

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

This applies only in liquidations. The liquidator can declare interim dividends as and when the liquidator decides fit. Once the liquidator has completed the realisation of the assets, the liquidator can declare a final dividend.

Security

44 Secured lending and credit (immovables)

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

The principal type of security taken on immovable property is a registered charge. Land ownership in Malaysia is governed by the National Land Code and is based on the Torrens system. Other forms of security taken by lenders on real property include a lien created under section 281 of the National Land Code by the deposit of title deeds with the lender.

Section 352 of the Act requires a charge to be lodged with the Registrar of Companies within 30 days after the creation of the charge. If the charge is not registered, the charge will be void against the liquidator and any creditor of the company.

Update and trends

The Companies Act 2016 (the Act) came into force partially on 31 January 2017, with the corporate rescue provisions in force from 1 March 2018. The Act has revamped the provisions on winding up and schemes of arrangement, including codifying some of the rights available to creditors at common law and introducing an additional safeguard where the court may appoint an approved liquidator to assess the viability of a proposed scheme. The corporate rescue mechanisms have been modelled after the United Kingdom provisions (the corporate voluntary arrangement) and Singapore provisions (judicial management) and are already being applied by companies in Malaysia.

45 Secured lending and credit (movables)

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

The principal types of security taken on movable property are fixed and floating charges. Liens, pledges, assignments and retentions of title are also other forms of security.

Further, in September 2017, the Companies Commission of Malaysia conducted a public consultation on a proposed new law to introduce a secured transaction legal framework for movable assets and the establishment of a unified collateral registry for Malaysia. The consultation proposed the adoption of the New Zealand legal framework, with appropriate references to the UNCITRAL Model Law on Security Interests.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Winding up

The following types of transactions occur prior to the presentation of the winding-up petition in a winding up by the court or when the passing of the resolution for voluntary winding up can be set aside:

- an undue preference, being a transaction relating to property made or done by or against a company where the company is insolvent at the time of the transaction, and where the transaction is made in favour of any creditor and the presentation of the winding-up petition or the passing of the resolution for voluntary winding up is within six months from the date of the transaction. However, the transaction will not be void if the counterparty dealt with the company for valuable consideration and without any actual notice of the contravention;
- sale at an undervalue or an acquisition at an overvalue of property, business or undertaking for a cash consideration where the counterparty is a director or a person connected with a director, or a company with the same director or person connected with that director, where the sale occurred up to two years before the presentation of the winding-up petition or the passing of the resolution to wind up the company;
- with leave of the court or the committee of inspection, the liquidator may disclaim onerous contracts, such as any estate or interest in land that is burdened with onerous covenants, shares in corporations, and unprofitable contracts (see question 26); and
- a floating charge created within six months from the presentation of a winding-up petition or the passing of the resolution for voluntary winding up. Such a charge is invalid except to the amount of any monies paid to the company at the time of, and in consideration of, the charge together with interest at 5 per cent per annum or such other rate as prescribed.

Judicial management

The undue preference provision also applies to any transaction relating to property made or done by or against a company where the company is insolvent at the time of the transaction, and where the transaction is made in favour of any creditor and the application for a judicial management order is presented within six months from the date of the

transaction. Thus, such transactions will be void unless the transaction was made by a counterparty in good faith and for valuable consideration through or under a creditor of the company.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There are generally no restrictions on claims by such creditors unless these claims fall within one of the transactions liable to be set aside (see the transactions listed in question 46).

Groups of companies

48 Groups of companies

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

The parent and affiliated companies would all be separate legal entities and would generally not be responsible for the liabilities of the subsidiaries or affiliates. There may be the exceptional situation where the court allows for the piercing of the corporate veil such that the parent company may be held responsible for the liabilities of the subsidiary.

49 Combining parent and subsidiary proceedings

In 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?

Each company in the corporate group would be a separate legal entity and the winding-up proceedings of each entity would be treated separately. Therefore, there would be no pooling together of assets and liabilities.

International cases

50 Recognition of foreign judgments

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?

Under the Reciprocal Enforcement of Judgments Act 1958 (REJA), foreign judgments obtained from superior courts of certain jurisdictions are recognised once registered in Malaysia. These jurisdictions are the United Kingdom, Hong Kong, Singapore, New Zealand, Sri Lanka, India (excluding certain areas), and Brunei Darussalam.

Malaysia is not a signatory to any treaty on international insolvency.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model Law on Cross-Border Insolvency has not been adopted in Malaysia although there has been some discussion on whether to adopt it.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

There are no special procedures in relation to foreign creditors. However, where there is a foreign judgment, this has to be registered in the Malaysian court under REJA (see question 50). Once the judgment has been registered, it is enforceable in Malaysia in the same manner as a local judgment. If the foreign judgment does not come within the REJA scheme, the foreign creditor would have to bring fresh proceedings in the Malaysian courts to sue on the foreign judgment as a debt.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

In the case of a foreign incorporated company that has a place of business or is carrying on business in Malaysia and where this company is in liquidation outside Malaysia, the assets recovered in Malaysia must be first used to pay debts and settle liabilities incurred in Malaysia before paying the net amount to the liquidator of that foreign company.

54 COMI

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?

Malaysia does not recognise the concept of COMI.

55 Cross-border cooperation

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?

Please refer to the answers to questions 50 and 51. If a registered foreign company goes into liquidation or is dissolved in its place of

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incorporation, the foreign liquidator shall have the powers and functions of a liquidator in Malaysia until a liquidator in Malaysia is duly appointed by the court.

56 Cross-border insolvency protocols and joint court hearings

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 courts in Malaysia do not have cross-border insolvency protocols or other arrangements with courts in other countries. There are no reported decisions where a Malaysian court has communicated or held joint hearings with courts in other countries in cross-border cases.

Mexico

Darío U Oscós Coria and Darío A Oscós Rueda

Oscós Abogados

General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The Commercial Insolvency Law (LCM), amended as of 11 January 2014, applies to merchants and traders, individual and legal entities, including commercial companies, trusts engaged in business activities, state-owned commercial companies, the estates of deceased merchants, partners of a liability partnership and small merchant debts lower than 400,000 unidades de inversión (UDI: a unit subject to inflation adjustments, whose value is announced daily and published in the Daily Gazette of the Federation and major national newspapers), subject to written agreement.

The insolvency of non-merchants (individuals, consumers) is governed by the state civil codes and state codes of civil procedure.

Insolvency for financial institutions, insurance, bonding, reinsurance and re-bonding companies is governed by their special laws.

Filing for insolvency is not mandatory.

2 Excluded entities and excluded assets

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

Workers-owed labour credits are excluded; such workers are governed by the Federal Labour Law (labour credits are claims by employees and may include unpaid wages and employment indemnity). Tax claims and claims equivalent to tax claims by the tax authorities (federal, state and municipal), the Mexican Institute of Social Security (IMSS) and the National Workers' Housing Fund Institute (INFONAVIT) are excluded from the general bankruptcy proceedings (see question 9). 'Claims equivalent to taxes' includes the IMSS and INFONAVIT tax quotas employers and employees must pay that are considered equivalent to taxes. Federal tax credits are governed by the Federal Tax Code and state and municipal tax credits are governed by state tax laws. Labour creditors and tax creditors do not join the bankruptcy proceedings and are paid and liquidated by their labour chambers and tax authorities, respectively.

Tax credits and labour credits are included within the total liabilities of the debtor. Labour claims have super priority. Tax credits have priority over unsecured credits and over credits secured by a pledge or mortgage, provided these secured credits were perfected and recorded before the notice to debtor of the tax credits. Tax credits have no priority over labour credits or over alimony for which a lawsuit has been filed before a court.

By law, tax creditors do not join the general bankruptcy proceedings. The law provides that if a debtor is adjudicated in general insolvency proceedings, the court shall notify tax creditors of such adjudication. Enforcement of tax creditors may be stayed by this adjudication, provided tax creditors had been notified of the filing of the general insolvency proceedings petition.

There are assets excluded from execution, attachment and liquidation in bankruptcy such as alimony, child support, recorded homestead

(family patrimony), communal real estate land and life insurance in the case of an irrevocable appointment of a beneficiary.

3 Public enterprises

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

The general bankruptcy proceedings govern the insolvency of a government-owned enterprise, when the government-owned enterprise is incorporated as a commercial corporation or, when by virtue of law, the commercial law shall govern the government-owned enterprise, as in the case of the newly productive enterprises Petroleos Mexicanos and Comisión Federal de Electricidad. For remedies to creditors of insolvent public enterprises, please refer to those discussed herein.

Consideration of the bill or act of incorporation and by-laws of a government-owned enterprise shall be taken into account for special regulations thereto and the applicability of a different insolvency regime, including, in some instances, the federal or state general insolvency proceedings.

Special public domain regulations on government-owned assets regime shall be considered as well, as they may not be subject to attachment, seizure or judicial auction sale. Creditors of insolvent public enterprises have as remedies the due process rights to claim, pursue and be paid based upon their priority, in accordance with the provisions governing the insolvency proceeding.

Consideration shall also be given to public budget regulations for the payment of debts owed by a government-owned enterprise.

4 Protection for large financial institutions

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

Under the new financial regime, the banking law provides for an autonomous, independent and special insolvency regime called 'judicial banking liquidation', in addition to the administrative control regulations. Such proceedings will be the federal district court-directed liquidation of a bank, and the trustee will be appointed by the Banking Commission. Accordingly, the amendments to the banking law, in the administrative regulation, give greater powers to the financial regulators and provide additional tools for the control, investigation, overview, preventive and protective measures, requirements, sanctions, etc, over banks and financial institutions, aimed at more efficiently preventing and remedying situations of financial distress.

On the other hand, amendments also provide legal tools for the efficient and prompt enforcement of financial regulators' powers, liquidation of estate assets and creditors' collection rights. It is recognised that under the current LCM, the liquidation of a bank in bankruptcy may take up to a decade. Accordingly, in the new regime dilatory practices are overcome to make liquidation faster and more efficient.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Federal district courts are the only courts with jurisdiction over commercial insolvency proceedings for merchants. Non-merchants are subject to state and local civil jurisdiction. The judiciary will set up specialised federal district courts dealing with insolvency matters.

The rights to appeal are to challenge a court order seeking its amendment or reversal based upon an appellant's opinion that the court order is unlawful. An appellant has an automatic right to appeal. Under the Commercial Insolvency Statute, there is no stay of the court order under appeal. There are just a few court orders that may be appealed, such as the judgment adjudicating debtor in *concurso mercantil* (see question 6), the judgment on the recognition, ranking and priority of claims and the judgment adjudicating the debtor in bankruptcy. There is an extraordinary remedy, namely *amparo* action, by means of which decisions of the appeal may be further challenged before a constitutional court. In the insolvency proceedings, most court orders may be challenged by a remedy, namely revocation, which is decided by the same court presiding over the insolvency proceeding.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

The general insolvency proceedings for merchants are a single, monolithic, compound process, namely *concurso mercantil*, comprising two major stages: conciliation (reorganisation) and bankruptcy (liquidation).

In conciliation, a conciliator is appointed and seeks to establish a reorganisation plan. If no reorganisation plan is agreed, the process, by operation of law, is converted into bankruptcy (liquidation). A trustee is appointed for liquidation.

There is also a sub-stage: the visit, wherein a visitor is appointed to inspect the debtor's premises and accounts to confirm that the standard for insolvency is met and reports accordingly to the district court, which may judge the debtor to be in general insolvency proceedings.

Full insolvency proceedings may be voluntary or involuntary. In a voluntary petition or prepackaged insolvency there is no visit. In an involuntary petition a visit shall be conducted to confirm the insolvency standard is met. The debtor may voluntarily request general insolvency proceedings (merchant's insolvency) in the event of bankruptcy, for which there is no visit. Involuntary petition at the stage of bankruptcy is allowed if the debtor does not oppose it; otherwise, full insolvency proceedings shall be pursued. In involuntary bankruptcy a visit shall be conducted. Bankruptcy allows for a reorganisation plan. Bankruptcy relief becomes available when the debtor (merchant) requests his or her bankruptcy.

Voluntary bankruptcy is adjudicated without full insolvency proceedings (see question 11) and in involuntary bankruptcy when the debtor does not oppose it. For a debtor to be placed in bankruptcy by a creditor (ie, involuntarily) full insolvency proceedings shall be pursued from the stage of conciliation, including the visit, unless the debtor agrees to its bankruptcy. A debtor is declared to be in bankruptcy by the court if a plan is not agreed upon during conciliation proceedings or if the debtor does not cooperate with the plan and the conciliator (see question 11) requests a declaration of bankruptcy.

In order to adjudicate a debtor in general insolvency proceedings, insolvency standards and law requirements shall be met, whether voluntary or involuntary and whether petition is to be opened as of the conciliation or bankruptcy stage. The general insolvency proceedings adjudication determines the respective stage. The effects of the respective stage are provided by this declaration and by law.

For requirements and effects, see question 11. Additional relief in bankruptcy is as follows:

- the debtor's incapacity to keep possession of, dispose of and administer assets is declared;
- possession and administration of assets are surrendered to the trustee;

- assets subject to the enforcement of a final judgment regarding obligations prior to the commercial insolvency declaration are excluded;
- debts to the bankrupt entity are not paid and assets shall not be surrendered to it; if debtors default, they are ordered to pay twice the amount defaulted on as a fine;
- a trustee is appointed, who shall take possession of assets and manage them; and
- in the case of an individual debtor, it is presumed that assets of a spouse acquired within two years prior to the suspect period belong to the state (the Muciana assumption).

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

LCM overview

The LCM provides one form of insolvency proceedings that has two phases: conciliation (reorganisation) with the debtor in possession; and bankruptcy (liquidation) under the possession and administration of a trustee.

The conciliation phase may last up to 185 calendar days, with two extensions of 90 calendar days each upon the approval of a special majority of recognised creditors (first extension: two-thirds of the total debt creditors; second extension: 90 per cent of recognised creditors).

If no reorganisation plan is reached during the conciliation, the procedure turns into a bankruptcy (liquidation). Upon declaration of bankruptcy, assets shall be sold at public auction through a bid process. Before conciliation, there is a visit to confirm whether or not the standard for insolvency is met (see question 9).

The Federal Institute of Commercial Insolvency Specialists (IFECOM) is the trustee office and appoints:

- for the visit, a visitor who reports his or her findings accordingly to the district court (see question 9) whether the insolvency standard is met or not;
- for the conciliation, a conciliator who seeks to establish a reorganisation plan and oversees the debtor-in-possession's administration and follows the allowance claims process. The conciliator receives proof of claims and makes an allowance or disallowance proposal to court in order for it to enter a judgment on the recognition, ranking and preference of claims; and
- in bankruptcy, a trustee who possesses, administers and liquidates the estate's assets and distributes the proceeds. A trustee shall have the same powers as a conciliator in a reorganisation.

Insolvency proceedings may be voluntary or involuntary at the stage of conciliation; however, involuntary bankruptcy (liquidation) is allowed if the debtor does not oppose it. If the debtor opposes involuntary bankruptcy, conciliation proceedings are opened. Accordingly, full insolvency proceedings shall be conducted to place the debtor in involuntary bankruptcy after conciliation is exhausted. Voluntary bankruptcy (liquidation) is initiated directly upon the debtor's request.

The conditions for initiation are: the debtor must be a merchant, individual or legal entity; there are two or more creditors; and there has been a failure to make payments generally when due.

Criteria for establishing a general default on payment obligations are:

- failure to meet payment obligations to at least two creditors;
- obligations more than 30 days overdue;
- such overdue obligations represent 35 per cent or more of the total amount of the debtor's obligations as of the petition filing date; and
- the debtor must lack cash assets, as defined by the law, to pay at least 80 per cent of the total debts due as of the petition filing date.

Cash assets are:

- cash on hand and deposits on site;
- deposits and investments due within 90 days as of the date of the petition being filed;
- accounts receivable due within 90 days as of the date of the petition being filed; and
- securities that regularly registered sell-or-buy operations in relevant markets, saleable within 30 banking business days.

The debtor may file a petition when it is imminent that the debtor will be under the insolvency standard in the ninety days following the petition filing (imminent insolvency). The LCM provides for the use of standard forms issued by the Mexican Trustee's Office to speed petition filings and other motions during the proceedings. A voluntary petition must be signed and include:

- the merchant's full name or corporate name;
- an address for notices;
- corporate and residential addresses;
- addresses of offices, facilities, establishments, plants and warehouses;
- the address of main management;
- financial statements for the past three years, audited if mandatory by law;
- a list of creditors and debtors, stating their names and domiciles, credits past due, secured and unsecured credits, priority, real or personal collateral, credits guaranteeing direct debt or third-party liabilities;
- an inventory of all assets, immovables, movables, securities, merchandise, stock and rights of any nature whatsoever;
- a description of legal actions to which the debtor is a party, stating the parties, identification of the proceedings, type and status;
- in the case of legal entities, the corporate decisions needed to file for general insolvency proceedings pursuant to the by-laws taken by the board of directors or the respective corporate office with legal standing for such decisions. The document must clearly show the intention of the partners or stockholders on such decision;
- the preliminary reorganisation plan offer to creditors; and
- the preliminary enterprise preservation plan.

Injunctions that may be granted before order for relief enters into effect are:

- attachment of the debtor's assets;
- order of no execution;
- stay of executions by creditors, seizure and attachments;
- orders restraining the debtor from making payments or selling, conveying or encumbering assets; and
- transferring proceeds or securities to third parties.

General insolvency proceedings start when relief is entered, that is to say, when general insolvency proceedings are adjudicated, which creates the bankruptcy estate. Insolvency adjudication creates a special legal situation for the debtor, subject to the LCM.

The procedural effects of the general insolvency proceedings adjudication are as follows:

- opening the conciliation phase, unless the debtor has requested the bankruptcy itself or a creditor has requested it without the debtor's opposition;
- debtor is ordered to surrender its financial statements;
- debtor is ordered to cooperate and allow a visitor (auditor) and conciliator to perform their duties;
- payments are stayed, except those necessary for the ordinary course of business;
- executions and attachments are stayed, except for labour credits (salaries of the past two years);
- suspect period is set;
- summary of the order for relief is published;
- order for relief is recorded in public registries;
- notice is given to creditors to file their claim credits (proof of claims);
- proof of claims process begins; and
- a certified copy of the order of relief is issued upon request.

The substantive effects following declaration of general insolvency proceedings are as follows:

- payments are stayed, except those necessary during the ordinary course of business;
- pre-existing contractual obligations shall be performed as agreed by the parties, except for special provisions under the LCM;
- all pre-existing obligations become due and have to be fixed in UDIs to determine their amount; and
- matured debts stop accruing interest. All obligations of the debtor are considered matured and interest stops accruing on obligations.

However, interest will continue to accrue on obligations secured by a mortgage or a pledge even after the insolvency declarations to the extent of the collateral:

- general insolvency proceedings adjudication does not bind and lacks effect towards third-party debtors such as guarantors; and
- 2014 amendments make clear that assets that are settled under business trust are not comprised within the estate and may be separated while in the possession of the debtor, including when the debtor is the settlor.

The LCM regulates the specific pre-existing contractual obligations that may be amended when the order for relief is entered. Performance of executory, preliminary or final contracts shall be complied with by the debtor, unless there is opposition by the conciliator, as long as it benefits the estate. The conciliator may accept or reject the contract. The other party to the contract may ask the conciliator to reject the contract. If the contract is not rejected, the debtor shall perform or guarantee the contract. If the contract is rejected, or the conciliator does not answer within 20 working days, the other party to the contract may terminate the contract at any time by giving notice to the conciliator.

8 Successful reorganisations

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

The LCM favours rehabilitation of the enterprise, and liquidation only takes place when rehabilitation is impossible. A reorganisation plan requires a simple majority of more than 50 per cent approval of approved creditors.

The conciliation phase is intended to create the best conditions for a reorganisation plan. The LCM does not regulate terms or conditions for the plan, but only sets forth minimum rules to ensure the legality of the plan. The LCM, however, provides mandatory notices and access to information to enable interested parties to exercise and protect their rights. Accordingly, the conciliator may recommend that appraisals and studies be conducted when they are necessary to achieve a reorganisation plan, as would be given to creditors through the court. When the conciliator considers that there is an agreement of a simple majority of more than 50 per cent of the recognised creditors in the plan, he or she shall give the plan to the other recognised creditors to give their opinion thereon or to execute the plan.

In order to approve a viable reorganisation plan that favours all or most creditors under the circumstances, the LCM provides mechanisms to protect the rights of minority creditors by giving them most favourable terms under the plan. This thereby avoids unnecessary or burdensome objections by minorities that in fact benefit from the plan. Only those creditors with accepted claims may agree on the plan. Labour and tax creditors do not execute the plan. To facilitate approval of the plan, unsecured, subordinated and participating secured creditors shall be taken into account for determining the necessary majority. The reorganisation plan, regarding non-participating creditors holding recognised debt, may only provide extension of time to pay the debt or debt discount or combination of both, provided that terms and conditions are equal to those agreed by at least 30 per cent of creditors holding unsecured allowed claims.

The plan may provide for an increase of capital. Shareholders must be notified to exercise first refusal rights. If shareholders do not exercise their rights, the court may approve the capital increase. Dissenting recognised unsecured creditors holding a simple majority or recognised unsecured creditors holding 50 per cent of the debt may veto the plan proposal. If there are no objections, the plan may be approved by the court. Because the approved plan is binding upon absent and dissenting creditors, the most favourable terms and conditions of the plan shall be allocated to them.

The plan shall be approved by more than 50 per cent of allowed creditors (unsecured, subordinated and secured) executing the plan.

Upon the court's approval of the plan, the insolvency process terminates and parties cease to perform their functions. The plan shall provide payment for:

- labour creditors (highest priority);

- creditors (administration costs and fees of the insolvency estate) whose claims are secured by assets of the estate;
- claims for burial costs when death is pre-general insolvency proceedings;
- claims for costs of sickness that caused the death of the debtor when death is post-general insolvency proceedings;
- secured creditors with mortgage or pledge;
- claims holding special privilege pursuant to law;
- tax credits; and
- fund for challenged claims and tax credits that have not been determined.

Private agreements between the debtor and any creditor are null and void once relief is granted and the creditor shall lose such rights. The plan may not release non-debtor parties, such as guarantors. The plan may only bind a debtor and its creditors. However, the liabilities of officers, directors, advisers and lenders may be released in writing by the interested party or parties taking legal action against them. The approved plan binds debtor, all creditors holding subordinated allowed claims, creditors holding secured allowed claims, who executed the plan or creditors holding secured allowed claims for whom the plan provides for full payment as of the general insolvency proceedings adjudication.

For voting of intercompany claims, see question 43.

Mandatory enforcement of the restructuring plan

Any allowed creditor may request the mandatory enforcement of the restructuring plan by means of a summary proceeding before the court that adjudicated the commercial insolvency.

Amendment of the plan

In the case of a change of circumstances that materially affects the fulfilment of the plan, it may be amended in order to satisfy the need to preserve the enterprise.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

See question 11 for conditions and qualifications. An involuntary petition shall be signed and include:

- the court where the claim is filed;
- the claimant's full name;
- the defendant merchant's full name or corporate name and domicile, including the locations of offices, facilities, establishments, plants and warehouses;
- facts supporting the petition, stating them in a summary form with clarity and precision;
- legal standing;
- a request to declare the merchant to be in general insolvency proceedings;
- documentary evidence proving that each petitioner is a creditor;
- a guarantee for the visitor's fees if the petition is successful; and
- documentary evidence to support the claimant's action.

The procedural effects of the general insolvency proceedings adjudication are as follows:

- opening the conciliation phase, unless the debtor has requested the bankruptcy itself or a creditor has requested it without the debtor's opposition;
- debtor is ordered to surrender its financial statements;
- debtor is ordered to cooperate and allow an auditor (visitor) and conciliator to perform their duties;
- payments are stayed, except those necessary for the ordinary course of business;
- executions and attachments are stayed, except for labour credits (salaries of the past two years);
- suspect period is set;
- summary of the order for relief is published;
- order for relief is recorded in public registries;
- notice is given to creditors to file their claim credits (proof of claims);

- proof of claims process begins; and
- a certified copy of the order of relief is issued upon request.

The substantive effects following declaration of general insolvency proceedings are as follows:

- payments are stayed, except those necessary during the ordinary course of business;
- pre-existing contractual obligations shall be performed as agreed by the parties, except for special provisions under the LCM;
- all pre-existing obligations become due and have to be fixed in UDIs to determine their amount; and
- matured debts stop accruing interest. All obligations of the debtor are considered matured and interest stops accruing on obligations.

However, interest will continue to accrue on obligations secured by a mortgage or a pledge even after the insolvency declarations to the extent of the collateral:

- general insolvency proceedings adjudication does not bind and lacks effect towards third-party debtors such as guarantors; and
- 2014 amendments make clear that assets that are settled under business trust are not comprised within the estate and may be separated while in the possession of the debtor, including when the debtor is the settlor.

The LCM regulates the specific pre-existing contractual obligations that may be amended when the order for relief is filed.

Performance of executory, preliminary or final contracts shall be complied with by the debtor, unless there is opposition by the conciliator, as long as it benefits the estate. The conciliator may accept or reject the contract. The other party to the contract may ask the conciliator to reject the contract. If the contract is not rejected, the debtor shall perform or guarantee the contract. If the contract is rejected, or the conciliator does not answer within 20 working days, the other party to the contract may terminate the contract at any time by giving notice to the conciliator.

Once the proceeding is opened there are no material differences to proceedings opened voluntarily.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

An involuntary reorganisation shall meet the same requirements, shall be signed and include:

- the court where the claim is filed;
- the claimant's full name;
- the defendant merchant's full name or corporate name and domicile, including the locations of offices, facilities, establishments, plants and warehouses;
- facts supporting the petition, stating them in a summary form with clarity and precision;
- legal standing;
- a request to declare the merchant to be in general insolvency proceedings;
- documentary evidence proving that each petitioner is a creditor;
- a guarantee for the auditor's fees if the petition is successful; and
- documentary evidence to support the claimant's action.

Once the proceeding is opened there are no material differences to proceedings opened voluntarily.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

A pre-packaged reorganisation is allowed by agreement between the debtor and creditors holding a simple majority of more than 50 per cent of the total debt. The debtor and creditors will execute the petition. It is required that the debtor states under oath that it is already in a state of insolvency and explains why, or states that such insolvency is imminent within 90 working days and that the creditors signing the petition hold

at least a simple majority of more than 50 per cent of the total debt. The proposed reorganisation plan must be enclosed with the petition. A full insolvency proceeding will be followed without an audit.

Protection measures and stays may be requested and granted upon filing of the petition. The court must approve the plan, whereupon the proceeding ends.

A reorganisation plan may not provide for release of liabilities owed by third parties who are not part of the debtor group. The LCM prevents third-party debtors remaining liable.

12 Unsuccessful reorganisations

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?

No executing recognised creditors may defeat the plan if due process for the plan is not met and if mandatory plan standards are not met. Due process includes access to supporting information and plan viability as well as full knowledge of the plan terms and conditions.

A majority of unsecured creditors whose proofs of claim have been allowed may veto the plan. Unsecured creditors not signing the plan may not object to the plan if they are to be paid in full.

Court approval of a plan may be appealed, without stay. A successful appeal dismissing the plan on legal grounds is sent to court. A new plan may be proposed. Otherwise, the case turns into a liquidation.

A default on the plan by the debtor turns the case into a liquidation.

13 Corporate procedures

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

The Law on Corporations provides for the private out-of-court corporate dissolution and liquidation of a company. In essence these are very similar: liquidation of assets to pay creditors. If there is any balance remaining it goes to stockholders. Corporate liquidation does not provide for court orders to stay payments and executions. Liquidators may apply for voluntary general insolvency proceedings.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Reorganisation concludes with court approval of the plan. Liquidation concludes with the sale of estate assets and payment of creditors' claims up to their sale proceeds. There is a court judgment declaring termination. Conditions for termination of insolvency proceedings:

- (i) the reorganisation plan may be approved by simple majority of creditors holding allowed claims. In liquidation, the plan must be approved by such creditors and the plan provides payment for all creditors holding allowed claims, including those not executing;
- (ii) full payment of recognised claims is made;
- (iii) recognised claims are partially paid and there are no estate assets left to liquidate;
- (iv) it is proven that the estate assets are not sufficient to pay expenses and fees for the administration of the estate; or
- (v) proceeding can be terminated at any time upon request of the debtor and all recognised creditors.

Reopening of commercial insolvency proceedings

In the case of (iv) or (v) above, proceedings may be reopened if it is proven that in the two years following termination there are assets to pay at least the expenses and fees for the administration of the estate. Termination is made upon court judgment. The LCM does not provide for discharge in liquidation.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

The conditions for initiating general insolvency proceedings (*concurso mercantil* for merchants) are that there must be a debtor who is a merchant, individual or legal entity and there has been a failure to

make payments generally when due. Criteria for establishing a general default on payment obligations are:

- failure to meet payment obligations to at least two creditors;
- obligations more than 30 days overdue;
- such overdue obligations represent 35 per cent or more of the total amount of the debtor's obligations as of the petition filing date; and
- the debtor must lack cash assets, as defined by the law, to pay at least 80 per cent of the total debts due as of the petition filing date.

Cash assets are:

- cash on hand and deposits on site;
- deposits and investments due within 90 days as of the date of the petition being filed;
- accounts receivable due within 90 days as of the date of the petition being filed; and
- securities that regularly registered sell-or-buy operations in relevant markets, saleable within 30 banking business days.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Filing for insolvency is not mandatory.

Commencement of insolvency proceedings is not mandatory in any circumstances under the LCM. However, while the debtor is insolvent, as the insolvency standard is provided by the LCM, directors, key officers and officers may be liable to pay damages in favour of the debtor based upon their unlawful acts causing damages to the debtor. The LCM provides for a direct legal action that may be enforced by the debtor or stockholders holding 25 per cent of the social capital of the debtor. This action may be brought pre and post-petition. This strong damages action is independent from the avoidance action available as a remedy following general insolvency proceedings adjudication. This action is also independent from a criminal liability upon general insolvency proceedings adjudication.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Directors and officers will be held personally jointly and severally liable for acts of wrongdoing. The time-bar on such action is five years. Because most acts of wrongdoing tend to be executed while insolvent or in the suspect period, to avoid personal liability it is advisable to file for insolvency proceedings when insolvency is imminent, and especially when already insolvent.

In pre-petition, if a company carries on business while insolvent, directors and officers committing wrongdoing might be liable to indemnify damages to the debtor and may have criminal responsibility pursuant to criminal laws other than the LCM.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Criminal responsibility shall be borne by the debtor. In the case of a legal entity, such responsibility will be borne by its board of directors, management or liquidators. They may be liable for pre and post-bankruptcy. If new management is appointed and they discover felonies or misbehaviour, the new administration shall report it, otherwise its members will become liable.

In the case of tax fraud or tax default, the new management shall report it. Otherwise, they are liable to pay it. In a limited liability partnership, corporate law prevents partners from taking management

roles. A default makes them jointly and severally liable towards contracting third parties. The law also provides that general partners are jointly and severally liable for the partnership's business.

Directors and officers involved in fraud are liable. Directors and officers may be liable if, knowing of misbehaviour or felonies regarding former administrators or officers, they do not report it. Default on obligations makes them jointly and severally liable towards contracting third parties. In a limited liability stock partnership, the law provides that general partners are jointly and severally liable for the partnership's business.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

No, the duties that directors owe to the corporation continue to be the same. They do not shift to the creditors. If an insolvency or reorganisation proceeding is likely to happen and it is an ongoing concern, the directors should manage the corporation as debtor in possession under the overview of the conciliator.

In case of a liquidation, the corporation in liquidation is administered by a trustee (liquidator).

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

After liquidation proceedings are commenced by, or against, their corporation, directors and officers cease to have powers. A trustee (liquidator) is appointed and is vested with powers to carry out the liquidation of the corporation's assets.

After reorganisation is commenced by, or against, their corporation, directors and officers have limited powers to carry on ordinary business as a going concern during conciliation, under the overview of the conciliator.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

Claims being pursued by the debtor and claims against the debtor before the general insolvency proceedings adjudication shall not be joined to the insolvency proceedings, including arbitration. Post-insolvency declaration claims, including post arbitration claims, shall not join the general insolvency proceedings. Post-insolvency claims shall be overviewed by the conciliator. Executions are stayed.

The final judgment on pre-insolvency actions shall be recognised by the insolvency court, without review, as to the amount of the claim and its priority. Claims are fixed in UDIs. Credits stop accruing interest, except secured credits up to the value of their collateral. In liquidation, secured creditors may obtain a writ of execution and be paid from the collateral. The trustee may oppose the execution of secured assets that are linked to the ordinary course of business; the secured creditor shall be paid pursuant to the LCM.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

The debtor is in possession while in conciliation proceedings and may continue in its ordinary course of business as a going concern. Assets may be used for such ends. The conciliator oversees the management of the debtor. In liquidation the insolvency estate is managed by a trustee in possession as liquidator.

Creditors that supply goods and services may keep doing so. Postpetition creditors may be paid and have priority against estate assets.

Creditors may supervise the debtor, in conciliation and liquidation, by means of an interventor, who represents and protects creditors' rights and has the authority to supervise the debtor as well as to obtain information and documents from the debtor and report to the court accordingly. The court has full authority to supervise and rule on debtors' business activities.

23 Post-filing credit

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

The LCM provides that a conciliator and a trustee may approve secured and unsecured loans or credits, with new or substituted collateral, provided that the assets involved are not linked to the debtor's ordinary course of business. Court approval shall be obtained for other assets. Consideration shall be taken to prevent creditor fraud and estate damage.

24 Sale of assets

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?

Reorganisation

The conciliator may perform asset transfers that are non-essential to the business. The conciliator may perform direct transfers if goods are perishable, will suffer a strong price diminution or will incur a high maintenance cost.

The conciliator and debtor must keep the business as an ongoing concern. However, to benefit the estate, the business may be closed, totally or partially, temporarily or permanently, to prevent the debt increasing or deterioration of the estate.

Assets not linked for the carrying on of the business as a going concern and sales that benefit the estate may be sold by the conciliator, provided that sales of assets rules under the LCM are followed. With court approval, assets may be sold including secured assets with creditors' agreement. The conciliator will report to the court accordingly.

Liquidation

Value optimisation, best conditions under the circumstances (characteristics of the commercial transactions, prevailing practices and uses, assets location, time and conditions of the transaction as well as diminution of management costs) and shortest period of time shall be sought for the collection. Assets shall be sold by public auction. Such sale shall seek the maximum price whether by sale of the entire business, parts of the business or its assets. Upon the court's approval, assets may be sold in a different process from public auction for a better sale price than would be obtained by public auction.

The trustee may sell assets immediately if they might deteriorate, diminish in value or involve a high cost of maintenance in proportion to their value. To maximise the sale price, the entire business of the debtor may be sold as an ongoing concern. If not, assets may be sold in packages to facilitate the sale. Executory contracts joint to assets subject to a sale may be conveyed to the new purchaser unless the contractor opposes thereto.

The bid shall indicate the minimum price, which is equivalent to stalking horse bids. Credit bidding in sales is permitted for creditors holding the specific right to receive a dividend for a sale.

Securities and stock may be sold without applying the Securities Law regarding securities offers. Assets subject to a separation claim may not be sold until dismissal of the final claim. The sale shall be conducted even if proof of claims is still pending. It should be noted that the LCM prevents the lowering of the value of the assessed assets.

For assets not sold after six months of liquidation have started, any interested purchaser may file before the court an offer to buy any remaining assets quoting the purchase price. If there is no opposition,

the court shall conduct the auction sale. The offeror may not increase the offer price.

During the first 30 calendar days of the bankruptcy stage, the trustee may only prevent a separate collateral foreclosure on assets linked to the ordinary operation of the enterprise when the trustee considers that it benefits the estate by sealing it in conjunction of assets. Secured creditors may obtain a writ of execution and be paid from the collateral.

In general, the sale shall be free and clear of claims, unless otherwise agreed. Sales should be as an asset as is. However, the LCM provides that the trustee shall have no liability whatsoever in case of a claim from a third-party preferential rights or assets hidden defects. The LCM also provides that the trustee and allowed creditors having received estate payments shall not reimburse part or full price, diminution thereto or any indemnity whatsoever.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The insolvency regime does not provide for stalking horse bids in sales procedures. Sales are made in court auction sales. The court may authorise other proceedings to optimise sales to benefit the estate. A creditor may make payment of the purchase price only with court-approved distributions. A creditor may not make payment of such purchase price by reducing the amount of a claim (allowed claim). The court may not allow an assessing credit bid as creditors may pay with court-approved distributions. The assignee of the original secured creditor, provided assignment is summoned to court, has legal standing to participate in the bid as successor of the original secured creditor.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 LCM regulates specific pre-existing contractual obligations that may be amended when the order for relief is entered. Performance of executory, preliminary or final contracts shall be complied with by the debtor, unless there is opposition by the conciliator, as long as it benefits the estate. The conciliator may accept or reject the contract. The other party to the contract may ask the conciliator to reject the contract. If the contract is not rejected, the debtor shall perform or guarantee the contract. If the contract is rejected, or the conciliator does not respond within 20 working days, the other party to the contract may terminate the contract at any time, giving notice to the conciliator. When the conciliator is in charge of administration or authorises the debtor to perform contracts, upon payment of the costs the conciliator may prevent assets being separated or claim delivery of assets.

If a debtor breaches the contract after the insolvency case is opened, the conciliator may enforce legal action seeking mandatory contract fulfilment or termination thereto – in either case with payment of damages.

For purchase and sales agreements, to claim delivery of assets, movable or immovable, the price shall be paid or a guarantee provided to the seller.

Sellers of goods in transit at the time of the general insolvency proceedings adjudication and not yet delivered to the debtor may oppose delivery, either by modifying the consignment as permitted by law or by materially stopping delivery. Such matters shall be pursued between the seller and debtor in discussions with the conciliator's participation.

A seller of real estate who is declared to be in general insolvency proceedings may deliver real estate upon payment of the price, provided the sale is legally perfected. A buyer that is declared to be in general insolvency proceedings, upon payment of such price or receiving a guarantee thereof, may enforce delivery of goods. If delivery was made under a sale agreement, the seller may repossess the goods if the sale was not formalised by a public instrument, where provided by law.

If enforcement is decided upon and a purchase and sale agreement was made stating that payment for the goods was payable at a future date, the seller may claim a fulfilment guarantee.

If the claim relates to the sales of goods that are delivered over a period of time and some deliveries have been made, such deliveries shall be paid for. If it is decided to enforce this agreement, the price for the remaining deliveries must be guaranteed to the seller.

If the seller of a movable asset is declared to be in general insolvency proceedings, if the assets had been identified before adjudication, the buyer may enforce fulfilment of the delivery upon payment for the asset.

A deposit agreement, revolving line of credit agreement, commission agency agreement and mandate agency agreement may not be terminated by adjudication in general insolvency proceedings of any party, unless the conciliator terminates them.

Current accounts, upon general insolvency proceedings adjudication, shall be terminated and shall be liquidated to claim any balance therein, unless the debtor, with the conciliator's approval, is permitted to continue the current accounts.

Securities repurchase agreements shall be terminated upon general insolvency proceedings declaration:

- (i) when the purchaser is declared to be in general insolvency proceedings, he or she shall convey to the seller, within 15 working days as of such ruling, securities of the respective kind, upon price reimbursement and payment of a premium;
- (ii) when the seller is declared to be in general insolvency proceedings, contracts shall be abandoned as of adjudication and the purchaser may claim payment of the differences in his or her favour as of the adjudication date, by means of a proof of claim, granting the seller adjudicated in general insolvency proceedings the contract price and the purchaser the ownership and securities disposition that are the subject of the securities repurchase agreement; or
- (iii) a securities repurchase agreement executed in a reciprocal way between the debtor and its counterparty shall be terminated in advance on the date of general insolvency proceedings adjudication, and shall be offset.

If there is no agreement regarding set-off and liquidation of debt balances, to make the set-off the value of the securities shall be their market value as on the adjudication date. If a verified market value cannot be determined, the conciliator may ask an experienced third party to assess their value. The outstanding balance against the debtor by virtue of their acceleration may be claimed by way of a proof of claim. If there is a balance in favour of the debtor, the counterparty shall deliver such balance to the estate within 30 calendar days of the general insolvency proceedings adjudication.

Transactions regarding loans on securities executed by the debtor with collateral in Mexican currency shall be governed like a securities repurchase agreement. Transactions regarding loans on securities executed by the debtor with collateral in securities in Mexican currency shall be governed as provided for under (iii) above regarding the securities repurchase agreements.

Differential agreements or future agreements and derivatives' financial transactions that shall terminate after the general insolvency proceedings adjudication must be terminated in advance of the adjudication. Such contracts and transactions shall be set off under the LCM. In the case of silence, for the set-off and liquidation of debt balances to perform set-off, the value of the goods and underlying obligations shall be that of their market value as on the adjudication date. If a verified market value cannot be determined, the conciliator may ask an experienced third party to assess their value. After the set-off is made, the balance of the debt may be claimed by the creditor by way of a proof of claim (ie, by means of the set-off the debt is accelerated and becomes due and payable). If there is a balance in favour of the debtor, the counterparty shall deliver such balance to the estate within 30 calendar days of the general insolvency proceedings adjudication.

For purposes of the LCM, transactions that parties of a contract have made that are bound to the payment of money or the fulfilment of other obligations to supply items or services with a market good or value as will be understood as financial derivatives, as will any agreement that by general regulation is indicated by the Bank of Mexico. It shall be set off and shall be due and payable under the contractual terms or as provided for under the LCM.

As of the date of the general insolvency proceedings adjudication, debts and credits that may be given a monetary value regarding any of the following may be made due and payable under the LCM, even if such debts and credits are not due and payable as of the date of the general insolvency proceedings adjudication:

- framework agreements;
- regulatory agreements;
- specific agreements executed regarding:
 - derivative financial transactions;
 - securities repurchase agreements;
 - transactions of loans on securities;
 - transactions on futures; or
 - any equivalent transaction; or
- any other juridical acts in which one person is a debtor of another and at the same time is a creditor such other entity.

The outstanding balance from the set-off against the debtor may be claimed by way of a proof of claim. If there is a balance in favour of the debtor, the counterparty shall deliver such balance to the estate within 30 calendar days as of the general insolvency proceedings adjudication. A lessor adjudicated in general insolvency proceedings shall not terminate a lease agreement on real estate. A lessee adjudicated in general insolvency proceedings shall not terminate a lease agreement on real estate. Notwithstanding the above, the conciliator may elect to terminate the agreement, in which case the lessor shall be paid the contractual indemnity. If there is no other agreement made, payment of three months of rent for the acceleration must be made.

Service supply agreements of a strictly personal nature shall be binding over the parties and shall not be terminated. Lump-sum construction contracts shall be terminated upon general insolvency proceedings of any party, unless the party adjudicated in general insolvency proceedings, with the authorisation of the conciliator, agrees to fulfil the contract with the other party.

Insurance entities adjudicated in general insolvency proceedings may not terminate insurance contracts over real estate. In the case of movables, the insurer may terminate the insurance contract.

If the conciliator fails to notify an insurer that an entity insured by it has been adjudicated in general insolvency proceedings within 30 days of the adjudication, the insurance contract shall be terminated, effective as of such adjudication.

Regarding life insurance contracts or mixed contracts, the debtor, with the conciliator's authorisation, may decide on the assignment of the insurance bond and obtain a reduction of the insured capital, in proportion to the premiums already paid pursuant to calculations that the insurance company has taken into account and considering also the risks covered by it. Likewise, the debtor may make any other transaction that economically benefits the estate.

There are specific requirements for the general insolvency proceedings adjudication of:

- a partner of a general partnership (unlimited liability partnership);
- a partner of a limited responsibility partnership;
- a general partner (unlimited liability partnership) of a limited liability partnership company; or
- a general partner (unlimited liability partnership) of limited liability stock partnership company.

Such partner, in each case, is entitled to request its liquidation as of the last company balance sheet or to continue being a partner to the company, if the conciliator so agrees. However, the remaining partners may instead choose to exercise their right to partially liquidate the company, unless the company's by-laws state otherwise.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Opening of insolvency proceedings does not prevent the execution of an IP licence agreement.

The conciliator in reorganisation (conciliation) and trustee in liquidation may oppose execution and may terminate such licences.

A party may ask a conciliator or trustee whether or not it will oppose execution. If there is no response, a licence may be terminated.

28 Personal data

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

The Federal Law on Personal Information Protection in Possession of Private Persons, enacted on 5 July 2010, provides for the protection and privacy of personal information or customer data. It, generally, prevents use or transfer of personal information and customer data without the owner's agreement. However, if the owner does not expressly oppose the privacy notice of the person to whom it is given, it is assumed that the owner tacitly agrees that his or her personal data may be used or transferred as it is provided for under the privacy notice. In insolvency proceedings, personal information and customer data may be used or transferred as long as it is within the scope of the privacy notice. There are some exceptions under some circumstances to use or release this information or these data under this Law.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

There is no arbitration in insolvency matters. Insolvency, as a mandatory proceeding according to public policy, is under the exclusive federal jurisdiction of the state and not subject to arbitration. Accordingly, disputes arising in insolvency cases after they have been opened may not be arbitrated, even if both parties agree to arbitrate the dispute.

The LCM provides that late actions shall not be joined to the general insolvency proceedings. The general insolvency proceedings court may not refer parties to arbitration. In theory, pre-petition insolvency cases may be subject to arbitration if all creditors and the debtor agree on the arbitration. The LCM is silent as to arbitration processes in insolvency cases. It is desirable that the LCM provides for arbitration.

Creditor remedies

30 Creditors' enforcement

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?

Processes for seizure of assets include:

- tax enforcement by attachment or seizure;
- criminal seizure in case of felony;
- labour executions by attachment; and
- seizure by customs authorities.

In all these cases, attached assets may be foreclosed and sold.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Attachment on enforcement of final, res judicata judgment has priority in liquidation. Pre-judgment attachments, attachments and judgments regarding unsecured credit lack any priority in liquidation. The processes are, in general, difficult and time-consuming. Allowed or disallowed claims may be appealed up to the Mexican Supreme Court, which might be costly and takes a long time. Foreign creditors receive the same treatment as domestic creditors. Proofs of claim must be filed to enforce creditors' rights, to become a recognised creditor and to participate in reorganisation and liquidation.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Adjudication and relief shall be noticed to creditors. Foreign creditors are served in their foreign domicile. Adjudication is noticed by means of publication in the daily gazette of the federation and major newspapers. Domestic and foreign creditors with known addresses are notified personally of the insolvency opening. All creditors are notified by publication of a notice in the daily federal gazette and a major newspaper.

There are no mandatory meetings, although meetings may be held.

There are no mandatory committees. In general, all such information and documents are available to creditors, except restricted information and documents protected by legal secrecy and confidentiality.

In addition, upon the request of the interventors, creditors may have access to the debtor and estate information that may affect creditors' rights.

Trustees shall provide court and interventors' reports every two months. Reports may be objected by interventors and creditors. After hearing the liquidator, the court rules accordingly.

33 Creditor representation

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?

Within the insolvency proceeding, creditors may be represented by interventors who oversee the trustee's performance and may obtain from the debtor or trustee a review of information that may affect creditors' rights.

Creditors are free to form their own committees and it is a regular practice to form committees outside the insolvency proceeding. Advisers may be appointed by creditors and costs are funded or borne by them.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

The LCM is silent regarding creditors' ability to pursue the estate's remedies in case the liquidator has no assets to pursue a claim. In such a case, creditors may request the trustee or interventor to enforce remedies against third parties or fund the estate. If the trustee or interventor fails to enforce estate's remedies, by general procedural law standing, creditors may enforce these remedies. It is an action by means of which creditors may enforce or pursue claims available to the estate upon the estate's lack of assets to enforce or pursue such remedies. The fruits of such actions belong to the estate. Creditors are entitled to be reimbursed for their costs. The creditor may enforce its debtors' rights against this latter debtors' debt.

Such estate's remedies, as estate's assets, may be assigned to a third party upon notice to and court approval.

35 Claims

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

There is a written format for proofs of claim that must be attached to either the original or a certified copy of documentary evidence. A

certified statement of account and accounting expert opinion may be filed to support the claim. If they are issued abroad, they shall be ratified before a notary public and apostilled. Note that a claim may be signed by an officer of the creditor; however, a valid and enforceable power of attorney may be needed. This format is found at www.ifecom.cjf.gob.mx. Proofs of claim shall be filed before the period for appealing the judgment has expired.

Disallowed claims are announced alongside the judgment of which claims have been allowed. Such dismissed claims may be challenged by appeal. Claims may be transferred, which must be notified to the court. Private agreements between the debtor and any creditor are null and void once relief is granted and the creditor shall lose such rights.

To participate in the discussion, approval, agreement and veto of the plan, creditors must hold approved claims. A claim acquired at a discount may be enforced for its full face value. Acquisition shall be notified to court, debtor, conciliator and trustee. Interest that accrued after the opening of an insolvency case may not be claimed by a creditor except on secured claims up to the collateral value. Claims for contingent or unliquidated amounts shall be determined by final judgment rendered by a court outside the general insolvency proceedings.

36 Set-off and netting

To what extent may creditors 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?

Upon issuance of the general insolvency proceedings adjudication, as a general rule, offset rights no longer exist for creditors, although there are specific exceptions (eg, for post-petition creditors).

However, what was intended to be an exception has become the general rule as the law mistakenly states that, as of the date of the insolvency declaration, any legal act may be set off when a person is a debtor and at the same time a creditor of another entity, even though such debts and credits are not in cash or due yet.

Securities repurchase agreements shall be terminated upon general insolvency proceedings declaration:

- (i) when the purchaser is declared to be in general insolvency proceedings, he or she shall convey to the seller, within 15 working days as of such ruling, securities of the respective kind, upon price reimbursement and payment of a premium;
- (ii) when the seller is declared to be in general insolvency proceedings, contracts shall be abandoned as of adjudication and the purchaser may claim payment of the differences in his or her favour as of the adjudication date, by means of a proof of claim, granting the seller adjudicated in general insolvency proceedings the contract price and the purchaser the ownership and securities disposition that are the subject of the securities repurchase agreement; or
- (iii) a securities repurchase agreements executed in a reciprocal way between the debtor and its counterparty shall be terminated in advance on the date of general insolvency proceedings adjudication, and shall be offset.

If there is no agreement regarding set-off and liquidation of debt balances, to make the set-off the value of the securities shall be their market value as on the adjudication date. If a verified market value cannot be determined, the conciliator may ask an experienced third party to assess their value. The outstanding balance against the debtor by virtue of their acceleration may be claimed by way of a proof of claim. If there is a balance in favour of the debtor, the counterparty shall deliver such balance to the estate within 30 calendar days of the general insolvency proceedings adjudication.

Transactions regarding loans on securities executed by the debtor with collateral in Mexican currency shall be governed like a securities repurchase agreement. Transactions regarding loans on securities executed by the debtor with collateral in securities in Mexican currency shall be governed as provided for under (iii) above regarding the securities repurchase agreements.

Differential agreements or future agreements and derivatives financial transactions that shall terminate after the general insolvency proceedings adjudication must be terminated in advance of the adjudication.

Such contracts and transactions shall be set off under the LCM. In the case of silence, for the set-off and liquidation of debt balances to perform set-off, the value of the goods and underlying obligations shall be that of their market value as on the adjudication date. If a verified market value cannot be determined, the conciliator may ask an experienced third party to assess their value.

After the set-off is made, the balance of the debt may be claimed by the creditor by way of a proof of claim (ie, by means of the set-off the debt is accelerated and becomes due and payable). If there is a balance in favour of the debtor, the counterparty shall deliver such balance to the estate within 30 calendar days of the general insolvency proceedings adjudication.

For the purposes of the LCM, transactions that parties of a contract have made that are bound to the payment of money or the fulfilment of other obligations to supply items or services with a market good or value as will be understood as financial derivatives, as will any agreement that by general regulation is indicated by the Bank of Mexico. It shall be set off and shall be due and payable under the contractual terms or as provided for under the LCM.

As of the date of the general insolvency proceedings adjudication, debts and credits that may be given a monetary value regarding any of the following may be made due and payable under the LCM, even if such debts and credits are not due and payable as of the date of the general insolvency proceedings adjudication:

- framework agreements;
- regulatory agreements;
- specific agreements executed regarding:
 - derivative financial transactions;
 - securities repurchase agreements;
 - transactions of loans on securities;
 - transactions on futures; or
 - any equivalent transaction; or
- any other juridical acts in which one person is a debtor of another and at the same time is a creditor such other entity.

The outstanding balance from the set-off against the debtor may be claimed by way of a proof of claim. If there is a balance in favour of the debtor, the counterparty shall deliver such balance to the estate within 30 calendar days as of the general insolvency proceedings adjudication.

37 Modifying creditors' rights

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

Modifying creditors' rights is not provided for under the LCM. The court may not change the rank (priority) of a creditor's claim.

38 Priority claims

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

Administration and conservatory claims of the estate have priority over secured creditors. However, these claims have no priority over labour claims and tax claims. Claims on burial when death is pre-insolvency and claims on illness when death is post-insolvency have priority over secured claims.

Government

Tax creditors, whether federal, state or municipal, social security credits (IMSS) and INFONAVIT credits have priority. These tax credits have priority over secured creditors, provided such tax credits are determined and notified before the date of the collateral of secured creditors.

Non-governmental

Labour credits have super-priority over secured creditors and tax creditors.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Employment contracts may be terminated upon general insolvency proceedings or bankruptcy adjudication when the court or creditors decide on total closure of the business or reduction of work. Notice must be given to the labour court, which in a special labour proceeding may allow or disallow such termination or reduction. Workers are entitled to receive three months' salary and 12 days' salary per year of employment (seniority bonus) and all unpaid labour rights borne whatsoever, such as holidays and extra time. Labour claims on pension funds may be regarded as an indemnity in favour of the workforce and accordingly such claims may have labour-claim priority.

40 Pension claims

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

Labour matters are not subject to LCM jurisdiction even in the context of an insolvency. An employee's labour claim is not joined to a general insolvency proceedings, so remedies for pension-related claims against employers must be asserted before the labour courts. Labour rights and claims are super priority claims, and the court may enforce its judgment over employers' assets, and attach or auction them to satisfy claims.

Actuarial deficiencies in pension assets and unpaid contributions to employee pension plans both give rise to claims that may be asserted before the labour courts. In practice, under insolvency context, the debtor seeks settlement with the labour creditors or union.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Environmental problems and liabilities are dealt by the official agencies and special laws thereto. The debtor is directly responsible for controlling the environmental problem and for remediating the damage caused. Official environmental agencies make an overview of the problem and then instruct the debtor to control the environmental problem and remediate the damage caused. Federal congress may also participate. The insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, and third parties may be liable for environmental responsibility, including indemnity for damages.

The estate shall face the environmental indemnity liability and make fund reserves thereto.

42 Liabilities that survive insolvency or reorganisation proceedings

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

Government tax credits and labour credits survive insolvency proceedings and are enforceable, unless otherwise provided by agreements of labour and tax creditors under the plan. An insolvency court may not assert jurisdiction over tax and labour creditors.

In a reorganisation plan, liabilities may survive unless it is agreed that they are fully discharged. There are no dischargeable debts. There is no discharge in liquidation. If payment is not made in full, liabilities survive and creditors may enforce the outstanding balance of the claim.

43 Distributions

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

Distributions are made in the liquidation phase with proceeds realised from the sale of estate assets. Distribution is made pursuant to a proof of claims judgment. In reorganisations, distribution is made pursuant to the plan.

Security

44 Secured lending and credit (immovables)

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

The principal types of security over immovables are mortgages; industrial mortgages; aircraft mortgages; maritime mortgages; train mortgages; guarantee trusts; and purchase and sale contracts with retention of ownership title.

45 Secured lending and credit (movables)

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

The principal types of security over movables are: ordinary pledges; pledges with debtor's holding possession of pledges; guarantee trusts; bonding guarantees (surety bonds); insurance credits; and stock exchange securities liens. As collateral, the *aval* (joint and several personal guaranty on negotiable instruments, which is equivalent to a comaker and is valid even though the direct obligation is null and void) personal guarantee on obligations and joint and several obligation is common.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

In general, all fraudulent transactions executed against creditors and the insolvency estate may be set aside.

The LCM defines as felonious those fraudulent acts that cause or aggravate the cessation of payments, as provided by law. These acts may be set aside as well.

Fraudulent transactions performed during the suspect period that may be annulled include:

- gratuitous acts, transactions with no consideration;
- acts and disposals in which the debtor pays an excessive consideration, or receives consideration whose value is lower than the goods or services supplied by its counterparty;
- transactions carried out by the debtor in which conditions or terms were agreed upon that are significantly different from the conditions prevailing in the market in which the transactions were carried out on the date on which they were carried out, in which the terms differed significantly from trade usage or practices;
- debt remission or write-off;
- payment of obligations not due; and
- discount of debtor's own notes by the debtor, which will be regarded as a prepayment.

Voidance may not be granted if the estate benefits from the payments made to the debtor. If the third party returns whatever it received from the debtor, it may request the recognition of its credits.

Fraudulent acts performed during the suspect period, unless the debtor's counterparty proves its good faith, include:

- creation of guarantees or the increase of any existing guarantees, if the original obligation did not contemplate such guarantee or increase; and
- any payments of debts made in kind, if the latter is different from that originally agreed upon or if the agreed-upon consideration was in cash.

All acts performed during the suspect period by the debtor with relatives or related individuals or legal entities may be regarded as fraudulent and voidable.

The LCM prescribes a 270-calendar-day 'suspect period' to be reviewed, counting backwards from the date the order for relief was made. This term may be doubled in the case of related subordinated creditors (intercompany or insiders' debt). A request for a longer review period of up to three years must be led before the judgment on recognition, ranking and priority is entered. The burden to prove is more flexible to obtain extension of the suspicious period without need to prove the actual fraud, which is a separate cause of action. The new retroactive period must be announced by publication in the court's list of orders and in the Official Gazette of the Federation.

Legal standing to enforce action seeking civil liability (damages) when upon fraudulent transactions (voidance actions) may be brought by: one-fifth or more of the allowed creditors; allowed creditors that jointly represent 20 per cent of the total allowed credits; receivers (interventor); the debtor; and shareholders holding 25 per cent of the debtor's shares. The time-bar on damages actions is five years.

In the context of an insolvency proceeding, the LCM now provides a regime of strict civil and criminal liability for the debtor, the debtor's general director, sole administrator, board of directors, legal representatives and key employees, including insiders and relatives when causing damages in regard to the facts and circumstances provided by the LCM. Damages shall be to the benefit of the estate. Civil liability is joint and several and is independent from criminal liability, which may be from three to 12 years' imprisonment.

The result of a transaction being annulled is that parties shall return to each other what was received upon the transaction set aside.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

As a reaction to the well-known *Vitro* case, the 2014 amendments of the LCM now provide for 'intercreditors debt' (subordinated debt) providing for a new ranking of creditors holding subordinated debt, namely subordinated creditors, that may be created by:

- contractual agreement or provided by statute law;
- the unsecured intercompany and insiders' debt; except for claims of a parent company and individuals that only have control over the debtor for claims ranking. This exception does not include, inter alia, casting votes for the reorganisation plan or fraudulent conveyances; and
- late-claim filings.

In order to prevent fraudulent conveyance of intercompany indebtedness and to give certainty to investors and creditors that their debt would be paid first before certain intercompany obligations, the 2014 amendment provides that in case the debtor is a corporation, the following unsecured creditors (statutory insiders) shall be characterised as subordinated in ranking:

- (i) subsidiaries and affiliates of the debtor;
- (ii) the director, members of the board of directors and key officers of the debtor, as well as those of its subsidiaries and affiliates; and
- (iii) corporations with the same managers, members of the board of directors or key officers similar to those of the debtor (commonality of management).

In the event the insolvent company is put into liquidation, all of the aforementioned creditors shall receive payment only after senior debt claims are paid in full. Claims held by controlling individual shareholders and by the holding company of the debtor were excluded from subordination in payment as lawmakers considered that including such claims would impair their ability to obtain financing from lenders.

Voting of 'inter-company' claims

In an inter-company claim, there may be no cramdown of legitimate third-party claims on the basis of an inter-company or insider-debt casting vote. The plan must be agreed by the debtor; creditors representing more than 50 per cent of the sum of all the debtor's unsecured

and subordinated claims; and creditors representing more than 50 per cent of the debtor's secured or priority creditors.

Further, if inter-company claim holders and insiders (including controlling individual shareholders and holding companies) as subordinated creditors, hold at least (jointly or severally) 25 per cent of the total amount of the credits of (i) and (ii), above, then to become effective, the plan must be accepted by creditors representing at least 50 per cent of such credits, excluding from this amount the claims of the insiders.

This rule will not apply when inter-company claim holders and insiders accept the plan as agreed by the rest of the voting claim holders, in which case the simple majority rule applies.

Now, the voting of insider or inter-company claims together with third-party claims will only be sufficient to approve a reorganisation if at least half of the non-insiders vote in favour of the plan.

Subordinated debt and 'subordinated creditors'

Creditors' agreements may provide for the total or partial extinction of subordinated debt or other type of treatment thereto, including its subordination or another form of particular treatment.

Interaction before the Mexican courts of indenture trustees and bondholders

Proof of claims may be filed individually by a bondholder, which will be subtracted from the overall proof of claim filed by an indenture trustee representing bondholders. Each bondholder as well as the trustee is entitled to pursue allowed claims, rights, objections and voting rights.

Bondholders' meetings shall be conducted as provided under the indenture agreement, the law governing the indenture or by the LCM; the decisions of bondholders' meetings will have a binding effect.

The extinction of debts

The restructuring plan and the judgment approving it shall be the only document governing the debtor's obligations towards allowed creditors.

Groups of companies

48 Groups of companies

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

The LCM now regulates groups of companies, and there is no piercing of the corporate veil. The LCM provides that the insolvency proceeding of holding and subsidiary companies will be joint in the same commercial insolvency proceeding, but each company's insolvency will be conducted in a separate court docket file. The LCM does not provide for these to be combined or consolidated for administrative purposes, nor may their assets or liabilities be pooled for distribution. However, creditors or debtors of the same group of companies may file for joint commercial insolvency insofar as one or more of the enterprises of the same group of companies meet the insolvency standard. The court may appoint the same visitor, conciliator or trustee, should it benefit the proceedings.

Mexican corporate law does not provide for the insolvency of corporate groups that are consolidated for tax purposes. Labour law recognises a substitute employer among a group of companies. The Law on Financial Groups recognises financial groups of companies with joint and several liabilities without consolidation. In such groups, assets may not be transferred from an administration proceeding in Mexico to one in another country.

Parent or affiliated corporations may be responsible for the liabilities of subsidiaries or affiliates when they are legally linked by virtue of a guarantee or a similar obligation to act with respect to the subsidiaries or affiliates. All of them are considered independent legal entities with independent patrimonies. Their being related companies does not make them liable for the liabilities of the others.

A court may not order a distribution of group company assets pro rata without regard to the assets of the individual corporate entities involved, as the estates do not merge and are not pooled.

Separation action may be enforced to recover assets or rights belonging to the debtor's estate.

The LCM provides for the insolvency of groups of companies, subsidiaries or affiliates being of a Mexican nationality as well as branches with centre of main interest (COMI) or establishment in Mexico, regarding their assets and transactions in Mexico as well as the assets

belonging to their estate located abroad, for which the respective international insolvency cooperation shall be sought.

49 Combining parent and subsidiary proceedings

In 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?

The LCM now regulates groups of companies, and there is no piercing of the corporate veil. The LCM provides that the insolvency proceeding of holding and subsidiary companies will be joint in the same commercial insolvency proceeding, but each company's insolvency will be conducted in a separate court docket file. The LCM does not provide for these to be combined or consolidated for administrative purposes, nor may their assets or liabilities be pooled for distribution. However, creditors or debtors of the same group of companies may file for joint commercial insolvency as far as one or more of the enterprises of the same group of companies meet the insolvency standard. The court may appoint the same visitor, conciliator or trustee, should it benefit the proceedings.

Mexican corporate law does not provide for the insolvency of corporate groups. Corporate groups consolidate for tax purposes. Labour law recognises a substitute employer among a group of companies.

The Law on Financial Groups provides for financial groups of companies, with joint and several liabilities without consolidation. Regarding groups of companies, assets may not be transferred from an administration in Mexico to another country.

International cases

50 Recognition of foreign judgments

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?

Foreign judgments or orders are recognised in Mexico that are not related to insolvency, bankruptcy or liquidation matters, provided the general standard for exequatur (homologation) under Mexican law and international treaties, of which Mexico is a party, is met. Mexico lacks any treaty on international insolvency matters whatsoever. Mexico is a party of the following international treaties that expressly exclude from their scope insolvency matters: the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (article 1(5)) and the Hague Convention on Choice of Court Agreements (article 2(2)e). Also, insolvency matters are excluded from the scope of the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Mexico's interpretation statement No. 2) and from the Inter-American Convention in the International Sphere for the Extraterritorial Validity of Foreign Judgements (article 6(e)).

As of the enactment of the LCM, foreign insolvency judgments and related insolvency judgments fall within the scope of the UNCITRAL Cross-Border Insolvency Model Law, incorporated by Mexico, as domestic law, since 2002. This model law provides the legal regime that applies and governs the recognition and enforcement of foreign insolvency proceedings, insolvency and related foreign judgments and orders. This new regime of the model law excludes the application and governance of the general exequatur standard for the recognition and enforcement of foreign judgments and orders.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Mexico was the first jurisdiction to recognise two foreign bankruptcy proceedings under the Model Law and grant international insolvency cooperation thereto – the *Xacur* case and the *IFS* case.

Mexico has no international treaty on insolvency, bankruptcy or reorganisation matters. Mexico has executed treaties on the recognition of foreign judgments that expressly exclude insolvency, reorganisation, bankruptcy and liquidation.

Mexico has incorporated the UNCITRAL Model Law on Cross-Border Insolvency. Accordingly, Mexico provides recognition and full cooperation on cross-border insolvency. Foreign creditors are granted equal treatment with domestic creditors. The federal judiciary has granted relief sought in support of the Model Law.

The LCM incorporates the UNCITRAL Model Law in Chapter 12. The law defines the following terms:

- ‘main foreign proceedings’ – collective judicial or administrative proceedings in a foreign country, including interim proceedings, under a law relating to insolvency, or adjustment of debt proceedings in which the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;
- ‘foreign proceedings’ – foreign proceedings pursued in the jurisdiction where the debtor’s COMI is located;
- ‘foreign representative’ – a person or body, including provisional persons or bodies, empowered in foreign proceedings to administer the reorganisation or liquidation of the debtor’s assets and affairs or to act as a representative of foreign proceedings;
- ‘foreign court’ – a judicial authority or other body with jurisdiction over the control or supervision of foreign proceedings; and
- ‘establishment’ – any place of operations where the debtor carries out a non-transitory economic activity with employees and goods and services.

Reciprocity is mandatory. International cooperation may be conducted through Mexican courts and Mexican representatives. Foreign courts and foreign representatives may only act through a Mexican court or Mexican representative. Recognition is not automatic. If a debtor has an establishment in Mexico, full insolvency proceedings (general insolvency proceedings) under the LCM shall be conducted. Otherwise, foreign proceedings may be recognised in summary proceedings. In interpreting and applying Chapter 12, consideration shall be given to avoiding any violation of the LCM and current prevailing fundamental principles of law in Mexico. Please note that Chapter 12 allows the rejection of recognition when there is any violation whatsoever of the LCM or any of such fundamental principles of Mexican law. Thus, Chapter 12 mandates, for overwhelming reason, rejection when there is a manifestly violation of public policy. Protection measures (stay of payments or execution) may be granted following the request being filed for recognition. Upon recognition, additional protective measures may be granted. Foreign proceedings shall be recognised as main or non-main proceedings, subject to the debtor’s COMI. Chapter 12 shall be interpreted considering its international origin and the need to promote uniformity in its application and good faith observance. Chapter 12 may be applied, unless otherwise provided for under international treaties executed by Mexico, except where there is no international reciprocity.

Mexico has not executed any international treaties regarding liquidations or reorganisations or the like.

Chapter 12 aims to provide effective mechanisms for dealing with cases of cross-border insolvency with the following objectives:

- cooperation between Mexico and foreign courts;
- increase of legal certainty for trade and investment;
- fair and efficient administration of cross-border insolvency cases;
- protection and maximisation of a debtor’s assets; and
- facilitation of the rescue of financially troubled businesses, thereby protecting investments and preserving employment.

Chapter 12 applies where:

- assistance is sought in Mexico by a foreign court or a foreign representative in connection with foreign proceedings;
- assistance is sought in a foreign country in connection with a case under Mexican insolvency law;
- both foreign proceedings and a case under Mexican insolvency law with the same debtor are concurrently pending (parallel proceedings); or
- creditors, or other interested parties, in a foreign country want to commence or participate in a case under Mexican insolvency law.

Cooperation and communication between Mexican courts and foreign courts and between Mexican representatives and foreign representatives may be direct, without the need for letters rogatory or any other formalities.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors are granted equal treatment with domestic creditors. The federal judiciary has granted relief sought in support of the Model Law.

Reciprocity is mandatory. International cooperation may be conducted through Mexican courts and Mexican representatives. Foreign courts and foreign representatives may only act through a Mexican court or Mexican representative. Recognition is not automatic. If a debtor has an establishment in Mexico, full insolvency proceedings (general insolvency proceedings) under the LCM shall be conducted. Otherwise, foreign proceedings may be recognised in summary proceedings. In interpreting and applying Chapter 12, consideration shall be given to avoiding any violation of the LCM and current prevailing fundamental principles of law in Mexico. Please note that Chapter 12 allows the rejection of recognition when there is any violation whatsoever of the LCM or any of such fundamental principles of Mexican law. Thus, Chapter 12 mandates, for overwhelming reason, rejection when there is a manifest violation of public policy. Protection measures (stay of payments or execution) may be granted following the request being filed for recognition. Upon recognition, additional protective measures may be granted. Foreign proceedings shall be recognised as main or non-main proceedings, subject to the debtor’s COMI. Chapter 12 shall be interpreted considering its international origin and the need to promote uniformity in its application and good faith observance. Chapter 12 may be applied, unless otherwise provided for under international treaties executed by Mexico, except where there is no international reciprocity.

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Cooperation and communication between Mexican courts and foreign courts and between Mexican representatives and foreign representatives may be direct, without the need for letters rogatory or any other formalities.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Inbound perspective

When a foreign proceeding of a foreign company or group company has been recognised in Mexico, based upon the fact that there are assets in Mexico belonging to the same company or group company, such assets may be transferred to the main administration, provided debtors’ rights and creditors’ rights in Mexico are fully protected or paid, for instance creditors’ legal actions, labour and tax claims. In the *Xacur* case for instance, regarding estate assets located in Mexico, after recognition of the main proceeding, the Mexican court authorised transfer of assets to the foreign bankruptcy court presiding the main proceeding. In turn, Mexican assets were marketed worldwide by the foreign representative

and sold before the foreign main bankruptcy court. Distributions were made by the foreign main bankruptcy court.

In the case of a foreign company or group company with COMI abroad, but with establishment in Mexico, the main foreign proceeding may be recognised in Mexico provided a plenary *concurso mercantil* regarding the establishment in Mexico is opened. In this latter case, transfer of assets may be made, provided debtors' rights and creditors rights in Mexico are fully protected or paid.

Outbound perspective

In case the COMI, the establishment or the court jurisdiction of a company or group company is in Mexico, as main proceeding, if the debtors' rights and creditors rights are fully protected or paid, assets may be transferred to a foreign jurisdiction.

54 COMI

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 COMI of a debtor company is determined by the domicile it has registered in the commerce registry, where it has its main administration or main facilities and offices (headquarters).

In the case of corporate groups, when a petition has already been filed regarding a holding or subsidiary member of the same corporate group, the new petition shall be joint to the district court where the first was filed.

55 Cross-border cooperation

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?

As stated above, the LCM incorporates generally the UNCITRAL Model Law on Cross-Border Insolvency. It provides 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. It recognises court-to-court direct communication.

Accordingly, direct cooperation is allowed between domestic courts and foreign courts as well as foreign insolvency administrators in crossborder insolvencies and restructurings. There have been instances between US and Mexican courts. Communications have been in writing in cases such as *Xacur*, *IFS* and *Satmex*.

Mexican courts under Chapter 12 of the LCM recognise foreign proceedings, such as those of *Xacur* and *IFS*, recognised as main foreign proceedings.

Mexican courts have rejected recognition of a main foreign proceeding and to cooperate in cases whereby the debtor is not a merchant and therefore the UNCITRAL Model Law does not apply. In such a case, recognition of non-merchants, individuals or consumers shall be brought before state courts and state laws as insolvency proceedings for merchants.

56 Cross-border insolvency protocols and joint court hearings

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?

In the *Xacur* and *IFS* cases Mexico had intensive court-to-court communication between the Mexican Fourth Federal District Court for Civil Matters, Honourable Judges Alejandro Villagomez Gordillo, and Eduardo Hernandez Sanchez and the US Bankruptcy Courts for the Southern District of Texas, Houston Division, Honourable Judges Karen K Brown and Marvin Isgur.

The *Xacur* case and the *IFS* case have established several precedents (case law) in Mexican jurisprudence regarding the UNCITRAL Model Law on Cross-Border Insolvency, which is also applicable worldwide in foreign jurisdictions.

The most significant of these precedents, which may be found in the *Semanario Judicial de la Federación*, are the following:

- Direct amparo 98/2003, Direct amparo 97/2003 and Direct amparo 96/2003 of 13 March 2003, regarding a foreign bankruptcy proceeding and the recognition and declaration of international cooperation. A judgment that recognises and grants international cooperation may be revoked.
- *Amparo in revisión* 282/2003, *amparo in revisión* 283/2003 and *amparo in revisión* 289/2003 of 5 September 2003, regarding a foreign bankruptcy proceeding and the recognition and declaration of international cooperation. Indirect amparo may not be allowed against an order that decides a revocation remedy, derived from a decision entered in a judgment enforcement that recognises it, as it is not the last decision in this stage.
- *Amparo in revisión* 1588/2005 of 26 October 2005, regarding a commercial insolvency. Chapter 12 of the LCM is constitutional because it grants equal treatment to foreign and domestic creditors.
- *Amparo in revisión* 361/2004 of 27 October 2006, regarding the LCM. Standards for the recognition of foreign proceedings in Mexico.
- *Amparo in revisión* 361/2004 of 27 October 2006. International treaties only bind the states that are a party to the treaty.

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These cross-border courts and their foreign representatives and professionals have created a legal vehicle in the form of general international cooperation by means of which they can communicate directly to immediately provide for recognition of foreign insolvency proceedings, protective measures, service of process, taking of all kinds of evidence abroad, sale of assets, criminal prosecution and the like. This vehicle harmonises the different legal systems of common law and civil law as well as domestic procedural law and practice. This vehicle has proved to be a very practical, efficient and effective tool, saving time and costs, making cross-border insolvency much more effective at optimising the activities and assets of the going concern for all involved.

Netherlands

Michael Broeders, Rodolfo van Vlooten and Charlotte Ausema

Freshfields Bruckhaus Deringer

General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

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 or her 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 creditors’ claims is due and payable; and the debtor has to have stopped making payments.

At EU level, there are a number of different legislative frameworks in operation in the insolvency context, but by far the most important is the Recast Regulation on Insolvency Proceedings (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015) (the Recast Regulation). We refer to the European Union chapter, which discusses the Recast Regulation in more detail.

We note that there are specific provisions in the Dutch Bankruptcy Act for the bankruptcy of clearing systems and settlement, credit institutions and insurance companies and that suspension of payments does not apply to credit institutions and insurance companies. Instead, there is specific emergency regulation that applies to credit institutions, and insurance companies pursuant to the Dutch Financial Supervision Act (the DFSA), which provisions are based on Directive 2014/59/EU (on the reorganisation and winding up of credit institutions and investment firms (the BRRD)) and Regulation (EU) 806/2014 (establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms (the SRM)). For more detail on the BRRD and the SRM, please see question 4 and the European Union chapter.

2 Excluded entities and excluded assets

What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or 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.

3 Public enterprises

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.

4 Protection for large financial institutions

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

Background

The BRRD and the 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, please 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 phase; early intervention phase; and resolution phase.

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 Central Bank) will be in charge of the execution of a resolution scheme.

With respect to the recovery and resolution of failing insurers, a legislative proposal is pending before the Dutch Senate. The proposal amends the Dutch Financial Supervision Act and the Dutch Bankruptcy Act and provides the Dutch Central Bank with more resolution tools and a wider authority in order to be able to take action on an individual basis regarding failing insurers. See 'Update and trends' for more information on this legislative proposal.

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 Dutch Recovery and Resolution Implementation Act), which entered into force on 1 January 2016. The Dutch 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 Dutch Recovery and Resolution Implementation Act need to be consulted to gain insight into the implementation and application of the new EU legislative framework within the Netherlands.

The SRM and the Dutch Recovery and Resolution Implementation Act both replace – for a large part – the Dutch Intervention Act, which was the previous legislative framework. The Dutch Intervention Act provided similar prevention, intervention and crisis management tools for distressed financial institutions that were deemed too big to fail (although the Dutch Intervention Act has largely been replaced by the new legislation, it is still relevant, see below).

Under the Dutch Recovery and Resolution Implementation Act, various amendments have been made to, among others, the DFSA, the Dutch Civil Code and the Dutch Bankruptcy Act. A large part of the most significant changes can be found in the DFSA, which introduces – among other things – a new sub-Chapter (3A) entitled 'Special Measures and Provisions regarding Financial Undertakings'.

Recovery and resolution measures within the BRRD legal framework

The Dutch 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 Dutch 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 that 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 on 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 and the bridge institution. For further information on each of these tools, please refer to the European Union chapter.

The bail-in tool is a new provision under Dutch law, but the nationalisation of Dutch bank and 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 Dutch 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/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 details on these, please refer to 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 Dutch 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. Firstly, it is still relevant 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 (note, however, that a legislative proposal is pending before the Dutch Senate, which will provide resolution tools to the Dutch Central Bank, specifically aimed at insurers – see 'Update and trends' for more information). Secondly, even though the new legislation has largely replaced the bank-related provisions in the Dutch Intervention Act, the special intervention powers that were granted to the Minister of Finance under the Dutch Intervention Act remain in place (see Chapter 6 of the DFSA). 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 Dutch Intervention Act to be emergency legislation, which means that they are allowed to remain in place, despite the direct applicability of the SRM in the Netherlands. However, application of the SRM 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 Dutch Intervention Act.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

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.

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 after 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 after the day of the bankruptcy declaration;
 - if the debtor has not been heard by the court prior to the bankruptcy declaration, he or she 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 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 or 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 Enforcement 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'. Because of 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.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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 14).

The Dutch 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 9).

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary 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. 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 44 and 45).

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.

We note that a proposal is being considered to amend the suspension of payments procedure as part of the Continuity of Companies Act III (see 'Update and trends').

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 Dutch Senate. The June 2017 European Court of Justice (ECJ) decision in *FNV v Smallsteps BV* (C-126/16) (the *Smallsteps* case) has shed light on the applicability of the transfer of undertaking rules for employees (as laid down in the EU Directive on transfer of undertakings) within the framework of the Dutch pre-pack. After the *Smallsteps* case, two decisions have been rendered by the Dutch court in appeal proceedings, in which the *Smallsteps* decision has been taken into account. See 'Update and trends' for more information and more background on the ECJ's decision in the *Smallsteps* case, the recent decisions by the Dutch court of appeal and the status of the legislative proposal.

8 Successful reorganisations

How are creditors classified for purposes of a reorganisation 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.

A draft legislative proposal has been prepared, which introduces a procedure for a compulsory composition outside of formal insolvency proceedings. The original legislative proposal, which was announced in 2014 as the Continuity of Companies Act II, has been significantly amended and a new proposal was launched in September 2017 (the Act on Court Approval of Schemes to Avoid Bankruptcy). This new proposal offers an efficient and fairly informal process to effect a compulsory composition between the company and all or certain of its (secured) creditors or shareholders. See 'Update and trends' for more information about this legislative proposal.

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.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

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 or her 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.

Bankruptcy

A debtor can be declared bankrupt when it has ceased to pay its debts (see above). 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. Once the bankruptcy proceeding has been opened, there is no material difference to voluntarily opened proceedings. 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 44 and 45). 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.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

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.

Note that creditors will have the ability to propose a plan under the newly proposed Act on Court Approval of Schemes to Avoid Bankruptcy.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' 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 bankruptcy trustee designate, who 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. This procedure has been developed in the legal practice but lacked a statutory foundation. A legislative proposal that intends to codify this procedure was adopted by the Dutch Lower House in 2016. See 'Update and trends' for more information on the legislative proposal for the Dutch pre-pack.

12 Unsuccessful reorganisations

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 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. Please see 'Update and trends' for more information about the legislative proposal on the pre-pack.

Note that a legislative proposal has been launched in September 2017 (the 'Act on Court Approval of Schemes to Avoid Bankruptcy'). This proposal will introduce a fast and efficient procedure to restructure the company's business through a scheme between the company and all or certain of its (secured) creditors or shareholders. See 'Update and trends' for more information about this legislative proposal.

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 8).

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.

13 Corporate procedures

Are there corporate procedures for the 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.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Voluntary liquidation (see question 6) 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 at the request of the debtor.

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.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test 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.

The insolvency test in the Netherlands is an open criterion, satisfaction of which must be established on the facts at hand. There is no 'binary' balance sheet or cash-flow insolvency test. A court may proclaim a debtor bankrupt when there is prima facie evidence that shows that the debtor has ceased to make payments (please also see questions 1 and 9). If a creditor petitions for the debtor's bankruptcy, the creditor also has to show prima facie evidence of his or her 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 creditors' claims is due and payable; and the debtor has to have stopped making payments.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

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 of 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.

In practice however, directors may decide to file for a suspension of payments or bankruptcy to mitigate the risk of incurring personal liability in a scenario where failing to do so would likely cause damage to creditors.

In addition, note that directors are obliged to notify the tax authority in writing in case the company is no longer able to pay certain taxes, social security premiums or pension fund premiums. Please see question 17.

Directors and officers**17 Directors' liability – failure to commence proceedings and trading while insolvent**

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

See answer to question 16.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? 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 or pension fund premiums. In particular, directors of a company in financial distress must notify the tax authorities in writing if the company is no longer able to pay certain taxes (including VAT, and wage withholding tax), and social security or pension fund premiums that are due. This notification should be made within two weeks of the date that the taxes and social security or pension fund premiums 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 or pension fund premiums 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 Dutch 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 amendment 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.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Yes, it is generally held that once the company is in financial difficulties, there is a shift in the focus of the directors' duties towards the interests of the company's creditors, depending on the circumstances of the case at hand.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation 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 Dutch 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.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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 45 and 46).

'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 45 and 46). 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.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

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. In addition, in a recent decision the Dutch Supreme Court has confirmed that the bankruptcy trustee shall also need to consult with the works council of the company. If a company has 50 or more employees, then the managing directors are in principle obligated to set up a works council. A works council has certain consultation rights under Dutch employment law, such as the right to be consulted about proposed reorganisations. In its decision of 2 June 2017, the Dutch Supreme Court confirmed that the consultation rights of a works council should in principle not be affected by the bankruptcy of the company, meaning that when the bankruptcy trustee makes decisions regarding the continuation or relaunch of (part of) the business, he or she is in principle obligated to consult the works council (however, the court also notes that the special nature of the insolvency process must be taken into consideration in the works council consultation process and timelines).

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 Dutch 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 creditors' 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.

23 Post-filing credit

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

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.

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.

24 Sale of assets

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?

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 7). There is no distinction between the sale of assets 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.

Additionally, in recent Dutch case law (see also question 22) it was confirmed that a bankruptcy trustee of an insolvent company that has a works council installed, must respect the consultation rights of the works council (in accordance with the Dutch Works Council Act) if it regards a sale of assets with a view to continue or relaunch (part of) the business of the insolvent company.

Often, depending on the method of sale chosen by the bankruptcy trustee, assets can be transferred free and clear of third party rights, for instance, when a bankruptcy trustee sells real estate or assets for the benefit of a mortgagee or pledgee. In other circumstances however, third-party rights may pass with the assets, for example, rights of a tenant leasing a property that 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 Dutch Bankruptcy Act, credit bidding in sale procedures is not unknown in the Netherlands (see question 25).

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Stalking horse bids

In the Netherlands, there is no legal basis for 'stalking horse bids' during a pre-bankruptcy scenario (as opposed to other jurisdictions, such as the United States). However, in the Dutch pre-pack procedure, which lacks a statutory basis but has been developed in practice (see also question 7), an asset deal is usually 'pre-packaged' through negotiations between the debtor and a potential buyer, who then buys the assets from the bankrupt estate after the debtor is declared bankrupt.

Credit bidding

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. Note that the entering into of a private agreement by the security right holder in its capacity as purchaser can be subject to court approval. In case the consent of the court is required for the entering into of a private purchase agreement, which includes a credit bid of the security holder, the court has discretionary power to assess whether it should give its approval (depending on the circumstances of the case).

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.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 Dutch 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 Dutch Bankruptcy Act. This has been confirmed in case law of the Dutch Supreme Court (see question 27). The Dutch 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 Dutch 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 identified 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.

We refer to the 'Update and trends' in relation to the (currently pending) legislative proposal that will provide for a scheme of arrangements (the Act on Court Approval of Schemes to Avoid Bankruptcy).

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Insolvency of a licensor

The position of an IP licence after insolvency has been the 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 or her 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 with regard to 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 and 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.

28 Personal data

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

As of 28 May 2018, the General Data Protection Regulation (GDPR) has entered into force and effectively replaced the Netherlands Personal Data Protection Act. The GDPR will apply to data processing and data controlling activities conducted by organisations established in the EU. We refer to the European Union chapter on the GDPR for more details, but in summary the new regulation has led to more strict and expansive duties of care for parties involved with the processing and controlling of data (eg, collecting, gathering, storing, categorising and monitoring of data or using data in any other way).

The GDPR will undoubtedly have an impact on the Dutch restructuring and insolvency landscape, but it is currently not yet fully clear to what extent. It remains to be seen how the GDPR will be interpreted and applied by relevant national supervisory authorities (in the Netherlands: the Dutch Data Protection Authority), the Dutch courts and the ECJ. Future court decisions or guidance provided by the Dutch Data Protection Authority or the European legislator will at some point in time provide clarity. The current legal uncertainties notwithstanding, pursuant to the GDPR, non-compliance with its principles for data processing activities can result in (quite severe) administrative fines by the relevant national supervisory authority of up to the higher of €20 million or 4 per cent of the annual (worldwide) turnover of the party involved. Whereas prior to the GDPR the Dutch Data Protection Authority did not issue fines (even though it had the authority to do so since 2016), this is likely to change now that the GDPR has entered into effect.

In light of the increased risk of administrative fines, a bankruptcy trustee will therefore need to be aware of any obligations both the insolvent company and the bankruptcy trustee have under the GDPR, as this may affect how the bankruptcy trustee must deal with, for instance, taking control of the company's (electronic and physical) records and the subsequent usage, storage or destruction of those records, using third parties to store personal data (eg, providers of cloud services), the occurrence of data leaks, continuing the business during the insolvency of the company (and thereby continuing the processing or controlling of data), publishing personal data in the three-monthly (public) bankruptcy reports, or selling off personal data (eg, a customer database) to a third party.

It will be interesting to see what effect the GDPR will have on these and other insolvency-related issues.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

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 Dutch 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, that are not aimed at retrieving payment from the estate) may also be submitted to arbitration. Neither the Dutch 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 Dutch 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 or she 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.

Creditor remedies

30 Creditors' enforcement

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 44 and 45. Unsecured creditors can levy an attachment (see question 31).

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

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.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

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 former EU Insolvency Regulation (as replaced by the Recast Regulation as per 26 June 2017) can be registered at the request of a foreign administrator.

Meetings

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 35).

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 38), 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 8).

Currently the debtor is unable to effect a compulsory composition between the debtor and the third-party creditors outside formal insolvency proceedings, but this will most likely change in the future. See 'Update and trends' for more information about a pending legislative proposal on the compulsory composition (the Act on Court Approval of Schemes to Avoid Bankruptcy) and what type of meetings related thereto may be held.

Information

The bankruptcy trustee in bankruptcy or the administrator in suspension of payments, as the case may be, must report on the state of affairs of the estate at the end of each three-month period. The report has to be filed 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.

Further, each of the creditors can file a petition with the supervisory judge to object against any act of the bankruptcy trustee or to instigate that the supervisory judge orders the curator to perform or refrain from performing any contemplated act, but a creditor cannot otherwise ask for the provision of information. If a creditor's committee is installed, the committee can ask for information and it has the right to receive that information, which has to be provided by the bankruptcy trustee upon request.

33 Creditor representation

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 Dutch Bankruptcy Act allows for the appointment of a creditors' committee by the supervisory judge (see question 22). 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.

A creditors' committee can have no more than three members. In practice, attempts are made to have the composition of the committee reflect the composition of the group of creditors of the debtor. There are no specific guidelines for the selection of the members of the committee.

There are no specific provisions that deal with retaining advisers or the funding of expenses.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

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 or her own claim based on the statutory anti-abuse provisions.

35 Claims

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? 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 Dutch 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 Dutch 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.

36 Set-off and netting

To what extent may creditors 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.

37 Modifying creditors' rights

May the court change the rank (priority) 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'.

38 Priority claims

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 or her 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 that 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.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

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 38). 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 payments procedure a less efficient restructuring tool if a large number of employees are involved.

As of 1 July 2015, new legislation has entered into force as a result of which the dual Dutch dismissal system (ie, permit from the UWV or court involvement) was replaced by a one-route system, whereby the route to be followed will depend on the reason for dismissal. With effect from 1 January 2016, a maximum on the wage guarantee by the UWV also applies.

40 Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation 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 that 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 39). 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.

41 Environmental problems and liabilities

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 personally, 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 an estate claim that 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 that 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), as amended by Directive 2006/21/EC, Directive 2009/31/EC and Directive 2013/30/EU, 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).

42 Liabilities that survive insolvency or reorganisation proceedings

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 payments 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. As an alternative 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 6).

43 Distributions

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 that 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.

Security

44 Secured lending and credit (immovables)

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

Security over immovable property (including leasehold) and certain registered movables (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.

45 Secured lending and credit (movables)

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

Security over movable property is created by means of a right of pledge. There are two types of pledges over movable 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 movable 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 movables or immovables 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.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

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.

Note that with respect to voluntary legal acts involving the debtor, which were performed during the year preceding the date on which the creditor initiated a challenge action, rebuttable statutory presumptions are applicable. These presumptions shift the burden of proof from the creditor that initiated the challenge action to the debtor. The presumptions provide that with respect to actions performed (for a consideration) during the one-year period prior to the date that the legal act is challenged, 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.

Suspension of payments

In a 'suspension of payments' the administrator does not have a specific statutory right under the Dutch 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 possibility 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.

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. If certain voluntary legal acts 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 such acts 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 acts 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.

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 due to the bankrupt's counterparty substantially outweighs the consideration for the transaction received by the 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.

Please note that the DFSA specifically provides that it is not possible to set aside or annul the transfer of assets, rights or liabilities that have 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 a bankruptcy situation.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Insiders should abstain from setting off their claims when 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 payments 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 36).

In addition, the Dutch Bankruptcy Act limits the possibility of setting off claims that are acquired before the date of bankruptcy, but where the acquirer was not acting in good faith, which is the case if the acquirer knew that the financial position of the insolvent entity was such that bankruptcy or a suspension of payments was to be expected.

Groups of companies

48 Groups of companies

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 that 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.

49 Combining parent and subsidiary proceedings

In 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?

The Dutch 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.

In a scenario involving a multinational group, a distinction should be made between insolvencies in countries to which the Recast Regulation applies and other non-EU jurisdictions (including Denmark).

In cases where the Recast Regulation applies, we note that the Recast Regulation includes a separate section dealing with the insolvency of members of a corporate group. We refer to the chapter on the European Union.

With respect to insolvency proceedings opened in countries that do not belong to the EU and where the Recast 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 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.

International cases

50 Recognition of foreign judgments

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?

As a result of the Recast 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 without further formalities. The concept of main and secondary insolvency proceedings still exists, but the Recast Regulation now also introduces the concept of synthetic secondary proceedings, whereby local creditors can be protected without the need for actual secondary proceedings to be commenced. Please refer to the chapter on the European Union (we note that pursuant to the Recast Regulation secondary proceedings no longer need to be liquidation proceedings and that therefore a Dutch suspension of payments now also qualifies as a secondary proceeding under the Recast Regulation).

The effects of the opening of insolvency proceedings in other non-EU jurisdictions (including Denmark, which has opted out of the Recast 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 cases where there was an absence of a treaty and where the predecessor or the Recast Regulation did not apply, the Dutch Supreme Court has consistently 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 insolvency office holder 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*. Note, however, that the effect of foreign insolvency proceedings (and any actions by a foreign insolvency office holder related thereto) on assets located in the Netherlands can be set aside by a Dutch court, if the court determines such proceedings to have been in violation of public policy.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The Netherlands has not adopted the UNCITRAL Model Law on Cross-Border Insolvency and this is not currently under consideration.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

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.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

See question 55.

54 COMI

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 old EU Insolvency Regulation did not contain a provision on COMI (although its concept was discussed in the preamble of the regulation). The Recast Regulation introduces a formal definition in article 3(1). COMI is defined as the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In addition, the Recast Regulation introduces a rebuttable presumption that a company's COMI will be the place of its registered office, in the absence of proof to the contrary. To address concerns regarding 'forum-shopping', the Recast Regulation also 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.

The Recast Regulation applies the concept of COMI to each individual debtor and not to a group of companies, which can all have individual COMIs. In accordance with European Union law, Dutch courts also determine the COMI for each individual company within a group of companies. This became 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 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 their COMI in the Netherlands to facilitate the group being restructured as a single unit.

We refer to the European Union chapter, which discusses the Recast Regulation in more detail.

Note that in the past the Dutch courts have, among others, considered the following factors in order to determine the COMI:

- the fact that the business activities of a Dutch general partnership had transferred to a foreign company that 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 (previous) 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 not (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

Update and trends

Legislative overhaul of Dutch insolvency law

In 2012 the Dutch legislator announced a legislative overhaul of Dutch insolvency law under the name *Herijking Faillissementsrecht* (the 'Re-assessment of Bankruptcy law'). This legislative programme aims to amend and modernise Dutch insolvency law. Legislative proposals that focus on the prevention of bankruptcy fraud, the negative social and economic effects caused by it, and the strengthening of the position of the bankruptcy trustee have entered into force in 2016 and 2017 and have resulted in, among others, a broader civil and criminal liability of (supervisory) directors and in statutory duties for the insolvent company (including its directors and officers) or third parties in control or possession of the insolvent company's administration to provide information or cooperation to the bankruptcy trustee.

The legislative proposals regarding the enhancement of companies' ability to reorganise are still pending: the Continuity of Companies Act I regarding the pre-pack, the 'Act on Court Approval of Schemes to Avoid Bankruptcy' (formerly the Continuity of Companies Act II) and the Continuity of Companies Act III regarding the continuation of business in bankruptcy. The legislative proposal aiming at the modernisation of bankruptcy proceedings has been adopted and will enter into force in early 2019.

The Continuity of Companies Act I

The legislative proposal that introduces a legal basis for the pre-pack sale (the Continuity of Companies Act I) has been adopted by the Lower House in 2016 and is currently pending before the Dutch Senate. The ECJ's decision in the *Smallsteps* case (C-126/16) on 22 June 2017 made it clear that the pre-pack procedure in that particular case could not be viewed as a procedure upon which the exceptions to the rules concerning the transfer of undertakings applied. In a formal response to questions from the Dutch Senate regarding the possible implications of the *Smallsteps* case for the current pre-pack legislative proposal, the Minister of Security and Justice stated in September 2017 that the *Smallsteps* case did not necessitate an amendment of the existing legislative proposal.

According to the Minister of Security and Justice, if a post-bankruptcy relaunch of the debtor's business is preceded by and prepared in a pre-pack procedure, the application of the employee protection rules concerning the transfer of undertakings should be determined on a case-by-case basis by either the bankruptcy trustee designate or a court (as the case may be) in accordance with the ECJ's decision in the *Smallsteps* case. Since the publication of the ECJ decision, two decisions have been rendered by two different Dutch courts of appeal that have shed further light on the implications of the *Smallsteps* case on the Dutch restructuring landscape.

In mid-2018, a Dutch court of appeal held that the *Smallsteps* decision did not mean that all post-bankruptcy restarts of insolvent companies (which have been prepared prior to the formal bankruptcy – whether or not in the form of a pre-pack) are automatically excluded from application of the exception to rules concerning the transfer of undertakings. According to this court of appeal, the assessment of whether the conditions set out in *Smallsteps* decision are satisfied, should occur on a case-by-case basis, taking into account all relevant facts and circumstances. In this case, the relevant circumstances led to the conclusion that the bankruptcy proceedings were initiated with the view to liquidate the company's assets. In addition, there was supervision by an authorised government authority from the moment of the liquidation order. Therefore, the union's claims – which were based on the assertion that the conditions regarding the exception to the rules concerning the transfer of undertakings were not met – were ultimately rejected by the court.

Around the same period in a different case, another court of appeal also held that whether the ruling in the *Smallsteps* case can be applied, should depend on all facts and circumstances of each particular case. In that specific case, there were no facts indicating that the bankruptcy was aimed at continuation of the business. Therefore, the court held that that the rules concerning the transfer of undertakings did not apply.

This means that the use of a pre-pack is still possible and confirms that the application of the employee protection rules concerning the transfer of undertakings is to be determined on a case-by-case basis, taking into account all the relevant circumstances of the individual case.

Earlier in 2018, the Minister for Legal Protection – after discussions with various stakeholder groups – already stated that in practice there is still a need for the Continuity of Companies Act I and has requested the Senate to continue the treatment of the legislative proposal. It was also announced that new legislation under employment law regarding the position of employees and employee rights in a relaunch following

bankruptcy is being investigated. At the same time, the current protection scheme for employees when a suspension of payments has been granted to the company or employer is being reconsidered in light of the precarious financial situation of the company. Finally, employees' participation rights in insolvency are a topic of debate, focusing on strengthening the position of the works council in insolvency situations.

The 'Act on Court Approval of Schemes to Avoid Bankruptcy'

The original legislative proposal, which was announced in 2014 as the Continuity of Companies Act II, has been significantly amended and substantively a new proposal was launched in September 2017: the 'Act on Court Approval of Schemes to Avoid Bankruptcy'. The act will introduce a fast and efficient procedure to restructure the company's business through a scheme between the company and all or certain of its (secured) creditors or shareholders. Through the scheme a release of liability of a surety, co-debtor or guarantor (including a parent company that is jointly and severally liable for debts of its subsidiary) can also be effected.

A scheme can be initiated by a debtor who foresees that he or she will no longer be able to pay his or her debts. If the debtor does not initiate a composition but it is clear that this would be the only way to avoid an imminent liquidation, or if the initiated composition cannot be seen as a serious attempt or if it has been rejected, a creditor can also initiate a composition. According to the new proposal, proposing a scheme is considered to be a last-resort restructuring tool; the debtor is expected to seek other out-of-court settlement solutions first, before initiating a compulsory composition. After initiating a scheme, the debtor has the opportunity to request the court to order a stay. During this period, any third-party rights to seek recovery against assets of the debtor or to repossess assets under the debtor's control cannot be exercised without court-permission. Creditors may seek the appointment of an independent expert to draw up a scheme.

The new proposal provides for the possibility for the debtor to propose to its counterparty in an executory contract a modification of such contract. If the counterparty does not agree, the debtor can terminate the contract, in which case the counterparty obtains a claim for damages against the debtor. The proposed composition can also entail a modification of the rights of shareholders, including a 'debt for equity swap'. Provisions in agreements that result in an automatic termination or permit termination because of a bankruptcy or similar procedure, will remain ineffective, according to the new proposal.

Creditors or shareholders will be divided into different classes if their rights or interests are so different that they cannot be deemed to be in a comparable position. In any event this includes creditors or shareholders that have a different rank in bankruptcy. Only the creditors or shareholders whose rights or claims are affected by the proposed composition are allowed to vote. A class has accepted the composition if the group of creditors who vote in favour of it, represents at least two-thirds in value of the total value of claims in that class, or, in case of shareholders, if that group represents at least two-thirds of total votes within that class. The new proposal no longer requires an absolute majority of the creditors or shareholders within a class.

If at least one class accepts the composition, the debtor is able to request that the court confirms the composition, which means the composition is binding on all creditors or shareholders affected by the scheme, also including those who voted against it. The court will among other refuse if (i) the debtor did not fulfil the statutory requirements regarding the voting process and notification, or (ii) at the request of one or more creditors, on the basis of one or more grounds for refusal (eg, the 'creditor's best interest-test'). If not all classes have voted in favour of the proposed composition, the court will refuse the confirmation of the composition if, under the proposal the creditors would receive less than upon liquidation ('best interest of creditors test') and the going concern value of the company would not be distributed among the classes of creditors and shareholders in accordance with their statutory ranking (thereby introducing the 'absolute priority rule'). Under the new legislative proposal, it is not possible to appeal against the decision of the court.

In 2018, the draft proposal again underwent several amendments and is currently being finalised. A final proposal is expected to be submitted to Parliament at the end of 2018 and if approved by Parliament it will enter into force in 2019/2020.

The Continuity of Companies Act III

The legislative proposal for the Continuity of Companies Act III will provide means to facilitate the continuation of businesses in bankruptcy, such as a duty for suppliers to continue to supply in bankruptcy. It is

Update and trends (continued)

aimed at improving the ability of the bankruptcy trustee to efficiently settle the bankruptcy and limit the damage for all parties involved as much as possible. It also considers amendments to the suspension of payments procedure. This proposal is still in the preparatory phase.

Modernisation of bankruptcy proceedings

This legislative proposal focuses on achieving a more efficient and transparent insolvency procedure in which the bankruptcy trustee can exercise his or her duties as administrator and liquidator more easily and effectively. In addition, the proposal aims to better inform creditors and other parties involved of the progress of the procedure, thereby improving these parties' ability to protect their interests. Proposals include the abolition of provisions that prevent the use of electronic communication. The proposal has been approved by the Senate in June 2018 and is expected to enter into force in early 2019.

The Recast Insolvency Regulation**Implementation**

The Dutch Implementation Act EU Insolvency Regulation amends the Dutch Bankruptcy Act in order to align with the Recast Regulation, which came into effect for insolvencies commencing on or after 26 June 2017, and mostly concerns technical amendments. The Implementation Act entered into force in December 2017.

Insolvency Regulation v Brussels I Regulation

Recently, the Dutch Supreme Court has asked the ECJ for a preliminary ruling regarding the qualification of anti-avoidance/fraudulent conveyance actions. The bankruptcy trustee in this case had filed a tort claim that he in his capacity as bankruptcy trustee brought on behalf of the joint creditors of an insolvent estate for compensation against a third party who acted unlawfully against the joint creditors, a '*Peeters/Gatzen vordering*'.

The Dutch Supreme Court referred the matter to the ECJ with respect to the question of whether a claim, brought on the basis of tort, for the benefit of the joint creditors arises directly from rules regarding insolvency proceedings, in which case the Insolvency Regulation (recast) applies, or is based on general civil law rules, governing claims generally, in which case the Brussels I Regulation applies. Because of the cross-border element, it is particularly relevant in this case to determine what the nature of the claim is, because that will decide which court has international jurisdiction and which law is applicable. It will be interesting to see how the ECJ will decide on this matter of international conflict of law rules regarding insolvency.

Other developments regarding Dutch restructuring and insolvency law**Proposal to prohibit contractual limitation on pledging receivables**

In response to pressure from the business sector in the Netherlands, in July 2018 the Dutch Ministry of Justice and Security has published a draft legislative proposal that will make ineffective any contractual provisions that limit parties' ability to transfer or pledge receivables. The proposal has been prepared in consultation with several organisations from the business sector in the Netherlands, including the Confederation of Netherlands Industry and Employers, the Factoring & Asset Based Financing Association Netherlands and the Dutch Banking Association.

The aim of the proposal is to stimulate credit lending to small and medium-sized companies. Currently, a limitation on pledging receivables is often included in standard contract terms and prevents companies from transferring and pledging their claims on third parties to banks or other lenders. By removing this obstruction, the Dutch government hopes to stimulate investments, innovation and growth as it should result in an increase of receivables that can serve as collateral for financing. In addition, the intended ban should enhance the competitive position of the Dutch business sector in comparison to

several other European countries. The consultation on the legislative proposal runs until August 2018.

Recovery and resolution of insurers

The legislative proposal for the Act Recovery and Resolution of Insurers reinforces and expands the current framework for the recovery and resolution of insurers. The proposal amends the Dutch Financial Supervision Act and the Dutch Bankruptcy Act and provides the Dutch Central Bank with more resolution tools and a wider authority in order to be able to take action on an individual basis regarding failing insurers. The guiding principle is that no creditor of a failing insurer should be worse off than in insolvency.

The resolution tools are based on the framework of resolution tools for banks and investment firms. An important element of the proposal is, for example, the bail-in tool. Contrary to the bail-in tool for banks however, bail-in under the proposal is aimed at the protection of the interests of policyholders and beneficiaries (not at saving the insurer). The legislative proposal was adopted by the Dutch Lower House mid-2018 and will need to be approved by the Senate, before entering into force.

Modification of Bank Creditor Hierarchy

The legislative proposal for the Act of the Modification of Bank Creditor Hierarchy implements Directive (EU) 2017/2399, which amends the Bank Recovery and Resolution Directive as regards the ranking of debt instruments in insolvency. The legislative proposal introduces a new rank in insolvency for unsecured debt instruments in insolvency in accordance with the requirements of Directive (EU) 2017/2399. The legislative proposal is currently pending before the Dutch Lower House.

Legislative proposal to amend the 'settlement finality' provisions in the Dutch Bankruptcy Act

Since the implementation of Directive 98/26/EC on settlement finality in payment and securities settlement systems (the Settlement Finality Directive) in 1999, the Dutch Bankruptcy Act contains specific provisions that ensure that insolvency proceedings against a participant in a settlement system do not retroactively affect the rights and obligations of other participants, nor their reliance on the normal financial guarantees inherent to a transaction in the system. For instance, the Dutch Bankruptcy Act specifically provides that the bankruptcy of a participant (eg, a bank) in a payment or securities settlement system (eg, TARGET2) will not have retroactive effect with respect to certain settlement transactions (eg, payments, set-off, netting, and other transfer orders) involving the bankrupt participant, nor will the granting of a cooling-off period affect the ability of a participant to seek recourse against assets of the bankrupt participant.

Currently, this protection only applies in relation to settlement systems that are (i) specifically identified as such by the Minister of Finance, (ii) governed by the laws of an EU member state, or (iii) specifically acknowledged as such by an EU member state and registered with the European Commission. This effectively means that a Dutch bank participating in a settlement system that does not meet these criteria would not be able to guarantee to its counterpart that settlement transactions would not be retroactively affected if the Dutch bank were to become the subject of insolvency proceedings. With an aim to lift this disparity and to improve the competitiveness of Dutch financial institutions operating in the international market, the Dutch legislator has proposed to amend the Dutch Bankruptcy Act by expanding the definition of settlement system (now also including systems in other non-EU countries with adequate supervision) and by having the exemption on the retroactive effect of a Dutch bankruptcy judgment apply to all settlement transactions (whether or not those transactions occurred within a settlement system).

This legislative proposal is still in the preparatory phase.

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.

While the introduction of a formal COMI definition in the Recast Regulation will mean that the past decisions of the Dutch courts on this topic will become less relevant for the initial determination of the debtor's COMI, it is not unlikely that past decisions will still play a role in cases where the presumption cannot be relied upon and more evidence about the debtor's COMI must be presented or where the chosen COMI is challenged.

55 Cross-border cooperation

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 50.

The Recast 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 currently not (yet) explicitly dealt with in the Dutch Bankruptcy Act. A legislative proposal for an implementation act that will align the Dutch Bankruptcy Act with the Recast Regulation will most likely address these legislative gaps (see 'Update and trends'). Currently the Dutch Bankruptcy Act does not prohibit coordination between procedures, and 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).

56 Cross-border insolvency protocols and joint court hearings

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 payments.



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The main legislation applicable to insolvencies and reorganisations in Norway are the Bankruptcy Act of 1984 and the Satisfaction of Claims Act of 1984. The Bankruptcy Act regulates both judicial debt negotiation proceedings and winding-up proceedings, and mainly provides procedural rules, including criteria for the opening, handling and finalisation of the respective proceedings. The Satisfaction of Claims Act includes, inter alia, rules on the bankruptcy estate's automatic seizure of the debtor's assets, avoidance (clawback or annulment of transactions), how to treat a bankrupt debtor's contracts, as well as rules on creditors' claims and the order of priority for such claims.

2 Excluded entities and excluded assets

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

Banks, insurance companies and certain other financial institutions, as well as parent companies of such entities, cannot be subject to insolvency proceedings pursuant to the Bankruptcy Act. Insolvency proceedings in such entities are governed by the Guarantee Schemes Act of 6 December 1996 No. 75. The act gives the government the authority to place financial institutions under public administration if they cannot fulfil their obligations as they fall due and they do not have sufficient funds to secure future operations, or they are not capable of fulfilling capital adequacy requirements.

If possible, the board of directors will be heard before such actions are taken. If public administration proceedings are opened in a financial institution that is a parent company in a financial group, the other companies in that financial group may also be included in the proceedings.

According to the Satisfaction of Claims Act, with only a few exceptions for personal bankruptcies, all of the debtor's assets may be subject to enforced recovery actions from creditors, and a bankruptcy estate automatically seizes all of the debtor's assets. Examples of assets that are exempt from seizure in personal insolvency proceedings are certain personal assets as well as certain monetary contributions that the debtor receives while under insolvency proceedings.

3 Public enterprises

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

There is no specific insolvency legislation for government-owned enterprises and insolvent public enterprises.

4 Protection for large financial institutions

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

No; however specific legislation applies to banks and financial institutions (see question 2).

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Insolvency proceedings shall be opened by the district court where the debtor has its main office or domicile. The court presides over the proceedings opened by that court, and all matters concerning the proceedings are heard by that same court, including ancillary proceedings (for example avoidance claims or disputes over a creditor's claim).

All court orders may be appealed within a month of their passing. An appellant has an automatic right of appeal, and does not need to obtain permission to do so. The appellant must, however, have a legal interest in the matter. There is no requirement to post security to proceed with an appeal; however, the appellant must pay a court fee. The size of the court fee varies and depends on which type of decision is appealed, whether a court hearing is held and for how many days, etc.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

A debtor wanting to commence a voluntary liquidation case must be insolvent (ie, be both illiquid and have negative net assets). The debtor must deliver a written petition for bankruptcy to the court, supported by a set minimum of documentation. The court rarely denies a petition for voluntary liquidation.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

A debtor who cannot meet its financial obligations as they fall due may file for a formal, judicial debt negotiation proceeding, even if the debtor is not insolvent. The petition to the court to open proceedings must be made in writing, and must fulfil certain contents and documentation requirements set out by the Bankruptcy Act. The court will usually ask the debtor to put up security to cover the costs of the initial proceedings.

There are no specific requirements for a debtor commencing a voluntary, out-of-court reorganisation.

8 Successful reorganisations

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

In a voluntary debt negotiation proceeding, the creditors have to be treated equally. There are no other mandatory features; however, the plan must be accepted by all creditors. In a compulsory debt negotiation proceeding where the debtor suggests a compulsory composition, the minority voters are crammed down by the majority voters. The plan must provide a minimum dividend payment of 25 per cent to all unsecured creditors with claims not ranking in priority, and the reorganisation plan requires a majority both in number of creditors and of the total amount of all claims filed to be binding on all creditors (ie, 'double majority'). The main requirements for reaching a double majority in a compulsory composition are (the numbers referring to creditors and claims that are granted voting rights):

- if the dividend payment is at least 50 per cent, the plan must be accepted by at least three-fifths of the creditors holding at least three-fifths of the total debt; or
- if the dividend payment is less than 50 per cent (but not below 25 per cent), the plan must be accepted by at least three-quarters of the creditors holding at least three-quarters of the total debt.

Claims ranking in priority shall be paid in full, and creditors with priority claims are therefore not entitled to vote. Nor will secured claims give voting rights, to the extent that they would be covered if the secured assets were to be sold or realised. Finally, closely related parties to the debtor do not have the right to vote.

A reorganisation plan will in itself not release non-debtor parties from liability. A release of liability would require the consent from each party against whom such protection is sought.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

A bankruptcy petition from one or more creditors must be delivered to the court in writing. The petitioner must provide documentation for the claim and its foundation. If the court finds that the claim is well founded and sufficiently documented, or if the claim is undisputed but the debtor cannot pay, the court will grant the petition and open bankruptcy proceedings in the debtor. If the claim is disputed, or if the debtor argues not being insolvent, the court will hear the parties before deciding on whether or not to open proceedings.

If the court decides to grant the petition, the debtor is taken under bankruptcy proceedings. If the court denies the petition, proceedings are not opened and the debtor may continue its operations as usual. If the court has denied the petition because it found the creditor's claim unfounded, the decision cannot be used by the debtor as evidence that the creditor has no claim. Hence, the creditor may initiate court proceedings before a regular court to determine whether their claim is valid. If that court decides that the claim is valid and the debtor still does not pay, the creditor may thereafter deliver a new petition for bankruptcy in the debtor.

There are no material differences between proceedings opened voluntarily and proceedings opened involuntarily.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Creditors cannot commence an involuntary reorganisation of a Norwegian debtor. However, a debtor that cannot meet its obligations as they fall due may itself file for a 'compulsory' debt negotiation proceeding, under which creditors or debt may be crammed down, subject to certain rules.

The petition must fulfil the same criteria as in a voluntary proceeding (see question 7).

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Procedures for expedited reorganisations do not exist under Norwegian law.

12 Unsuccessful reorganisations

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 voluntary debt negotiation plan cannot be carried out unless it is approved by each of the debtor's creditors. A proposed compulsory plan is defeated if the voting requirements (see question 8) are not met. Further, the court may in certain situations decide not to accept the plan, for instance if the procedure has not been carried out in accordance with the law or if the plan does not treat the creditors equally and the creditors have not agreed to differential treatment. Other reasons the court may have for not accepting a plan include that it would be unreasonable or that it is considered likely that the debtor will not be able to fulfil the plan.

The court may decide that the debtor's fulfilment of the plan shall be supervised, usually by one or more members of the debt negotiations committee. If a debtor is subject to supervision and severely or repeatedly acts against its duties, the court shall open liquidation proceedings against the debtor if petitioned by the supervisors, and if it is not clear that the debtor nevertheless will be able to fulfil the plan. If a non-supervised debtor fails to adhere to a plan, there are no automatic consequences; however, the creditors may initiate (new) debt recovery proceedings.

13 Corporate procedures

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

Forced liquidation or dissolution proceedings follow the procedural rules of an insolvent winding-up proceeding and are also governed by the Bankruptcy Act. The law differentiates between forced dissolution and forced liquidation, as the conditions for the opening of the two proceedings are different.

The court may take charge of a dissolution process if the company has reported to the National Register of Business Enterprises that it is in the process of a regular dissolution but has not managed to complete the dissolution process within a year from delivering the first notification. The court may also take charge of a dissolution process if this is requested by shareholders representing at least one-fifth of the total shares in the company.

A company may be subject to a forced liquidation process if it has failed to fulfil certain legal requirements, including those related to the composition of the board of directors, the appointment of an authorised public auditor and the reporting of the company's annual accounts to the Register of Company Accounts.

Insolvency is not a precondition for the opening of forced dissolution or liquidation. The business may even be solvent and ongoing and still be subject to proceedings, as the conditions to open such proceedings are objective and absolute. Nevertheless, most of these cases result in liquidation of the company, as the process of returning the company to its shareholders is often complex, time-consuming and expensive.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Judicial debt negotiation proceedings are a 'make or break' situation for a company, and are finalised either by a successful reorganisation plan being carried out, or by ending in liquidation proceedings. The conclusion is formally decided by the court either way. Liquidation proceedings are formally concluded by a court decision.

Insolvency tests and filing requirements

15 Conditions for insolvency**What is the test to determine if a debtor is insolvent?**

The test to determine whether a debtor is insolvent is twofold. Firstly, the debtor has to be illiquid, meaning that the debtor cannot settle its debt as it falls due. Secondly, the total value of the debtor's assets and income must be insufficient to cover the total debt.

16 Mandatory filing**Must companies commence insolvency proceedings in particular circumstances?**

The board of directors in a limited liability company must act promptly if the company's equity is not considered reasonable compared with the size and risk of the business operations. Such actions include measures to improve the company's financial situation, convene a shareholders' meeting to discuss the situation and, ultimately, to file for bankruptcy proceedings if it is unlikely that the financial difficulties can be resolved in the immediate future.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent**If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?**

If the board of directors fails to meet its obligation to act, as described in question 16, and carries on business while the company is insolvent, it may result in penal liability or economic responsibility for the directors, or both.

18 Directors' liabilities – other sources of liability**Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?**

The most common breach of duty for which the CEO or general manager and board members are held liable in Norway, is a lack of payment of employees' tax deduction. The company's duty to pay income tax on behalf of its employees is very strict, and the CEO can be held personally liable for any lack of such payment.

Furthermore, corporate officers and directors may – subject to further requirements – be held liable for their corporation's obligations, if such obligations are the result of negligent acts or omissions by the officers or directors.

The board of directors has certain duties when the company is experiencing financial difficulty, and failure to comply with such duties may lead to the directors being held liable for damages or criminally liable. For instance, they shall ensure that the company's creditors are treated equally, and that the company does not incur any new debt or obligations that it cannot meet, unless the creditor is familiar with, or informed of, the company's financial situation and the risk involved with providing new loans or credit.

Furthermore, the directors must act promptly if the company's equity is not considered reasonable compared with the size and risk of the business operations (see question 16).

If the court finds it probable in relation to a bankruptcy proceeding that corporate officers or directors are guilty of criminal violations (typically a lack of accounting duties or embezzlement) or unfit to run a business, the court may quarantine the responsible persons from establishing a new company or being a corporate officer or director in any company for the duration of the quarantine period (normally two years from the opening of the relevant bankruptcy proceedings).

19 Shift in directors' duties**Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?**

The various rules on liability for board members and rules regarding the priority between claims when a company has insufficient funds to meet all their obligations, gives a de facto shift for directors' responsibilities; going from being towards the owners and shareholders to being towards the creditors (the latter ranking higher in priority than the shareholders in an insolvency process).

20 Directors' powers after proceedings commence**What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?**

In a judicial reorganisation process in Norway, either voluntary or involuntary, the debtor retains legal powers over its assets, and the company's board of directors maintains responsibility for the ongoing business. The debtor and its operations are, however, supervised by an administrator and a debt negotiations committee, both appointed by the court. The debtor cannot renew or obtain new debt, pledge assets or sell or lease out its real property, business premises or any asset of significant value without the consent of the administrator and debt negotiations committee.

Directors and officers are stripped of all their powers if the company is taken under insolvent winding-up proceedings, or forced liquidation or dissolution proceedings.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria**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 opening of an insolvency proceeding triggers an automatic stay on certain enforcement proceedings against the debtor, including a creditor's attempt to carry out an enforced sale of the debtor's assets. The stay lasts six months from when the proceedings are opened. Further, the creditors are prevented from attaching an execution lien in any of the debtor's assets throughout the proceedings, for claims originating from before the proceedings were opened.

When a petition for judicial debt negotiation proceedings has been filed, there is a three-month automatic stay of any petitions for winding-up proceedings related to debt incurred prior to the opening of the proceedings. The stay may be prolonged at the discretion of the court upon a motion from the debtor. If compulsory judicial debt negotiation proceedings are opened, the automatic stay lasts throughout the proceedings.

The automatic stay is, however, not effective against a petition for winding-up proceedings filed by at least three creditors with voting rights whose claims in sum represent at least two-fifths of all claims entitled to dividend payment, even though the debt arose prior to the filing of the petition.

If the debtor at the time of the opening of liquidation proceedings is the claimant in a legal proceeding, the case is automatically stopped by the court. If the debtor is the defendant, however, the claimant may choose to include the bankruptcy estate as a defendant in the legal proceeding to have their claim tried by the court. Any award in the creditor's favour against the debtor has to be filed as a claim in the estate and receive dividend payment subject to the rules on priority between claims.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

In a formal reorganisation process in Norway, either voluntary or involuntary, the debtor retains legal powers over its assets, and the company's board of directors maintains responsibility for the ongoing business. The court has a passive role in the proceedings. The debtor and its operations are, however, supervised by an administrator and a debt negotiations committee, both appointed by the court. The members of the committee are usually representatives for the largest creditors. See question 20.

Creditors who supply goods or services after the filing will not be given any special treatment with respect to claims that arose prior to the reorganisation proceedings, but will be entitled to payment for any services or goods delivered in agreement with the debtor after the opening of proceedings.

The administrator of a liquidation proceeding may choose to carry on the business operations of the debtor for a limited period of time (often merely a few days) during negotiations with potential buyers, enabling the business to be sold as a going concern. The estate will be responsible for goods and services delivered upon request from the administrator or estate after the opening of the liquidation proceedings, and the estate will normally enter into new agreements with suppliers, employees, etc to regulate the terms of delivery.

23 Post-filing credit

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

A debtor in liquidation may not obtain secured or unsecured loans or credit. A debtor in a formal reorganisation (judicial debt negotiation proceedings) may only obtain loans or credit if accepted by the debt negotiations committee.

24 Sale of assets

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 judicial debt negotiation proceedings, the sale of specific assets or the entire business of the debtor are generally subject to the same rules as a company that is not in an insolvency proceeding; however, the debtor is supervised by a debt negotiations committee, which shall approve the sale of any real property and assets of significant value. See question 20.

If a compulsory judicial debt negotiation proceeding is successful, any encumbrances that supersede the assumed value of the encumbered assets cease to exist. In liquidation proceedings, the business may be sold free and clear of debt (see the Bankruptcy Act, section 117a). In such a sale, encumbrances that supersede the value of any asset sold by the bankruptcy estate may be eradicated if they are sold together with other assets, or as part of the business operations, subject to certain further statutory conditions. This provision is, however, quite narrow and hardly ever used in practice, meaning that a bankruptcy estate must usually respect and deal with any pledgees.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

There is no practice of 'stalking horse' bids in sale procedures in Norwegian insolvency proceedings. Credit bidding in sales is not practised in Norwegian insolvency proceedings, except if the bidder has a security interest (ie, a pledge or lien) in the respective asset, and an

unsecured creditor cannot purchase assets from the insolvent debtor by reducing the amount of their claim against the debtor. Any encumbered asset of the debtor may be transferred to the pledgee holding security in that asset, in exchange for the pledgee reducing its claim against the debtor accordingly (see the Bankruptcy Act, section 117c).

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

A debtor undergoing judicial debt negotiation proceedings may not reject or disclaim an unfavourable contract merely because of the opening of proceedings; the debtor's contracts remain unchanged when the proceedings are opened. When liquidation proceedings are opened, however, the bankruptcy estate may choose to enter into or disregard any of the debtor's contracts. As for tenancy agreements and employment contracts, the bankruptcy estate automatically becomes a party unless it explicitly declares to the contractual parties within four and three weeks, respectively, that it does not want to become a party to the contract.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

In insolvency proceedings, IP agreements are treated as most of the debtor's contracts: the estate has a right to enter into the contract as a party. This means that the IP licensor or owner may not terminate the debtor's right to use it if the estate enters into the contract as a party. If the estate does not want to become a party to the contract, however, the debtor's contractual party may terminate the agreement.

28 Personal data

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

An insolvency estate in Norway will have the same rights and obligations as the debtor, and in general, the estate has the opportunity to use or transfer personal information or customer data collected by the debtor to the same extent as the debtor.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

If arbitration is used in insolvency proceedings, it is never used for the actual insolvency proceeding, but, for example, in an ancillary proceeding or in a dispute concerning a contract of the debtor with an arbitration clause.

If the debtor was party to an arbitration proceeding when the insolvency proceedings were opened, the estate may choose to continue those proceedings. A bankruptcy estate may agree to arbitrate a case where the estate is the plaintiff or defendant; however, it will most likely never do so because it is often far more expensive than having the case brought before a regular court.

Creditor remedies

30 Creditors' enforcement

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?

Besides a bankruptcy estate's automatic seizure of assets, there are no processes by which some or all of the assets of a business may be seized outside of court proceedings.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Unsecured creditors can attempt to recover their undisputed claim through a regular debt collection procedure, by attaching an execution lien in the debtor's assets, or by filing for bankruptcy in the debtor, or all of the above. A disputed claim cannot be subject to regular debt collection, but the creditor may seek an execution lien or file for bankruptcy of the debtor, or both. A disputed claim will be heard by either an execution officer or the court before an execution lien is allowed or bankruptcy proceedings opened.

The process of obtaining an execution lien might take months to complete. An execution lien gives the creditor a lien comparable to a pledge or mortgage, and serves as a foundation for requesting a forced sale of the asset in question. The process is usually fairly straightforward and is not expensive.

It will normally take at least one to two months from when the creditor sends notice of a bankruptcy petition to the debtor until bankruptcy proceedings are opened. The difficulty of the process depends on the claim and whether it is disputed by the debtor. An unsecured creditor has to pay a fee upon delivering the petition to the court, which at the moment is 56,500 kroner, as security for the costs of the bankruptcy proceedings.

If an unsecured creditor is worried that the debtor will dispose of assets and reduce the creditor's chances of obtaining coverage for their claim, it may file an injunction petition. The court then decides whether or not to grant the petition and issue an order preventing the debtor from, for example, disposing of one or more assets.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

In compulsory judicial debt negotiation proceedings, the debt negotiations committee shall hold a meeting for the creditors; no earlier than four weeks and no later than eight weeks after proceedings are opened.

The court-appointed administrator in a bankruptcy case shall inform all known creditors of the bankruptcy proceedings. In liquidation proceedings, the court usually schedules a creditors' meeting within two to four weeks after proceedings are opened. In that meeting, the court-appointed administrator delivers a report regarding the status and findings of the proceedings so far, which is also made available to all creditors. Unless there are special circumstances that necessitate a second or more creditors' meetings, no further such meetings are held. The date and time of the first creditors' meeting is stated in the court's decision to open proceedings. If the proceedings last longer than a year or for several years, the court-appointed administrator and creditors' committee shall each year prepare an annual report to the court. The report is also made available to all creditors. A creditor may ask for, but has no specific right to receive, further information regarding the estate and the proceedings. A request for transparency is considered and decided on in each separate case. Creditors may pursue claims against third parties after the insolvency proceedings have been finalised (see question 34).

33 Creditor representation

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?

When liquidation proceedings are opened, the court often, but not always, appoints one or more individuals to form a creditors' committee. The committee more or less functions as a 'board of directors' for the estate, with the trustee as chairman and other members as directors. The committee makes decisions for the estate, for example deciding when and how to realise assets and whether or not to pursue claims, and is responsible for testing claims filed in the estate before carrying out any distribution to the creditors. Usually the trustee suggests to the court one or more creditor representatives to appoint as members of the creditors' committee. A creditor who is interested in being on the committee may notify the trustee.

In larger cases, the committee usually has at least two creditor representatives, and often also a representative for the employees. The creditors' committee's members' expenses are paid from the estate provided that the estate has sufficient funds to do so. In smaller bankruptcy estates, the members of the creditors' committee might not receive any remuneration. The committee may retain advisers; however, it can only do so if it is pro bono or if there are sufficient funds in the estate.

A creditors' committee in judicial debt negotiation proceedings has more of a supervisory function. See questions 20 and 22.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

If the liquidator has no assets to pursue a claim, it is not uncommon that a creditor provides funding to the estate in order to pursue the claim through an agreement between the estate and the creditor. The fruits of the remedy will under such circumstances belong to the estate, but since the funding creditor takes a risk by financing the estate's pursuit, the agreement will often provide the funding creditor with a percentage of the outcome in addition to a mere refund of costs as well as any regular dividend payment from the estate.

If the liquidator (or the creditors' committee where one has been appointed) is in doubt regarding whether or not to pursue a claim, the question shall be decided on by the creditors in a creditors' meeting. If the creditors then decide that the estate shall not pursue the claim, any creditor who voted against the decision may pursue the claim on behalf of the estate within a deadline set by the court, unless the matter is settled between the estate and the opposite party. The creditor must fund such a pursuit, however if the pursuit results in increased gross assets in the estate, the creditor may request that its reasonable costs are covered from the estate's share before the balance falls to the estate.

35 Claims

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

When the court opens insolvency proceedings, it sets a time limit for filing claims in the estate. The time limit shall be within three and six weeks from when the opening of proceedings was announced in The Bronnoysund Register Centre. The time limit is, however, not preclusive, and claims filed after the time limit has expired, but before the proceedings are finalised, will be registered in the estate.

Claims filed in the estate will only be tested if there are sufficient funds in the estate to give distribution to the class of claims in which the respective claims belong. The trustee tests the claims by assessing documentation provided by the creditor, and decides whether or not to recommend to the creditors' committee to allow the claim. If a claim is

disallowed, and the creditor and estate do not reach an amicable agreement, the trustee informs the court of the matter, and the court sets a deadline of three weeks for the creditor to take legal action in order for the court to decide on the matter. If the creditor does not take legal action within the deadline, the claim will be treated in accordance with the trustee's recommendation, without any possibility of appeal.

A claim filed in the estate may be transferred, and it is sufficient to give notice to the estate of such a transfer. Contingent claims may be recognised and recommended. However, such claims will only receive dividend payment to the extent that the condition has occurred. If the condition has not occurred at the time of distribution to the creditors, the dividend payment for the contingent claim shall be preserved on account by the trustee and only paid out to the creditor if and when the condition occurs.

A claim acquired at a discount may be enforced for its full face value. Interest accrued after insolvency proceedings were opened may be filed as a claim in the estate; however, it will rank last in priority.

36 Set-off and netting

To what extent may creditors 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 general rule is that a creditor may exercise its right to set-off its claim after insolvency proceedings have been opened against the debtor, provided that the general terms of set-off are fulfilled and a set-off, therefore, was possible before proceedings were opened. However, if the debtor's claim against the creditor fell due before proceedings were opened, and the creditor's claim does not fall due until after proceedings were opened, the creditor is permanently deprived of the right to set-off.

37 Modifying creditors' rights

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

If the trustee finds that the creditor has filed its claim in a different priority than it should have, but the creditor disagrees, the trustee shall report the matter to the court (see question 35). If the creditor takes legal action within the three-week deadline set by the court, the court may change the priority of the creditor's claim if the court agrees with the trustee. If the creditor does not take legal action within the deadline, the claim and its priority will be treated in accordance with the trustee's recommendation.

38 Priority claims

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

Claims that have arisen after the opening of bankruptcy proceedings (eg, payment for a service requested by the estate) shall be covered before any creditors with dividend claims receive any distribution.

Employees' claims for unpaid wages, with certain limitations, rank first in priority. With mainly the same limitations and up to a certain maximum amount, outstanding wages will, in the event of a bankruptcy, be paid out to the employees by the Norwegian Wages Guarantee Fund (the Fund). The Wages Guarantee Fund then subrogates the employee's claim and becomes a creditor in the estate for the same amount that was paid by the Fund to the employee.

Certain tax and VAT claims rank second in priority. Remaining claims have no priority, except for interest accrued after the bankruptcy proceedings were opened and certain other claims, which have priority below all other claims.

Creditors with security for their claims will have priority to the assets in which they have security. Any part of a secured creditor's claim that is not covered by the realisation of such assets will be an unsecured claim in the estate and thus have no priority.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

In a liquidation proceeding, the bankruptcy estate automatically becomes a party to all employment contracts, unless it, within three weeks, expressly declares to the employees that it does not want to be a party to the respective contract. There are no bankruptcy specific employee claims that arise where employees are terminated during a restructuring or liquidation.

The procedures for termination in a restructuring are the same as outside a restructuring. The termination rules for employment contracts are more or less the same as outside a liquidation proceeding, and the estate must issue termination notices to each and every one of the employees.

40 Pension claims

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

Pension-related claims against an employer in insolvency proceedings are subject to more or less the same rules as claims for salary. Pension-related claims rank first in priority, with certain limitations, and will to an extent be covered by the Fund (see question 38).

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Any environmental problems that arose prior to the opening of insolvency proceedings are usually left with the debtor, and no liabilities are imposed on the insolvency administrator or estate. There could, however, be grounds for liability for the debtor's officers and directors. If environmental problems are caused by the bankruptcy estate, the estate or the insolvency administrator could be held liable, depending on the circumstances.

42 Liabilities that survive insolvency or reorganisation proceedings

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

Liabilities of personal debtors (ie, debtors that are not limited liability companies or other structures with limited liability), survive an insolvency or a reorganisation. This entails that the debtor's debt and liabilities do not go away when the proceedings are finalised. The debt may, however, be reduced or waived by the creditors as part of the process, or the debtor and its insolvency estate may carry out a compulsory composition, forcing a reduction of debt.

43 Distributions

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

Distributions to creditors may be carried out both during the proceedings and after the proceedings have been finalised. The main prerequisite for distributing dividend payments to creditors during the proceedings is that there must clearly be sufficient funds in the estate to make such payments. Prior to any distribution, the claims are tested (see question 35).

Security

44 Secured lending and credit (immovables)**What principal types of security are taken on immovable (real) property?**

The principal type of security taken on immovable (real) property is a mortgage. Ownership, encumbrances and certain other information about real estate is registered in public national registers, and a mortgage registered in such a register obtains legal protection and extinguishes any argument from a third party claiming to have been in good faith in assuming that the property was not encumbered upon purchase.

Standard forms (in Norwegian) are being used to register mortgages, pledges, etc, and the entire registration process can usually be done in a few days if urgent and handled by a professional. The fees for registering a security interest are very modest, ranging from approximately 500 to 2,000 kroner per asset. If a creditor has an adequate legal basis for legal enforcement, he or she can deliver a petition for an execution lien in the debtor's property.

With a few exceptions, any asset belonging to the debtor may be encumbered with an execution lien (see question 31).

45 Secured lending and credit (movables)**What principal types of security are taken on movable (personal) property?**

One cannot generally pledge 'everything that one owns or will own'. It is, however, possible to get a floating charge over certain categories of assets, including 'machinery and plant', 'inventory and stock', 'motor vehicles and construction machines' and 'trade receivables'. A floating charge is registered with a fixed maximum amount and includes all the company's assets within that category. Legal protection is obtained by registering the floating charge in the Norwegian Register of Mortgaged Movable Properties, which will also give protection against alleged bona fide acquirers. This public register also includes a registration of pledges in specified vehicles.

Pledges in assets that are registered in national registers have to be registered in the relevant register to obtain legal protection. The registration costs are low, and the process of registering the security interest usually takes from a few days to one or two weeks. As described in question 31, a creditor might be able to attach an execution lien to the debtor's assets. An execution lien may also be effectuated as attachment of earnings.

A vendor's fixed charge or retention of title may be agreed in more or less all types of movable property, to secure the purchase price and any interest and expenses related to the purchase of that specific asset. If the buyer finances the purchase with a loan that is paid directly from the lender to the seller as settlement of the purchase price, a vendor's fixed charge may also secure such loan. Such security cannot be agreed for assets registered in an assets register or assets that the buyer has a right to resell before they are paid. To obtain legal protection, a vendor's fixed charge or retention of title must be agreed between the seller and the buyer for that specific asset before the asset is handed over to the buyer. In a transaction between two professional parties, it is sufficient that such agreement is confirmed in writing without undue delay after the asset was handed over to the buyer. The agreement must state the purchase price and hence the size of the security.

Clawback and related-party transactions

46 Transactions that may be annulled**What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?**

There are several provisions regulating different kinds of transactions that may be annulled (eg, transactions considered to be extraordinary payments, gifts, security for old debt and certain cases of set-off). In general, the transaction in question must have been performed within three months prior to the date on which the court received the bankruptcy petition (for gift transactions, the general time limit is one year). However, older transactions may also be annulled if the beneficiary and the debtor were closely related parties (applying a two-year time limit), or if the beneficiary has not acted in good faith with regard to the

poor economic state of the debtor and the unfairness of the transaction (applying a more subjective element of assessment and a 10-year time limit).

The estate has one year from the opening of bankruptcy proceedings to forward an annulment claim. Such claims may only be attacked by a bankruptcy (liquidation) estate or by the debt negotiations committee in compulsory debt negotiation proceedings.

Generally, if a transaction is annulled, the receiving party of the transaction in question must return to the estate what was received from the debtor, or any enrichment it has obtained. If the receiving party is considered to have been in bad faith when the annulled transaction was carried out, the receiving party might have to indemnify the estate for the economic loss or any damages suffered as a result of the transaction.

Annulment may only be claimed by the administrator or trustee of either compulsory reorganisation proceedings or liquidation proceedings, and not by the creditors themselves.

47 Equitable subordination**Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?**

In general, there are no restrictions on such claims.

Groups of companies

48 Groups of companies**In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?**

Norwegian insolvency rules do not provide specific rules for insolvency in groups of companies. Each company is treated as a separate legal entity, and the proceeds of assets of the company are divided between the creditors of that legal entity.

49 Combining parent and subsidiary proceedings**In 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?**

In insolvency proceedings involving a corporate group, the proceedings in the parent and its subsidiaries are often combined in the sense that the same administrator is appointed for the separate proceedings. However, the decision of who to appoint as trustee is subject to the discretion of the court that opens the proceedings, and there is no automatic appointment of the same trustee for the insolvency proceedings of all companies in a group.

The assets and liabilities of companies in the same company group and under insolvency proceedings may not be pooled for distribution purposes; each estate handles its own assets, and distribution or dividend payment is done individually from each estate.

Specific legislation applies to banks and financial institutions (see question 2).

International cases

50 Recognition of foreign judgments**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?**

In April 2016, the Ministry of Justice and Public Security published a legislative proposal to add a chapter to the Norwegian Bankruptcy Act, with new provisions on cross-border insolvency matters. The chapter was added by an amending act dated 17 June 2016, but has not yet entered into force and as of mid-September 2018, no date has been set for when the new chapter will enter into force. The chapter includes provisions on both territorial and factual jurisdiction, choice of law rules, as well as recognition of foreign insolvency proceedings and the impact foreign proceedings shall have in Norway. When the new rules enter into force, the legislation on international matters, and especially those discussed in questions 50, 53, 54 and 55, will be somewhat different.

An insolvency proceeding in another country is in general not recognised by Norwegian courts unless that country has a mutual agreement with Norway. A Supreme Court decision from 2013, however, implies that although a foreign insolvency proceeding does not impose a stay on creditors' debt recovery proceedings against any assets the foreign debtor has in Norway, a foreign bankruptcy estate will be acknowledged in Norwegian courts as a representative for the common interests of the debtor's creditors. In other words, the foreign bankruptcy estate might, according to the decision, be treated equal to and have the same debt recovery possibilities as any other unsecured creditor of the debtor.

Foreign judgments or orders are recognised to the extent that they are subject to either the Lugano Convention or another convention or agreement between Norway and that state. In addition to the Lugano Convention, Norway is a party to the Nordic Convention on Bankruptcy, which, inter alia, regulates cross-border insolvencies within Norway and the other member states: Denmark, Sweden, Finland and Iceland. The Nordic Convention also has rules on recognition and enforcement as well as choice of law in various situations.

51 **UNCITRAL Model Law**

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model Law on Cross-Border Insolvency has not been adopted by Norway. There are, however, legislative changes in motion that to a large extent will implement elements from the UNCITRAL Model Law.

52 **Foreign creditors**

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors in a Norwegian insolvency proceeding are generally not treated differently from national creditors.

53 **Cross-border transfers of assets under administration**

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Norwegian law does not allow for a mere transfer of assets from an administration in Norway to an administration in another country.

54 **COMI**

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?

Under Norwegian law, a company's COMI is generally where the company has its registered main office or business address. However, if the company has its actual centre of business elsewhere, the COMI may be decided to be where the actual business is performed, instead of where the company has its registered address.

55 **Cross-border cooperation**

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?

Norway does provide for recognition of foreign insolvency proceedings where there is a mutual agreement in place between the states (see question 50). Domestic and foreign courts rarely cooperate. While lower courts in Norway have accepted the recognition of foreign proceedings, the Supreme Court refused recognition in a 2013 decision and ruled that acknowledgement of insolvency proceedings in another state must primarily be in accordance with mutual agreements or legislation.

56 **Cross-border insolvency protocols and joint court hearings**

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?

We are not familiar with cases where the Norwegian courts have communicated or held joint hearings with courts in other countries.



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

Insolvencies and reorganisations are regulated by Law No. 27809 (the Insolvency Law).

In August 2018, the Insolvency Law was amended by means of Law No. 30844. The amendments introduced by Law No. 30844 have been in force since 29 August 2018 and mainly refer to the term of liquidations as a going concern and the mechanisms for the sale of assets.

Finally, it should be considered that special insolvency legislation has been enacted in order to allow the restructuring of certain professional football clubs (Law No. 29862 and Law No. 30064) and this legislation is still ongoing.

2 Excluded entities and excluded assets

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

The following entities are excluded from the insolvency proceedings regulated by the Insolvency Law:

- entities that are part of the Peruvian state structure, such as public sector entities;
- private pension funds (Supreme Decree No. 054-97-EF);
- banks, financial institutions, insurance companies and other entities that are regulated by the General Law of the Financial and Insurance Systems (Law No. 26702); and
- certain special purpose vehicles or 'autonomous property' such as trusts, mutual funds and investments funds. Descendants' estates and community property are under the scope of the Insolvency Law.

Specific sectors have a special legal framework for insolvency cases such as the Patrimonial Protection Regime for sugarcane agrarian companies, which is regulated by Law No. 29299; and the insolvency of water and sanitation companies, which is regulated by Legislative Decree No. 1280.

Also, individuals that do not carry out business activities are excluded from the insolvency proceedings regulated in the Insolvency Law.

If an insolvent debtor has granted a guarantee related to a particular asset (rights in rem such as a pledge or mortgage) in favour of a third-party obligation, such a secured party can enforce its rights according to the respective agreement terms, independently of the fact that the guarantor (the insolvent debtor) is subject to an insolvency proceeding (the automatic stay will not be opposable against such secured party). Goods that are considered as unattachable property by the Civil Procedural Code (ie, state property considered of public use or public domain) will be exempt from creditors' claims.

3 Public enterprises

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

Government-owned enterprises are not subject to the Insolvency Law.

Pursuant to the National Fund for the Financing of State Business Activity (FONAFE) Guidelines approved by FONAFE's Board of Directors Resolution No. 001-2013/006-FONAFE (as amended), the liquidation proceeding of government-owned enterprises is carried out by a liquidator appointed by the shareholders' meeting and according to a liquidation agreement approved by the same shareholders' meeting. To the extent that the above-mentioned guidelines do not regulate all aspects of the liquidation proceeding of government-owned enterprises, the specific proceeding to be followed (and the remedies available to the creditors) will have to be determined on a case-by-case basis and based on the specific resolutions adopted by the shareholders' meeting and under some FONAFE decisions.

Notwithstanding the above, currently there are certain state-owned enterprises excluded from the FONAFE regulations. The insolvency proceedings of those enterprises are subject to the Insolvency Law.

4 Protection for large financial institutions

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

No. However, it should be noted that the Peruvian banking regulatory framework does contain specific prudential rules that apply to holding companies of financial institutions and insurance companies, which include consolidated capital requirements and consolidated risk management controls and supervision.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Peru has had an administrative insolvency system since 1992. The insolvency authority, the National Institute for the Defence of Competition and the Protection of Intellectual Property (INDECOP), is a public technical specialised agency of the executive branch, which through its Insolvency Commission (the Commission) deals solely with insolvency proceedings. INDECOP's second instance (which deals with appeals to the Commission's decisions) is the INDECOP's Tribunal (specifically, the Chamber Specialised in Insolvency Proceedings of the INDECOP's Tribunal).

Within an insolvency proceeding, the debtor, creditors holding allowed claims or third parties appearing at the proceeding have the right to file a reconsideration recourse before the Commission or an appeal before the INDECOP's Tribunal in order to challenge administrative resolutions issued by the Commission that resolve definitely on the merits. The reconsideration or appeal recourse will be admitted by the competent instance if the interested party is able to identify an error within the administrative resolution and the damage it causes.

The reconsideration recourse is supported on the existence of new evidence; while the appeal recourse is supported on a different interpretation of the existing evidence or the applicable laws. The reconsideration or appeal recourse must be filed within 15 business days from being notified with the relevant resolution.

Although courts do not participate directly in the insolvency proceedings, they are involved in certain aspects associated with the proceedings such as the following:

- courts are in charge of the processes for the avoidance of certain agreements entered into during the clawback and avoidance periods (see question 46);
- courts are competent to rule in contentious administrative judicial review proceedings in which INDECOPI's Tribunal decisions are challenged;
- courts are in charge of criminal law processes derived from insolvency-related crimes; and
- courts are competent to declare the bankruptcy of the debtor. Under the Insolvency Law, the term 'bankruptcy' is used only to describe the situation in which, after a liquidation proceeding, some creditors remain unpaid even though no assets remain.

The Insolvency Law contains specific provisions in order to restrain actions of creditors or debtors through courts (particularly through the commencement of constitutional proceedings such as the amparo proceeding) related to aspects that are exclusively in charge of INDECOPI.

No prior permissions are required to appeal or to challenge an administrative resolution within the term for such action.

The Insolvency Law does not establish any requirements to post security to file an appeal or reconsideration recourse.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

The Insolvency Law regulates two types of proceedings: the ordinary insolvency proceeding (ordinary proceeding) and the preventive insolvency proceeding (preventive proceeding).

Voluntary and involuntary liquidations and reorganisations can only be carried out under the framework of an ordinary proceeding. To initiate a voluntary proceeding, the debtor must comply with the following requirements: more than one-third of its outstanding obligations have been due for more than 30 calendar days or, alternatively; its accumulated losses minus its retained earnings exceed one-third of its paid-in capital. Note that if its accumulated losses minus its retained earnings exceed its paid-in capital, the debtor can only request its liquidation.

Formal requirements for the commencement of the proceeding include the presentation of a copy of the shareholders' meeting minutes with the shareholders' authorisation for the commencement of the proceeding and a copy of the last two years' financial statements. Currently, if the outstanding liabilities exceed 100 tax units (approximately US\$126,000), the financial statements shall be audited.

In addition, if the debtor is an individual, decedent's estate or community property, it will need to prove that more than 50 per cent of its income comes directly from its economic activity or more than two-thirds of its obligations were originated by its economic activity.

Even with the above-mentioned requirements, the creditors' meeting can decide to change a reorganisation to a liquidation and vice versa (certain special rules will apply).

It is important to distinguish between the effects of the commencement of the proceeding by the debtor (the filing of a petition before INDECOPI for the commencement of an ordinary proceeding) from the effects produced as of the date when the beginning of the insolvency proceeding is published in the Official Gazette (the 'bar date'). The effect of the filing of the petition is that such a date will determine the date that will be used to calculate the clawback and avoidance period terms (see question 46). The proceeding to finally obtain a formal decision of INDECOPI that declares the insolvency of the debtor and the corresponding publication of such a decision in the official gazette (the bar date) could take between three and six months.

From the bar date, an automatic stay is imposed (see question 21).

Any claim originated before the bar date will be considered a pre-publication claim. Only pre-publication claims are subject to the Insolvency Law rules, INDECOPI's venue and the terms and conditions of the reorganisation plan or liquidation agreement. In order to participate in the creditors' meeting, creditors must file a proof of claim before INDECOPI within 30 business days from the bar date. Only those creditors allowed by INDECOPI can participate in the creditors' meeting. Allowed claims will be paid before non-allowed claims either in a reorganisation or liquidation.

In the case of voluntary or involuntary liquidations, the creditors' meeting will mainly designate a liquidator (who must be a liquidator registered before INDECOPI), approve a liquidation agreement and decide if the debtor can carry out business during the liquidation as a going concern (the maximum term for this type of liquidation is one year, extendable for one additional year). Also, pursuant to Law No. 30844, enacted in August 2018, the creditors' meeting is allowed to grant an extraordinary extension of two additional years to the maximum term for liquidations as going concern if the following requirements are met: (i) debtor have been under liquidation as a going concern when such law entry into force; and (ii) debtor is a holder of any public concession.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Ordinary proceeding

For general requirements and effects, see question 6.

According to the Insolvency Law, the decision to reorganise a debtor will be exclusively in the hands of the creditors' meeting. The creditors' meeting shall approve a reorganisation plan within 60 business days from its decision to reorganise the debtor. The decision to reorganise the debtor and the approval of a reorganisation plan must be approved by more than 66.6 per cent of the allowed claims (in the first call of the creditors' meeting) or more than 66.6 per cent of the allowed claims attending in the creditors' meeting (in the second call).

Whenever the allowed related creditors amount to more than 50 per cent of allowed claims, any decisions pertaining to either the approval of the reorganisation or liquidation of the debtor or the approval of the liquidation agreement, reorganisation plan (and its amendments) and debt financing arrangements (in the case of preventive proceedings) must be voted separately by the related party creditors and the non-related creditors. In these cases, such decisions will be deemed approved if the aforementioned majorities are met in both the related and non-related creditors' meetings.

All allowed creditors (whether secured or not) participate in the creditors' meeting on an equal footing as the participation of each creditor is determined not by their payment priority order, but by the percentage that their allowed claims represent with regard to the total amount of the allowed claims. The reorganisation plan must satisfy certain requirements, such as containing a payment schedule that comprehends all of the insolvency claims (whether allowed or not) and a provision that states that at least 30 per cent of all funds used to pay pre-publication claims on an annual basis, will be used to pay labour claims.

During the reorganisation proceeding, the creditors' meeting may decide to keep the debtor 'in possession' or replace, partially or totally, the debtor's management. The creditors' meeting replaces the shareholders' meeting in its duties and rights. The reorganisation process does not end until the Commission verifies that all claims (allowed or not) have been paid, which, in practice, means that the debtor will remain under the regulations of the Insolvency Law for the maximum term established in the reorganisation plan for the payment of pre-publication claims.

Preventive proceeding

The preventive proceeding is conceived as a fast-track proceeding that can only be initiated by the debtor (voluntary proceeding). The preventive proceeding is a mechanism that is useful for debtors when anticipating a financial crisis. It may only be initiated if the debtor does not meet the requirements to be granted access to a voluntary ordinary proceeding. In this type of insolvency proceeding, creditors can only approve or reject a Global Refinancing Agreement, under which the

payment of the debtor's obligations is rescheduled. Automatic stay is available upon the debtor's request.

8 Successful reorganisations

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

Within a reorganisation proceeding, the priority order detailed in question 38 shall not apply. The creditors' meeting can establish different classifications based on reasonable economic criteria, specific characteristics of the creditors and their roles in the success of the reorganisation plan. However, when the debtor's assets are sold under the reorganisation proceeding, the applicable priority order established in question 38 will apply for the proceeds.

The Insolvency Law does not contain any provision that allows the creditors' meeting to release non-debtor parties from liabilities. In any case, the validity and legality of any such release would have to be determined on a case-by-case basis.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

For general requirements and effects, see question 6.

For a creditor to initiate an involuntary proceeding, it must prove that its outstanding credit exceeds 50 tax units (approximately US\$63,000) and that such amount has been due for more than 30 calendar days.

The Insolvency Law allows creditors to initiate an insolvency proceeding against debtors that have already initiated a liquidation under the General Corporations Law (in which case the liquidation under the General Corporations Law will be stayed during the duration of the insolvency proceeding).

Under certain circumstances (ie, when the creditors' meeting fails to approve a reorganisation plan within the time limits established in the Insolvency Law), the Commission can declare the liquidation of the debtor. However, the creditors' meeting is allowed to revert such decision and resolve to submit the debtor to a reorganisation process.

Once the proceeding is opened, involuntary liquidation does not present material differences with proceedings opened voluntarily.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

See questions 6 and 7.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

There are no pre-packaged reorganisations. The most expeditious insolvency proceeding under the Insolvency Law is the preventive proceeding (see question 7).

12 Unsuccessful reorganisations

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 reorganisation plan must be approved by more than 66.6 per cent of the allowed claims (in the first call of the creditors' meeting) or more than 66.6 per cent of the allowed claims attending in the creditors' meeting (in the second call). The creditors' meeting shall approve a reorganisation plan within 60 business days from its decision to reorganise the debtor. If the creditors' meeting fails to approve such

reorganisation plan within the mentioned time limit, the Commission can declare the liquidation of the debtor. However, the creditors' meeting is allowed to revert such decision and resolve to submit the debtor to a reorganisation process.

If the debtor fails to perform the reorganisation plan, the Commission can declare its liquidation.

13 Corporate procedures

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

The General Corporations Law establishes a corporate procedure in order to liquidate a company.

The main differences between such procedure and the liquidation proceeding regulated in the Insolvency Law are that the decision to liquidate the company is always in the hands of the shareholders that will remain in control of the company throughout the procedure (there is no creditors' meeting). Any individual or company can be appointed as liquidator, there is no automatic stay, there is no proof of claims proceeding, there are no clawback or avoidance periods and there is no participation of INDECOPI at all. Note that creditors are able to initiate an ordinary insolvency proceeding (under the insolvency of companies that are already under a liquidation proceeding under the General Corporations Law, in which case such liquidation proceeding will be stayed during the duration of the insolvency proceeding).

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Reorganisations

When all pre-publication claims (allowed or not) are paid according to the reorganisation plan terms, INDECOPI grants a decision declaring the formal conclusion of the reorganisation proceeding.

Liquidations

If all creditors are paid, the liquidator files a petition before the Public Registry in order to register the extinction of the company. If creditors remain unpaid after the liquidation of all the debtor's assets, the liquidator will file a petition before a civil judge in order to obtain a judicial bankruptcy declaration. Such a declaration is published in the official gazette for two consecutive days. After the publication, the 'extinction of the debtor's patrimony' is registered in the Public Registry.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

The Insolvency Law does not provide a particular definition for 'insolvency'.

However, it establishes different requirements to commence voluntary or involuntary insolvency proceedings, which could be assimilated to the criteria applicable to determine if a debtor is insolvent. For requirements of each particular type of insolvency proceeding see questions 6, 7 and 9.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

The Insolvency Law does not contain regulations that establish the mandatory commencement of insolvency proceedings.

However, the General Corporations Law provides that the board of directors is obliged to inform the shareholders immediately when it becomes aware or suspects the existence of losses in excess of 50 per cent of the company's share capital. Moreover, if the assets of the company are insufficient to cover its obligations or if such insufficiency is suspected, the board should immediately summon the shareholders for a shareholders' meeting to inform them of the situation and, within 15 calendar days of such a summons, notify the company's creditors and commence an insolvency proceeding according to the Insolvency Law provisions.

Moreover, pursuant to the General Corporations Law, if the company suffers losses that reduce its net patrimony to less than one-third of its paid-in share capital, the company must be dissolved and liquidated (under the rules set out in the General Corporations Law).

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

If the board of directors does not comply with the obligations described in question 16, the directors may be liable before the company, the shareholders and third parties for any proven damages and losses caused as a consequence of such a breach. Any such liability would have to be reviewed by the judiciary on a case-by-case basis.

In cases where the company continues in business despite incurring in a dissolution cause, officers and representatives of the company may be held personally and jointly liable (with the company) for the agreements and acts entered into since incurring in a dissolution cause.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Pursuant to the General Corporations Law, corporate officers and directors are liable before the corporation, the shareholders and third parties for any damages arising from the non-compliance of their obligations or the performance of acts (resulting from the agreements adopted with their votes in the case of directors) against the law, the by-laws, acts of fraud, gross negligence or those resulting from the abuse of their faculties.

Particularly, the general manager (CEO) is subject to criminal responsibility, in addition to civil liability.

Managers may be jointly and severally liable with the companies before the tax authorities when tax debts are not paid because of a manager's gross negligence, fraudulent acts with the intent to cause harm or abuse of powers. Gross negligence, fraudulent acts with the intent to cause harm and abuse of powers are presumed by the law for several actions and cases expressly specified in article 16 of the Tax Code, such as the lack of an accounting system in a company, or such a company not being registered before the tax authorities, among others.

The Insolvency Law does not establish sanctions for officers and directors (eg, disqualification).

The Criminal Law Code establishes criminal responsibility for management (liquidators and creditors can also be responsible in certain circumstances) if they engage in certain conduct associated with insolvency scenarios (eg, concealment of property, simulation of debts, among others).

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Duties that directors owe to the corporation do not shift to the creditors when an insolvency or reorganisation proceeding of the debtor is likely.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Before the creditors' meeting is convened, directors and officers can exercise the ordinary powers and faculties inherent to their positions. However, the Insolvency Law has identified certain actions that may be declared void if taken during the avoidance period (see question 46).

In a reorganisation scenario, the administrator may replace the debtor's management partially or totally. Ultimately, all directors and managers cease their functions.

In a liquidation scenario, the liquidator replaces the debtor's management once the liquidation agreement is approved and executed by the creditors' meeting. At this time, all directors and managers cease their functions.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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 bar date, all obligations of the debtor become temporarily unenforceable. The automatic stay suspends enforcement of any pre-publication claim against the debtor's estate until a reorganisation plan or liquidation agreement is approved. In addition, from the bar date, all execution proceedings for collection as well as injunctions (related to pre-publication claims) against the debtor's estate are stayed. Certain special rules apply regarding guaranties over perishable goods and warrants (see question 30).

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

Under a reorganisation proceeding, the debtor will always be allowed to carry on its business activities subject to the limitations that the reorganisation plan or the creditors' meeting may impose.

Under a liquidation proceeding, the general rule is that the debtor will not be allowed to carry on their business activities once the creditors' meeting approves a liquidation agreement. However, the creditors' meeting can decide to carry out business during the liquidation as a going concern for a limited term (see question 6).

The Insolvency Law does not establish any special treatment to creditors who supply goods or services during the reorganisation. Special treatment for those creditors is usually established in the reorganisation plan for the credits originated before the bar date (eg, for their pre-publication claims, not for the new credits that might be provided to the debtor during the reorganisation).

In general, the role of creditors (through the creditors' meeting) is central during the whole insolvency proceeding. The creditors' meeting replaces the shareholders' meeting, has the right to designate and replace the debtor's administration or liquidator, modify its by-laws, designate directors, approve mergers and any other agreement needed.

INDECOPI is not directly involved in the supervision of the debtor's business activities. However, the debtor's administration or liquidator is obliged to file quarterly reports to INDECOPI regarding the principal aspects related to the business and the compliance of the reorganisation plan or liquidation agreement. INDECOPI can impose fines if such reports are not filed.

23 Post-filing credit

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

In the case of reorganisation proceedings, a debtor may obtain loans and grant guarantees provided that such agreements are approved by the creditors' meeting or through the reorganisation plan. Any credit obtained by the debtor after the bar date will be considered as a post-publication claim and will not be included in the reorganisation proceeding. Those new credits will be part of the insolvency proceeding only if the debtor ends up being liquidated and will not have any particular priority or privilege in the liquidation proceeding.

Provided that a liquidation as a going concern has been approved by the creditors' meeting, loans or credits originated during that period

(and related to the continuity of activities of the debtor) will be considered as expenses of the liquidation and will have priority over all other claims.

24 Sale of assets

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 the case of reorganisations, the sale of fixed assets requires approval of the creditors' meeting or an authorisation through the reorganisation plan, in the event that the debtor's management does not already have express faculties to sell fixed assets. There are no provisions for the purchaser to acquire the assets 'free and clear' of claims. Finally, there are no express legal restrictions for selling the entire business in a reorganisation (provided that the creditors' meeting has approved the agreement), nonetheless, in our opinion, depending on the particular characteristics of the agreement, post-publication creditors and shareholders could challenge such kinds of agreements before the judiciary. A case-by-case analysis would be required.

In the case of liquidation proceedings, it is possible to sell specific assets or the entire business as a going concern. In both cases, the purchaser will acquire the assets 'free and clear' of liens as it is expressly stated in the Insolvency Law.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

'Stalking horse' bids are not expressly regulated in the Insolvency Law. During reorganisation or liquidation proceedings, the creditors' meeting can establish the procedure for the sale of assets in the reorganisation plan or liquidation agreement. In this respect, it can establish 'stalking horse' bids in sale procedures (no restrictions apply). However, during a liquidation proceeding, if the debtor's assets are subject to precautionary measures, charges or liens, such assets can only be sold in public bids, which shall be carried out by a public auctioneer, except that, after three calls for such public bid, it would not have been possible to carry out the same, in which case, the creditor's meeting may opt for a direct sale, private or public auction.

Credit bidding in sales is not expressly regulated in the Insolvency Law. During reorganisation or liquidation proceedings, creditors can make payments of the purchase price by reducing the amount of its claims against the debtor. There are no restrictions in case the credit bidder is an assignee of the original secured creditor, as pursuant to the Insolvency Law, the transfer of a claim entails the transfer of its corresponding order of priority.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 Law does not entitle the debtor to terminate or reject contracts, unfavourable or not, to which it is a party. Such decisions are up to the debtor's administration or liquidator on case-by-case basis. Similarly, any breach of contract occurring after the bar date shall be governed by the provisions of the contract.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The Insolvency Law does not contain special provisions associated with IP rights. Parties' rights and relations will be governed by the corresponding contract.

28 Personal data

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

The Insolvency Law does not contain any special provisions in relation to the use or transfer of personal information or customer data within an insolvency proceeding. However, the Personal Data Protection Law, Law No. 29733, which regulates the treatment of personal and sensitive data, does contain general provisions regarding the use and transfer of said information.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Pursuant to the Insolvency Law, insolvency proceedings cannot be carried out through arbitration proceedings. INDECOPI is the only competent authority to administer insolvency proceedings involving debtors domiciled in Peru. Arbitration is expressly allowed for disputes arising from the reorganisation plan or liquidation agreement. Note that besides there is no provision in the Insolvency Law that expressly establishes the exclusive role of INDECOPI on this issue, through Resolution No. 2311-2013/SDC-INDECOPI, INDECOPI has indicated that has exclusive jurisdiction to determine whether a default under a reorganisation plan has occurred. In this respect, the existence of a default under an ordinary reorganisation plan may not be arbitrated.

If a party on an ongoing arbitration is subject to an insolvency proceeding, the arbitration will continue in order to determine (through an award) the existence and amount of any pre-publication obligation of the insolvent party. The creditor shall register the controversy with the Commission through a proof of claims proceeding. Because of the insolvency proceeding effects, the award will not be enforceable against the debtor. The creditor who obtains a favourable award establishing a credit against the insolvent debtor shall file the award with the Commission in order to vary its credit status from 'contingent' to 'allowed'.

Creditor remedies

30 Creditors' enforcement

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 general rule is that from the bar date, all proceedings (associated with pre-publication claims) related to seizures or attachments of the debtor's assets are suspended. However, special regulations apply in the case of perishable goods (the goods can be sold but the proceeds shall be put at the disposal of the new administration or liquidator). Special regulations also apply in the cases of warrants granted to entities that are regulated by the General Law of the Financial and Insurance Systems.

Note that if the insolvent debtor has granted a guarantee related to a particular asset (rights in rem such as a pledge or mortgage) in favour of a third-party obligation, such a secured party can enforce its rights according to the respective agreement terms, independently of the fact that the guarantor (the insolvent debtor) is subject to an insolvency proceeding (the automatic stay will not be opposable against such secured party).

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Prior to the initiation of an insolvency proceeding, unsecured creditors can initiate judicial proceedings to obtain payment of their credits. Seizures and attachments, including pre-judgment attachments, are available in all types of judicial proceedings initiated for such a purpose.

If seizures or attachments over debtor assets are granted by a court (and are formally registered prior to the bar date), in practice, the creditor will become a third priority order creditor.

As mentioned in our answer to question 21, as of the bar date all obligations of the debtor become temporarily unenforceable and all execution proceedings for collection as well as injunctions (related to pre-publication claims) against the debtor's estate will be stayed.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

The first notice that creditors receive is the publication in the official gazette informing that the debtor has been declared insolvent. Various other notices could be given to creditors throughout the proceeding, including, but not limited to, the approval or refusal of their proofs of claim, the date and time of any creditors' meeting, and any disputes against their proofs of claim, among others.

There is no limitation on the number of times that a creditors' meeting can be held. The meetings held during an ordinary proceeding include the meeting to approve the debtor's reorganisation or liquidation, the meeting to approve the debtor's reorganisation plan or liquidation agreement; and the meeting to ratify or replace the debtor's administrator or liquidator. The creditors' meeting shall appoint a creditor to act as president, who will be in charge of calling the meetings; creditors representing 10 per cent of allowed claims can also request a creditors' meeting to the president of the creditors' meeting, and if the president does not comply with such request, to INDECOPI.

All allowed creditors have access to the files of the proceeding (including other creditors' files and those containing information filed by the debtor).

The debtor's administration or liquidator is obliged to file quarterly reports to INDECOPI on the principal aspects of the business and the compliance of the reorganisation plan or liquidation agreement.

In general, the debtor's administration or its liquidator has the right to pursue the estate's remedies against third parties. However, please consider that the Insolvency Law expressly authorises creditors to pursue the estate's remedies in connection with claims regarding the avoidance and clawback periods (see question 46); and, pursuant to article 1219.4 of the Peruvian Civil Code, creditors are entitled to enforce its debtor's rights (or assume its defence) without requiring previous judicial authorisation. Although the Insolvency Law does not contain references to this specific action, we do not see limitations for it being utilised by creditors in the context of an insolvency proceeding. The fruits of any of these remedies will belong to the debtor.

33 Creditor representation

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 ordinary proceedings, the creditors' meeting may designate a creditors' committee from within its members and delegate all its powers, with the exception of the power to decide on the reorganisation or liquidation of the debtor and the power to approve the reorganisation plan or liquidation agreement (and their amendments). The creditors'

committee shall be conformed by four members (creditors) each representing, if possible, different types of credits. The president of the creditors' meeting shall also preside the creditors' committee.

The committee members will be liable before creditors, shareholders and third parties for any damage caused through the approval or execution of agreements or contracts that violate the law or the debtor's by-laws, or are incurred with deliberation, gross negligence or abuse of their faculties.

There are no limitations for the committee members to retain advisers; however, their expenses shall be funded by the creditors that are members of the committee (not by the debtor).

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

See question 32.

35 Claims

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

To be allowed to participate in the ordinary or preventive proceedings, pre-publication creditors shall file before INDECOPI their proofs of claim, in writing within 30 business days from the bar date. With exception of labour credits, creditors must pay an administrative fee to INDECOPI in order for such entity to process, evaluate and – as the case may be – allow their claim.

Claims filed after the referred period will be allowed by INDECOPI but will not be entitled to vote in the creditors' meeting unless the debtor ends up being liquidated. It should be noted that if a creditor does not file a proof of claim, the payment of its credit, either in a reorganisation or liquidation or in a preventive proceeding, will be subordinated to the payment of all allowed claims (independently of its priority). Special provisions apply in the case of labour claims.

If INDECOPI disallows the creditor claim, the creditor has the right to file a reconsideration recourse before the Commission or an appeal before INDECOPI's Tribunal. Contentious administrative judicial review proceedings can be commenced in order to challenge INDECOPI's Tribunal decisions (special procedural rules will apply).

Contingent creditors who file their proof of claim will be registered by INDECOPI as such. Although contingent creditors who filed their proofs of claim within 30 business days after the bar date can attend (and participate in) the creditors' meetings, their voting rights will be suspended until their claims stop being contingent (that is, until the pending judicial, administrative or arbitral proceeding comes to an end with a favourable result for the creditor) and are allowed by INDECOPI.

The transfer of claims is expressly allowed by the Insolvency Law (no restrictions apply). The creditor that transfers its claim shall inform INDECOPI of the transfer.

Claims acquired at a discount value can be enforced for their full-face value. It is also important to note that, pursuant to the Insolvency Law, the transfer of a claim entails the transfer of its corresponding order of priority.

In reorganisation proceedings, creditors holding pre-publication claims can only claim interests accrued until the bar date. Interests of pre-publication claims accrued from the bar date forward will be governed by the provisions of the reorganisation plan. In liquidation proceedings, creditors may claim interests accrued before and after the bar date. However, interests accrued after the bar date will be governed by the provisions of the liquidation agreement.

36 Set-off and netting

To what extent may creditors 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 Insolvency Law has established a ban on compensations or set-offs by declaring that compensations entered into by a debtor during the avoidance period (as defined in question 46) may be declared void by the judiciary (it does not require a cause). Moreover, given that from the bar date, the debtor's obligations will be unenforceable, it will not be possible to offset pre-publication credits against the debtor.

In the case of reorganisations, the reorganisation plan could establish mechanisms that allow extinguishing obligations through set-offs.

37 Modifying creditors' rights

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

INDECOPI does not have the faculty to change the rank of a creditor's claim. However, creditors (different from labour and tax creditors) can waive their priority.

38 Priority claims

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

Within a liquidation proceeding, the liquidator must mandatorily pay the allowed claims in the following priority order:

- first: labour claims (included pension claims);
- second: alimony claims (applicable only when the insolvent is an individual);
- third: secured claims (ie, creditors secured by mortgages, pledges, attachments, seizures or precautionary measures);
- fourth: tax claims; and
- fifth: non-secured claims.

This order of precedence is not of mandatory application in reorganisations and preventive proceedings. Although, when fixed assets are sold during a reorganisation, the priority (rank) applicable in a liquidation proceeding will apply for the payment of the proceedings of such sale.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

The Insolvency Law does not provide any particular regulation that allows the termination of employment contracts in a reorganisation context (nor in preventive proceedings).

In a liquidation context, the Insolvency Law contains provisions that allow the debtor to terminate labour contracts in a collective manner. Labour credits that arise after such termination will have priority (first priority) in the liquidation proceeding.

The priorities granted to labour credits are expressly recognised in the Peruvian Constitution, which establishes a super-priority for such type of credits.

40 Pension claims

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

Pension-related credits have the same priority as labour credits (first priority). However, commissions owed by the debtor to private pension fund have a fifth order in priority.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The Insolvency Law does not contain any provision regarding environmental problems and liabilities. Such obligations and liabilities will continue to be governed by the applicable environmental regulations. To the extent that they qualify as pre-publication claims, credits derived from environmental liabilities should be allowed as unsecured claims within the proceeding (unless that prior to the bar date, the environmental authority obtained a security or collateral – such as an attachment or seizure – to secure the payment of such claim, in which case it should be allowed as a secured claim).

Remediation liabilities and responsibilities shall be analysed on a case-by-case basis.

42 Liabilities that survive insolvency or reorganisation proceedings

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

In reorganisation, post-publication credits will 'survive' the proceeding as those credits are not part of it. As mentioned in question 14, a reorganisation concludes with the payment of all pre-publication claims.

After the conclusion of the liquidation, creditors may enforce their credits against the liquidator only if the liquidator is responsible for the lack of payment. Such a responsibility shall be established in a judicial proceeding. Without prejudice to statute of limitation regulations, credits will not be technically extinguished after the conclusion of the liquidation proceeding and the extinction of the debtor.

43 Distributions

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

Liquidations

The exact terms of how and when the distributions shall be made will be established in the liquidation agreement. The liquidation agreement shall respect the general framework for distributions in liquidation proceedings established in the Insolvency Law. Besides the priority order mentioned in question 38, the following principal rules apply:

- the liquidator shall start making payments to the creditors when at least an amount equivalent to 10 per cent of the total allowed claims has been obtained through the sale of the debtor's assets;
- the liquidator shall first pay the allowed credits, respecting the priorities established in the Insolvency Law;
- labour credits shall be paid *pari passu* taking into consideration the percentage that each labour credit represents in relation to the total amount of credits incorporated in the class; and
- all other credits (different from secured credits) shall be paid *pari passu* in relation to the credits incorporated in each class.

Secured credits shall be paid with the proceeds of the foreclosure of their respective collateral, unless such collateral has been sold and the proceeds have been used to pay labour or alimony claims (which are senior in relation to the secured creditor). In those cases, all the creditors that hold collateral participate *pari passu* in relation to their contribution for the payment of the credits ranked above them. If there should be any unpaid remnant, such amount is paid *pro rata* with non-secured claims.

Reorganisations

Distributions to creditors within a reorganisation process shall be made in accordance with the payment schedule and dispositions or terms set for each class of creditors (such as interest payments) contained in the reorganisation plan approved by the creditors' meeting. Also, such payment schedule must contain a provision that states that at least 30 per cent of all funds used to pay pre-publication claims on an annual basis will be used to pay labour claims. Labour claims shall be paid equally within the number of creditors holding labour claims. On the other

hand, creditors holding tax claims shall be paid in accordance with the conditions set for the class with the most allowed claims.

Security

44 Secured lending and credit (immovables)

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

The principal securities over immovable property are mortgages. The creation of a mortgage requires the execution of a public deed before a public notary and its registry before the Public Registry.

Immovable property can also be transferred to trusts under the provisions of the General Law of the Financial and Insurance Systems (also created by means of public deed and subject to registration before the Public Registry). The trust estate is autonomous and independent and is not subject to the insolvency risk of any of the parties. However, trusts can be put under scrutiny pursuant to the clawback and avoidance periods regulated under the Insolvency Law (see question 46). Moreover, pursuant to the General Law of the Financial and Insurance Systems, the transfer of assets to a trust can be annulled when such transfer is made incurring in creditors' fraud. The action for this annulment prescribes after six months following the publication of the creation of the trust in the Official Gazette.

45 Secured lending and credit (movables)

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

The principal security devices relating to movable property are asset pledges and trusts (under the same principles explained in question 44). Asset pledges are opposable to third parties only if a public instrument has been duly filed and registered before the Public Registry.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Under the Insolvency Law, once the debtor files for its insolvency, or is given notice of an involuntary filing, all actions by management during the previous year (clawback period) and from that date on and until the date the creditors ratify or replace management (avoidance period) are put under scrutiny with two different tests. These tests may result in such actions being declared void.

The first test covers all actions or transactions, whether for consideration or not, performed during the clawback period. These actions will be declared void if they have a negative effect on the net worth of the company and are not related to the ordinary course of business of the debtor (both requirements must be met).

It is important to mention that there is no consensus on the definition of 'ordinary course of business'. In our opinion, the requirement shall be interpreted as widely as possible. The regular activities of the debtor shall not be restricted to the debtor's corporate purpose but shall be understood as all the usual and typical activities performed by the debtor - not only those that are expressly contained in its corporate purpose - or, in any case, all those activities that other companies from the same industrial sector usually perform.

The second test covers the following actions by management if they happen during the avoidance period:

- payment of unmatured obligations;
- payment of mature obligations not made according to their terms;
- contracts for consideration that are not in the ordinary course of business;
- compensations (set-offs) among mutual obligations with creditors (see question 36);
- liens over, or transfers of, property;
- liens created in security of obligations incurred before insolvency;
- foreclosure on liens and attachments; and
- mergers and spin-offs if they have a negative effect on the net worth of the insolvent.

After declaring an act or contract void, the court will order the return of the property to the insolvent party or the termination of the lien, as the case may be.

An action against a particular act or contract may be brought before a court only by the designated administrator, replacing management or by any creditor holding an allowed claim.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There are no restrictions for insider creditors obtaining the allowance of their credits by INDECOPI. However, when deciding to allow a proof of claim filed by an insider creditor, INDECOPI must verify the existence, legitimacy and amount of the alleged claims by all means it deems appropriate (the highest standard of proof applies). See question 7 in relation to special provisions applicable if the total amount of insider credits exceeds 50 per cent of the total amount of allowed credits.

Groups of companies

48 Groups of companies

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

There are no regulations establishing that parent or affiliated companies are responsible for subsidiaries' nor affiliates' liabilities.

49 Combining parent and subsidiary proceedings

In 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?

The Insolvency Law does not recognise corporate group insolvency. Hence, for a Peruvian company to be declared insolvent, it is required that the company, individually, satisfies the insolvency criteria under the Insolvency Law to be declared insolvent (either through a voluntary or involuntary request), none of which relates to insolvency of a shareholder, a subsidiary or any related party to the insolvent company.

International cases

50 Recognition of foreign judgments

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?

Recognition and relief for foreign insolvency proceedings is available provided that the debtor is not domiciled in Peru. An exequatur proceeding is commenced (before the judiciary) if there are assets of the foreign debtor located in Peruvian territory. The competence of the Peruvian authorities is exclusively related to the assets located in Peruvian territory.

After the judicial recognition is granted, an ancillary insolvency proceeding will be commenced before INDECOPI according to the rules settled in the Insolvency Law (publication in the official gazette, proofs of claims, creditors' meeting, etc).

In cases in which a treaty exists, such a treaty shall be applied. Peru is signatory of the following treaties related to recognition of foreign judgments and international insolvency: the Montevideo Treaty (1889), the 1928 Havana Convention (Bustamante Code), and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979).

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model Law on Cross-Border Insolvency has not been adopted and, to the best of our knowledge, it is not under consideration

at this moment in Peru. Current legislation regarding international insolvency scenarios is principally contained in the 1984 Civil Code and the Insolvency Law.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

There are no special proceedings nor impediments nor protections applicable to foreign creditors. Foreign creditors have the same rights as national creditors regarding a request for the commencement of an insolvency proceeding and their participation therein.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

If no creditors requested payment in Peru or if after paying those creditors who requested payment there were proceeds obtained from the foreclosure of the assets, such proceeds should be sent to the foreign administrator only if, previously, the foreign administrator obtained a judicial recognition (by a Peruvian judge) of the existence of credits in the foreign jurisdiction.

54 COMI

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 Law does not provide any kind of test to determine the COMI. For purposes of determining the competence of INDECOPI's offices in Peruvian territory, the Insolvency Law establishes that companies are domiciled where it is stated in their respective by-laws duly registered in the Commercial Public Registries. As previously mentioned, the Insolvency Law does not recognise insolvency proceedings of a corporate group.

55 Cross-border cooperation

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?

There are no legal provisions that allow cross-border cooperation.

56 Cross-border insolvency protocols and joint court hearings

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?

There are no legal provisions that allow cross-border insolvency protocols and joint court hearings.

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

Insolvency proceedings in Portugal are mainly regulated by the Portuguese Insolvency and Recovery Code (the CIRE) and the Regulation (EU) 2015/848 of the European Parliament and the Council on Insolvency Proceedings (the EU Regulation).

2 Excluded entities and excluded assets

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

The following entities are excluded from insolvency proceedings: public entities and public enterprises, insurance companies, credit institutions, financial companies, investment firms providing services involving the holding of funds or securities of third parties and collective investment undertakings, in so far as the submission to insolvency proceedings is incompatible with the special schemes provided for such entities.

There is special legislation applicable to credit institutions as detailed in question 4.

Assets that cannot be seized are excluded from insolvency proceedings, namely: inalienable rights and items, assets in the public domain, objects whose apprehension would offend morals or that have an irrelevant economic value, religious objects, and, unless indicated by the insolvent him or herself, instruments that are indispensable to its activity (unless seized as part of a commercial establishment) and a part of a salary that is an indispensable means of subsistence (for natural persons).

3 Public enterprises

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

Public enterprises are excluded from the scope of application of the CIRE and cannot be subject to insolvency proceedings. However, this exception does not apply to municipal companies as they are considered private legal persons according to Law No. 50/2012 and, so far, one municipal company has been declared insolvent. Creditors of public enterprises can make use of normal enforcement proceedings to obtain payment.

4 Protection for large financial institutions

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

In addition to the EU legislation adopted in relation to the Single Supervisory Mechanism and the Single Resolution Mechanism for banks, namely, Regulation (EU) 806/2014 (the Single Resolution Mechanism Regulation) and Regulation (EU) 1024/2013 (the Single

Supervisory Mechanism Regulation), the settlement system for Portuguese credit institutions is governed by the provisions of Decree-Law No. 199/2006.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The commerce court within the territory of which the debtor's head office or centre of main interest is situated is the court with jurisdiction to open insolvency proceedings. Decisions by this court of first instance can be appealed to the corresponding court of appeal if the insolvency proceeding has a value of over €5,000. Awards of the court of appeal can only be appealed to the Supreme Court if there is a contradiction between different awards of the courts of appeal or between those and an award of the Supreme Court.

As a rule, these appeals will not suspend the execution of the appealed decision, unless the appellant posts a security, with an amount determined by the court.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

The voluntary liquidation of a company can be obtained through the initiation of insolvency proceedings, given that the requirements for a declaration of insolvency are met (see question 16). Under the CIRE, insolvency proceedings can be aimed at enabling payment to the insolvent's creditors through the implementation of an insolvency plan or at the liquidation and judicial sale of the insolvent's assets. If a debtor initiates insolvency proceedings and does not propose to present an insolvency plan, the creditors can decide to close down the company and proceed to liquidation of its assets.

In this case, the proceeding is initiated with the filing of a written petition by the debtor requesting that the court declare its insolvency, which it must do immediately. In its decision, the court will nominate an insolvency administrator, deadline for the creditors to file their claims and schedule a creditors' general meeting. As a rule, the pending enforcement proceedings filed against the debtor or other proceedings affecting the debtor's assets are suspended and the debtor's assets at the date of declaration of insolvency are seized, as well as any assets and rights obtained by the debtor while the insolvency proceeding is pending. In the creditors' general meeting, the insolvent must request that the proceeding goes to the liquidation phase, with the sale of the assets.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Once a company is declared insolvent, the insolvency proceedings can be used to restructure the company. In this case, the debtor can initiate

the proceeding and make a request to present an insolvency plan for approval. This must be done in the first creditors' general meeting and is subject to approval by the creditors, who also take into consideration when deciding the report of the company's financial situation and assets produced by the court-appointed administrator. Note that the initiation of an insolvency proceeding produces a standstill effect on pending enforcement proceedings and operates the transfer of the administration of the company to the court-appointed insolvency administrator, as described in question 6.

Further, Portuguese Law provides for two Special Proceedings: The Special Revitalisation Proceeding (PER) and the Special Payment Agreement Proceeding (PEAP). The PER is intended to allow companies in difficult financial situations to renegotiate their debts with all creditors and to prepare recovery plans, without being declared insolvent. The proceeding commences by filing the following with the court: a written statement signed by the company and at least 10 per cent of its non-subordinated creditors, announcing they have begun negotiations in order to approve a recovery plan; a statement signed by a certified accountant or by a statutory auditor written no more than thirty days prior, attesting that the company is not insolvent; and a statement signed by the company assuring its ability to be recovered.

The PEAP on the other hand is aimed at similar situations but the debtor is not a company. In this case the debtor and at least one of its creditors must sign a written statement expressing their willingness to enter into negotiations to conclude a payment agreement.

Thereafter, in both proceedings, the court issues a judicial order appointing an administrator and creditors are granted a 20-day deadline to claim their credits. The debtor will have a period of two months (extendable for an additional period of one month) to conclude negotiations and present a recovery plan or a payment agreement that its creditors would approve. During this period, the creditors are not entitled to request the court to declare the insolvency of the company.

8 Successful reorganisations

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

Portuguese law establishes four classes of credits: secured, preferential, subordinated and non-secured. Secured credits are those with security over seized assets up to the value of such assets. Preferential credits are those with a right to be preferentially paid up to the value of the assets over which such preference exists. Subordinated credits are those that will be settled only after the non-secured creditors have been paid in full. The subordinated credits are listed in the CIRE and include, namely, any credits held by 'connected entities' with the insolvent company, provided that such special connection existed at the time the credit was granted. In any event, the credits related to the insolvency proceeding take precedence over all credits, followed by fiscal credits and credits owned by social security.

A reorganisation plan in insolvency proceedings is approved at the creditors' general meeting and the necessary quorum for approval is of two-thirds of the votes, provided that at least half of the votes issued are not subordinated and that one-third of the total amount of credits with voting rights are represented at the meeting.

The plan (PER) and the payment agreement (PEAP) can be approved by this same majority or by a favourable vote of the creditors representing more than half of the total amount of credits, provided that at least half of the votes issued are not subordinated.

It is still disputable in case law whether a reorganisation plan can release non-debtor parties from liability, with some courts stating that this is only possible if the plan is approved by a unanimous vote.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

A debtor can be placed into involuntary liquidation through the initiation of insolvency proceedings by its creditors. The debtor's insolvency can also be requested by any creditor, which must allege and prove

the source, nature and amount of its credit and disclose any known facts related to the debtor's assets and liabilities. The debtor can file its opposition within 10 days, which must include a list of the debtor's five major creditors. The debtor has the burden of proving its solvency. If the debtor opposes the petition or cannot be located, the court shall schedule a hearing. After the hearing, the court gives its decision on the insolvency of the debtor.

Following a judgment declaring the insolvency of a debtor, the proceeding can go to liquidation or proceed to the approval of a recuperation plan, according with the decisions of the creditors' general meeting, as described in question 6.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

The creditors wishing to commence a reorganisation of a debtor can file for the declaration of insolvency of the debtor and, at the first creditors' general meeting, request the insolvency administrator to prepare a recuperation plan. A recuperation plan can also be prepared and presented by one-fifth of the non-subordinated creditors. See questions 7 and 9.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

The CIRE provides for a special proceeding to homologate extrajudicial agreements, which allows a company in a difficult financial situation or that is in imminent risk of insolvency to submit a pre-arranged plan signed by the debtor and creditors of more than 50 per cent of the credits of the company (provided that more than 50 per cent of them are non-subordinated creditors).

This solution is not exclusive to companies; the proceedings may also be followed in the PEAP, allowing the debtor to attain an extrajudicial agreement.

In 2018, the Law 8/2018, of 2 March 2018, implemented an Extrajudicial Proceeding for Companies' Recovery (RERE).

12 Unsuccessful reorganisations

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?

The reorganisation of the debtor is defeated if the recuperation or insolvency plan is not approved by the creditors. In this case, the insolvency proceedings go to liquidation and the assets seized are sold to pay the creditors of the insolvent, according with the order priority referred to in question 8. In the PER, the non-approval of a plan has one of two consequences: either the proceeding is closed and all effects terminated, and the company proceeds with its business, or the insolvency of the company is declared, if its financial situation so requires. An opinion by the judicial administrator will be taken into account in this regard.

In case a plan is approved but the debtor fails to perform it, the pardons and grace periods conferred in the plan are rendered void and all credits become due. In insolvency proceedings, this likely implies going to liquidation. In the PER, this might justify a declaration of insolvency of the debtor, if all other criteria are fulfilled.

13 Corporate procedures

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

The Code of Commercial Companies provides for a procedure for the dissolution of corporations, that can be initiated by deliberations of its shareholders. Once the dissolution is executed, the liquidation of the company assets is initiated and should be concluded in no more than two years. The members of the board of directors will act as liquidators, unless decided otherwise. If the company has no debts, the

shareholders may divide its assets between themselves; if there are debts, the assets of the company should be used to pay its creditors.

Unlike insolvency proceedings, these are extra-judicial procedures that the shareholders can use to extinguish their company and they suppose a situation in which they can still pay its creditors.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

The court will, *inter alia*, order the closing of the insolvency proceedings in the following cases:

- after the final allotment of assets;
- after the decision homologating the insolvency plan becomes res judicata (unless if otherwise provided therein);
- upon request of the insolvent, when the insolvency situation ceases or all creditors consent to closing the procedure; or
- when the administrator concludes that the insolvent's estate is insufficient to pay the court costs and the remaining debts of the insolvent's estate.

Both the PER and the PEAP are concluded with a decision expressly agreeing to the plan (PER) or the payment agreement (PEAP); with the plan's or the agreement's approval; in case the deadline is exceeded; or with the declaration by the administrator that the negotiations with the creditors ended unsuccessfully. In this case, the administrator must also give its opinion on whether the debtor is in a situation of insolvency.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

A debtor should be deemed to be insolvent when its liabilities significantly exceed its assets or when it is unable to perform its obligations as they fall due.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

The director of a company must file for insolvency within 30 days of the date when it becomes aware of the insolvency or the date on which it should have been aware of it. When the debtor is the owner of a company, Portuguese law presumes that awareness of the insolvency occurs three months after the general failure to meet certain debts, such as taxes or social security contributions.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Directors can face civil and criminal penalties for breaching their legal duties. When the insolvency is deemed to be caused by directors' actions, the judge may:

- declare their incapacity to manage third-party estates for a certain period;
- prevent the persons held liable from performing commercial activities for a certain period, including as a member of the board of directors of any company;
- order that these persons may not be considered as creditors and require them to return the insolvent's estate any amount already received; and
- sentence the directors to indemnify creditors up to the amount of their unpaid credits.

Furthermore, Directors may be subject to criminal penalties if they contributed fraudulently to the insolvency of the company and also be held personally liable for a company's tax or social security debts.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

See question 17.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

No.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

After the insolvency is declared, as a general rule the directors remain in office, although with limited powers. They can resign after submitting the annual financial statements of the company. Directors are obliged to cooperate with the insolvency administrator, the court, the creditors' general meeting and the creditors' committee. In some specific cases, directors may continue to exercise active management functions under the administrator's supervision. Directors and officers can claim their credits in the insolvency proceeding.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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 enforcement proceedings filed by the creditors against the debtor or other proceedings affecting the debtor's assets are suspended during insolvency, PER and PEAP proceedings, unless they were also filed against others' debtors (aside from the debtor that was declared insolvent). In this event, the proceedings shall continue but only against the other non-insolvent debtors.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

In the PER, the debtor continues to carry on its business during the reorganisation. In insolvency proceedings, the insolvent will only continue to operate if it proposes to present a restructuring plan and the creditors at the creditors' general meeting agree. Nevertheless, unless it is requested otherwise in the petition for insolvency, administration of the company will be transferred to the court-appointed administrator. Creditors who supply the debtor after the insolvency is declared are considered creditors of the insolvency state, which means that they will rank higher in the list of credits and will be paid before the creditors of the insolvent.

The debtor's activity during insolvency and PER proceedings is supervised by the creditors' general meeting, the creditors' committee, the court-appointed administrator and by the court, which will have the last say.

23 Post-filing credit

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

In the PER, whose goal is the recuperation of the company, the debtor can obtain loans and the creditors that grant them are given priority in the list of recognised creditors, being ranked as preferential credits.

24 Sale of assets

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?

The court-appointed administrator will be in charge of the sale of the insolvent's assets and, preferably, he or she should conduct an electronic auction, on a special platform. However, a different method of sale can be selected as long as that choice is justified. The assets are sold free of all claims and liabilities.

A creditor holding a security over an asset will be consulted in deciding the method and the price of sale and he or she can propose to acquire the asset him or herself.

In any case, the sale of the entire business of the debtor is always the preferred solution, unless there is a specific advantage in the separate sale of the assets, where the administrator should attempt to do so.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Not applicable.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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, all contracts of the debtor that are not yet fulfilled by any party are suspended until the insolvency administrator decides whether or not the insolvent will comply with them. The administrator can decide not to fulfil a contract and the other party is entitled to make a credit claim in the insolvency proceedings in the amount of the unfulfilled obligation (discount its own obligation that it would have to perform) plus any amount due as compensation.

Further, contracts that are prejudicial to the debtor's assets can be terminated by the administrator – see question 46.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

No. Agreements granting IP rights are treated as any other agreements in insolvency proceedings.

28 Personal data

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

The data protection legal framework makes provision for some restrictions, such as purpose limitation and proportionality, which prevent the data from being freely shared with third parties.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Arbitration is never used in liquidation or reorganisation proceedings in Portugal. All arbitrations clauses that can affect the value of the insolvency estate are suspended during insolvency proceedings. If an arbitral proceeding is pending, the insolvent will be replaced by the insolvency estate and the other party in the dispute will have to present a credit claim in the insolvency.

Creditor remedies**30 Creditors' enforcement**

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?

After the declaration of insolvency, all assets of the debtors are seized in the insolvency proceedings and creditors are prevented from filing executive or interim claims over those assets outside the bankruptcy procedure. Accordingly, all individual enforcement proceedings are suspended and the filing of any enforcement proceeding by creditors against the insolvent is halted.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Both unsecured and secured creditors must claim their credits with the insolvency administrator, within the deadline established in the declaration of the debtor's insolvency set out by court. Creditors shall submit details regarding the amount, maturity, guarantees and nature of their claims. After the deadline established in the declaration of insolvency has expired, creditors can still claim their credits by filing a claim against all the creditors and the insolvency estate.

Creditor involvement and proving claims**32 Creditor participation**

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

After the declaration of insolvency, the insolvent and its five major creditors are notified by letter of the court's ruling. The remaining creditors are notified by means of public announcements, posted on a specific website. As a general rule, the creditors are later convened to meet in a creditors' general meeting, so as to decide whether they wish to attempt the company's restructuring, through the approval of a restructuring plan, or to proceed with the complete liquidation of the insolvent's estate and subsequent distribution to creditors. In that meeting the insolvency administrator will present a report that lists the debtor's assets and the list of creditors. If the creditors' general meeting decides to entrust the insolvency administrator with the preparation of a restructuring plan, a new meeting will be convened to discuss and vote on the proposed plan.

33 Creditor representation

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. It has

a central role in authorising the insolvency actions and in controlling the bankruptcy management acts carried out by the insolvency administrator.

Usually, the creditor's committee is appointed in the declaration of insolvency and it may be composed of three or five members, with two alternating. The president is usually the biggest creditor but the other members should be chosen so as to represent the different classes of creditors. At the creditors' general meeting, changes to the composition of the committee may be proposed or the commission can be created, if it has not been appointed by the court.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

No.

35 Claims

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

The creditors' claims must be filed with the insolvency administrator or court-appointed administrator within the established deadline. In insolvency proceedings, the deadline is set by the court decision and, if creditors fail to comply they will have to initiate a declaratory proceeding, as described in question 31, within six months after the declaration of insolvency becoming *res judicata*. In the PER and in the PEAP, the deadline for credit claims is 20 days starting from the announcement of the initiation of proceedings made on a specific website. There is no statutory form for the claim, but it should nevertheless state the name and address of the creditor, the amount due, the maturity, guarantees and nature of their credits and attach supporting documentation. Any creditor whose claims have not been recognised or have been partially recognised may challenge the list of recognised credits. Within the same time period, any creditor may challenge the recognition of other creditors' claims. The CIRE does not formally regulate the transfer of claims already admitted to bankruptcy proceedings. However, the Portuguese Civil Code admits that transfer is possible, but the new creditor has to file a request with the court so that its position is recognised under the same terms as the original creditor.

Conditional claims are accepted under reservation, and the respective amount is set aside awaiting the fulfilment of the condition. Once the condition is fulfilled, the creditor must request the judge to admit its claim.

Finally, the amount of default interest verified after the declaration of insolvency might equally be claimed, but they will be considered as subordinated credits and will be paid last.

36 Set-off and netting

To what extent may creditors 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?

After the declaration of insolvency, creditors can only balance their debts to the insolvency estate with their credits if the right of set-off is prior to the declaration of insolvency and the credit is due and the object of the credit and that of the debit is of the same nature.

The right of set-off cannot be exercised if:

- the debt to the insolvency estate was constituted after the declaration of insolvency;
- the credit was acquired from another person after the date of the declaration of insolvency;
- the relevant debts are the responsibility of the insolvent and not of the insolvency state; and
- the credit is subordinated.

37 Modifying creditors' rights

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

The court will only change the rank of a creditor's claim if the creditor challenges the list of credits recognised relating to the nature of its credit and the court, after the production of evidence, finds that the credit was wrongly classified.

38 Priority claims

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

In the insolvency procedure, claims are ranked as follows:

- claims over the insolvent's estate: ranked above any other, to be paid first, usually resulting from the insolvency administrator's activity and concerning, among others, the court fees, the insolvency administrator's fees and obligations incurred under contracts entered into by the insolvent company after the declaration of insolvency, or under contracts that the administration of the insolvent company decides to keep in force and perform;
- secured claims;
- preferential claims;
- non-secured claims (unsecured, unprivileged and unsubordinated credits); and
- subordinated claims.

See question 8.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

During these proceedings, employees' contracts might terminate because the company initiates a procedure of collective redundancies, to restructure its business and reduce costs, or because of the closure of the company, in which case the contracts will expire. Employees are entitled to compensation settled according to the rules for collective redundancies. Employees will be equally entitled to credits that become due with the termination of the employment contracts.

40 Pension claims

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

Not applicable.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Both the company and its directors can be liable for environmental problems, given certain circumstances. For instance, directors are liable to pay fines related to environmental infractions once the company does not have enough funds (namely, in insolvency situations) and they are liable in a solidary manner for environmental damages caused by certain activities of the company.

42 Liabilities that survive insolvency or reorganisation proceedings

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

Fiscal debts and social security debts can never be subject to a pardon in a restructuring plan. Otherwise, all credits can be subject to haircuts and restructuring in insolvency and reorganisation proceedings and, in case the plans are approved and later complied with, all liabilities are terminated.

43 Distributions

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

After the judicial sale of the insolvent's assets is concluded, the insolvency administrator must, after having consulted with the creditors' committee, prepare a distribution plan and submit it to the court for approval. It is the court that must approve the plan and order a distribution. According to Portuguese law, there is a mandatory order of priority for the payment of claims, as described in question 38. Non-secured debts will generally be paid on a pro rata basis after the debts of the insolvency estate, the secured credits and the preferential credits have been satisfied and subordinated debts will be paid once the remaining debts have been satisfied in full. Within the same category, payments are made on a pro rata basis.

Security

44 Secured lending and credit (immovables)

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

Under Portuguese law, loans are mainly secured by way of a mortgage over immovable property, a type of security that entitles the creditor to be paid with priority over unsecured creditors. There are three types of mortgage: legal mortgage, which is provided for by law; judicial mortgage, when a judgment is rendered against a debtor on the debtor's personal property; and conventional mortgage, when parties agree to grant a mortgage, for example, as security for a loan. A mortgage on immovable property can only be validly constituted by notarial deed.

45 Secured lending and credit (movables)

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

The main type of security taken over movable property is the pledge. A pledge entitles the creditor to be paid, with priority over unsecured creditors, against the value of certain existing movable assets or rights (including shares (whether listed or unlisted), patents or trademarks). 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 list of recognised credits as a preferential credit. It is essential that the pledge be established in writing for proof.

It is also possible that a mortgage is taken over certain movable assets that have a legal regime similar to that of immovable property, namely regarding registration procedures (eg, vehicles, ships, aircraft). Finally, a general lien could be taken over all movable assets of the debtor, allowing the creditor to satisfy his or her claim with priority over other creditors, although in compliance with the order expressly set out by law.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Once insolvency proceedings have commenced, the insolvency administrator can set aside transactions that unfairly favour one creditor over the others or any acts that reduce, make it more difficult or impossible, jeopardise or delay payment to the creditors that were carried out in bad faith and within a period of two years prior to the initiation of the

Update and trends

In 2017, a new Special Proceeding – PEAP – was introduced in Portuguese Law with the intention of allowing debtors who are not a company to negotiate with all creditors a payment agreement without being declared insolvent. This meant a segregation of pre-insolvency procedures into two different legal regimes depending on whether the debtor is a company or not.

Furthermore, in 2018 an Extrajudicial Proceeding for Companies' Recovery (RERE) was implemented.

insolvency proceedings. The insolvency administrator can terminate contracts that fulfil these criteria by means of a registered letter within six months of knowledge of their existence. The termination has retroactive effects. The insolvent debtor or the third party who received the termination communication can challenge the termination, filing a judicial action within three months after receiving the communication.

In the case of the PER, the termination of transaction is not provided for, so creditors must, in that case, resort to the general provisions of the civil code on termination of agreement and file a declarative action.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

The CIRE lists as subordinated credits any credits held by 'connected entities' to the insolvency company, provided that such special connection existed at the time the credit was constituted, and by those that were transmitted in the two years prior to the insolvency proceeding. The subordinated creditors must file a credit claim in the insolvency proceeding. Their credits will be ranked after all other credits in the insolvency. Furthermore, subordinated credits do not confer voting rights, except when the creditors' general meeting votes on the insolvency plan.

Groups of companies

48 Groups of companies

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

A parent company that completely controls a subsidiary (because there are no other shareholders) is responsible for the liabilities of that subsidiary, as a solidary debtor, whether those liabilities were constituted prior to or after the controlling relation. These provisions only apply if the parent company is established in Portugal.

49 Combining parent and subsidiary proceedings

In 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?

Companies involved in the same corporate group can be joined and the same administrator can be appointed for both. This normally depends on a request by the court-appointed administrator but can also be ordered ex officio by the court or be requested by the relevant debtor companies. However, assets and liabilities of the different companies are not pooled together as that would disregard their separate legal personalities.

International cases**50 Recognition of foreign judgments**

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?

A judgment given in any EU member state is recognised in Portugal without any special procedure being required. For judgments of other states, a review of the judgment or orders is required. Parties should file for this review in the court of appeal and the judgment will be recognised as long as the following requirements are met:

- there is no doubt about the authenticity of the document;
- the judgment is no longer appealable;
- the foreign court was competent, there was no fraudulent evasion of the law and Portuguese courts do not have exclusive competence for the matter;
- there is no pending case on the same issues nor any judgment that has become *res judicata*;
- the defendant was summoned to present its defence in the proceedings; and
- there is no violation of public order.

Note that, according to Portuguese law, Portuguese courts have exclusive jurisdiction for the declaration of insolvency of companies that have their headquarters in Portuguese companies, meaning that no foreign judgments (outside the EU) will be recognised in this regard.

Regulation (EU) 2015/848 applies to cross-border insolvency proceedings within the EU.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

No.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors have the same rights and obligation as national creditors. They must claim their credits within the deadline established by the court (not being granted any special extension) and, following this, they can participate in insolvency and PER proceedings, both in negotiations and in deliberations.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

The company's assets located in Portugal that are placed under administration of the court-appointed insolvency administrator can only be transferred to the administrator of a foreign insolvency proceeding after the debts to Portuguese creditors have been paid.

54 COMI

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?

According to Regulation (EU) 2015/848, the COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary and unless it has been moved to another member state within the three-month period prior to the request for the opening of insolvency proceedings.

Under Portuguese law, which is applicable to cross-border situations not involving EU states, the concept of COMI has the same definition as in the Regulation.

55 Cross-border cooperation

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?

Within the EU, the recognition of foreign proceedings and the cooperation between courts is made according to the terms of Regulation (EU) 2015/848.

Foreign insolvency proceedings outside EU member states are recognised by Portuguese courts as long as the foreign court that declared the insolvency based its competence on the criteria of the location of the residence or headquarters of the debtor or of its centre of main interests and the recognition does not violate public order.



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56 Cross-border insolvency protocols and joint court hearings

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?

Within the EU, Regulation (EU) 2015/848 is applicable to cross-border insolvency cases. For other cross-border proceedings, when the insolvency is declared abroad, secondary proceedings in Portugal can be initiated regarding the assets of the debtor that are located in the territory and, in this case, the Portuguese court-appointed administrator will coordinate with the foreign administrator on all relevant matters.

Russia

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

To understand the below analysis relating to restructuring and insolvency in Russia, it is necessary to comprehend the basic definitions and terms used in the relevant Russian legislation.

Bankruptcy

The terms 'insolvency' and 'bankruptcy' are synonymous in Russian law. These terms, when used in this questionnaire, will generally have the same meaning, namely, the inability of a debtor to satisfy, in full, the claims of its creditors recognised by a commercial court that may subsequently result in a debtor winding up or recovering its solvency (as described in more detail below).

Russian insolvency legislation provides for a 'balanced model' of bankruptcy proceedings aimed at equal treatment of creditors' and debtors' interests and usually provides for a wide range of bankruptcy procedures. There are five, namely:

- supervision – a procedure aimed at ensuring the preservation of a debtor's property, analysing the financial state of a debtor, drawing up a list of creditors and holding a first meeting of creditors;
- financial rehabilitation – a procedure aimed at restoring a debtor's solvency by means of repaying its debts in accordance with a debt repayment schedule;
- external administration – a procedure aimed at restoring a debtor's solvency in accordance with an external administration plan, which includes different economic measures, such as sale of a debtor's assets, assignment of claims, increasing charter capital, etc;
- winding up – a procedure aimed at selling a debtor's assets, satisfaction of creditors' claims and subsequent liquidation of a debtor; and
- settlement agreement – a procedure aimed at restructuring and repaying debts aimed at termination bankruptcy proceedings through entering into and adhering to an agreement between a debtor and its creditors.

Together, these are the bankruptcy procedures.

Basic legal provisions on bankruptcy are set out in the Civil Code of the Russian Federation (the Civil Code). However, the main piece of legislation is the Federal Law No. 127-FZ On Insolvency (Bankruptcy) of 26 October 2002 (the Bankruptcy Law), which, from December 2014 and October 2015, also incorporates the rules for the bankruptcy of credit organisations and natural persons.

Reorganisation

The term 'reorganisation' means a corporate procedure resulting in the transfer of rights and obligations of a legal entity to one or several legal successors (corporate reorganisation). Russian law provides for five types of corporate reorganisation, namely:

- merger (consolidation of two or several legal entities into one new legal entity);
- accession (affiliation of one or several entities to another existing legal entity);

- division (separation of one legal entity into two or several legal new entities);
- spin-off (separation of one or several new entities from another existing legal entity will continue to exist); and
- transformation (change of a legal form (eg, from limited liability company to joint-stock company)).

Basic legal provisions on corporate reorganisation are set out in the Civil Code as well. Additional requirements or restrictions in relation to the procedure of corporate reorganisation may be imposed on legal entities of certain legal forms (eg, limited liability companies and joint-stock companies) or conducting certain types of activity (eg, credit institutions, insurance companies, etc) and are reflected in the federal laws regulating the activities of such companies.

Please note that reorganisation, in its broad and non-legal sense, may also be deemed restructuring of debts in the context of bankruptcy legislation. As described in question 8, such bankruptcy reorganisation includes those bankruptcy procedures involving the restructuring of the debts, namely, financial rehabilitation, external administration and settlement agreement (bankruptcy reorganisation).

2 Excluded entities and excluded assets

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

Bankruptcy proceedings

The Civil Code expressly excludes the following entities from bankruptcy proceedings: treasury enterprises (see question 3); and certain types of non-profit organisations.

A state corporation or a state company (specific types of company that are formed by the Russian state to exercise specific functions and achieve specific aims set out by a relevant federal law) may only be subject to bankruptcy proceedings if expressly provided by the federal law that set up such corporation or company.

The Bankruptcy Law also specifies some types of assets that do not fall within the bankruptcy estate and that are subject to special procedures of transfer of such assets from the debtor to third parties, including:

- assets withdrawn from turnover (eg, objects of seaport infrastructure);
- socially significant facilities and cultural heritage objects;
- social housing facilities;
- non-assignable property rights connected with the personality of the debtor (eg, rights to licences to conduct particular activities);
- in the event of the bankruptcy of a professional securities market participant, assets of its clients;
- pension savings and pension reserves of private pension funds;
- mortgage collateral securing obligations of the issuer of mortgage-backed securities;
- in the event of a bankruptcy of an individual, his or her assets in relation to which execution cannot be levied (eg, the sole living premises (if not mortgaged), household articles, etc);
- in the event of a bankruptcy of a farm, any property owned by the head or members of the farm household or in relation to which it

can be proven that such property was not acquired using funds of the farm household; and

- assets of compensation funds of self-regulating organisations.

Corporate reorganisation

In general, Russian law does not provide for exclusions in terms of legal entities that may not be reorganised in a corporate procedure, although the Civil Code contains restrictions regarding the form in which a certain legal entity may be reorganised. In addition, sometimes corporate reorganisation in the form of a merger, accession or transformation can only be effected with the consent of the authorised state bodies. Public-law companies, state companies, state corporations and certain funds can be reorganised based on special federal laws providing for the procedure of such corporate reorganisation.

3 Public enterprises

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

Unitary enterprises

State or local authorities may establish companies in the form of a unitary enterprise. Unitary enterprises do not own the assets that are provided to them by the relevant authorities (such assets continue to be owned by the Russian Federation, the constituent entity of the Russian Federation or the municipal unit). The enterprises have either the right of economic management (state enterprises) or the right of operational management (treasury enterprises) in relation to such assets. The second type of right is more limited in nature than the first one.

Under the Civil Code, the owner of assets of a state enterprise is not liable for the debt of that enterprise. Conversely, the owner of assets of a treasury enterprise has subsidiary liability for the debts of that enterprise in the event of their insufficiency.

In contrast to treasury enterprises, state enterprises can be subject to bankruptcy proceedings in accordance with the Bankruptcy Law and the procedures and the rights of creditors will generally be the same as in insolvencies of companies. Creditors of treasury enterprises may try to hold the asset owner liable for the enterprise's debts. This may also be possible in relation to state enterprises, provided the bankruptcy of the enterprise was caused by the asset owner.

Other government-owned enterprises

As stated above, state corporations, companies, public-law companies and funds are generally not subject to bankruptcy proceedings (see question 2). They can be liquidated based on special federal laws providing for the procedure for such liquidation. The creditors of such companies can bring claims against them in the ordinary course. In the event of insufficiency of assets to satisfy such claims, the creditors will not have any additional remedies.

4 Protection for large financial institutions

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

Generally, no special legislation has been enacted to deal with the financial difficulties of institutions that are considered 'too big to fail', but the Bankruptcy Law sets out certain specific rules with respect to the bankruptcy procedures for strategic companies, natural monopolies, city-forming enterprises, credit, clearing and other financial institutions. Most of these specific rules aim to provide more possibilities to restore the financial solvency of such companies.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

There are two types of court: courts of general jurisdiction and commercial (*arbitrazh*) courts. Bankruptcy cases fall within the jurisdiction of commercial courts. Commercial courts have jurisdiction in relation to all matters arising out of or in connection with a bankruptcy case, so there are no restrictions on the matters that the commercial courts may

deal with, except for criminal proceedings against the management of the debtor, in relation to which courts of general jurisdiction have jurisdiction.

Court orders passed in bankruptcy proceedings can be appealed without any specific permission in the court of appeals, court of cassation and the Supreme Court of Russia. There is no requirement of post security to proceed with an appeal.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Bankruptcy liquidation

A company that is insolvent can initiate bankruptcy proceedings itself by filing a bankruptcy petition with the court pursuant to a decision of the company's authorised body. The debtor is entitled to file a bankruptcy petition only if it shows an inability to meet its debts or to pay tax and other amounts because of state organisations such as social levies (the compulsory payment) as they become due.

If the court decides that the company is insolvent, it will place the debtor under supervision and appoint a supervisor. Once the court has passed such decision, the following consequences will follow, inter alia:

- the creditors' claims relating to the monetary obligations may be presented to the debtor only in compliance with the procedure for presenting claims to a debtor established by the Bankruptcy Law;
- all proceedings against the debtor shall be suspended in cases relating to the collection of amounts of money from a debtor upon the motion of the creditor;
- execution of writs of execution relating to property collection shall be suspended;
- it is prohibited to discharge the debtor's monetary obligations by means of offsetting a homogenous counterclaim;
- it is not admissible to pay out dividends, or distribute profit among the debtor's founders (shareholders); and
- no penalties and other financial sanctions are accrued for a default.

Corporate liquidation

A solvent company can be liquidated under a voluntary corporate procedure approved by an authorised body of a legal entity. The beginning of a voluntary liquidation does not trigger a moratorium on claims against the company.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Bankruptcy reorganisation

In general, a debtor cannot file a request for a voluntary bankruptcy reorganisation. A debtor may file a bankruptcy petition to initiate bankruptcy proceedings (see question 6). If the court decides that the company is insolvent, it will place the debtor under supervision and appoint a supervisor. The main functions of the supervisor are to identify the creditors, to analyse the financial status of the company and to convene and conduct the first creditors' meeting. The first creditors' meeting must be held at least 10 days prior to the end of the supervision. At this meeting, the creditors may decide to request the court to commence the bankruptcy reorganisation procedure, which includes financial rehabilitation and external administration, or to approve the settlement agreement to be entered into between the debtor and the creditors.

Corporate reorganisation

A solvent company can be reorganised under a voluntary corporate procedure approved by the authorised body of a legal entity. A creditor of the reorganised legal entity generally has the right to claim for early performance of the debtor's obligations in a judicial procedure, or if early performance is impossible, for termination of the obligation and compensation of losses.

8 Successful reorganisations

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

Bankruptcy reorganisation

The content of the bankruptcy reorganisation plan depends on the bankruptcy procedure initiated by the commercial court based on the decision of the creditors' meeting.

Financial rehabilitation

A financial rehabilitation plan includes measures aimed at repayment of creditors' claims in accordance with the payment schedule set out in the plan. Specific measures are not set out in the Bankruptcy Law. The financial rehabilitation plan and the payment schedule must be approved at the creditors' meeting. In addition, the payment schedule must be approved by the court.

If, at any time before the end of the financial rehabilitation, the debtor duly repays all debts, the bankruptcy proceedings will terminate. If the debtor fails to perform its obligations in accordance with the payment schedule, the parties that provided security for the debtor's obligations under the payment schedule (the requesting parties) are obliged to satisfy the creditors' claims.

If the requesting parties satisfy the creditors' claims, the bankruptcy proceedings may terminate (the requesting parties will be entitled to submit their claims to the debtor outside the bankruptcy procedure) or the bankruptcy procedure may continue (the requesting parties will be entitled to submit their claims to the debtor during the winding up as third-ranking creditors).

One month before the financial rehabilitation is completed, the debtor must prepare a report on the results of the financial rehabilitation. The Bankruptcy Law does not require the report to be approved; it will only be considered by the insolvency office holder, by the creditors at the creditors' meeting and by the court. If the court decides the debts have been repaid in full, the bankruptcy case will terminate.

Settlement of creditors' claims during financial rehabilitation is conducted in accordance with the payment schedule. The payment schedule should provide for the proportional settlement of creditors' claims, in accordance with the ranking of creditors' claims established by the Bankruptcy Law (see question 38). Therefore, no releases in favour of creditors may be created by the payment schedule or the financial rehabilitation plan; however, the Bankruptcy Law establishes priority of settlement of creditors' claims filed during the supervision (ie, included in the payment schedule) over claims filed during the financial rehabilitation. Claims filed during the financial rehabilitation are not included in the payment schedule and are satisfied upon settlement of claims included in the payment schedule.

External administration

The reorganisation plan should contain appropriate measures to restore the company's solvency, such as:

- the sale of the company's assets;
- the sale of the business;
- the assignment of the debtor's claims;
- the recovery of receivables;
- the performance of the debtor's obligations by its shareholders, participants or any third parties;
- the placement of additional ordinary shares under a closed subscription; or
- the establishment of open-stock companies on the basis of the debtor's assets.

The Bankruptcy Law does not state that the reorganisation plan can release the non-debtor parties from liability. Given that the reorganisation plan provides for measures to restore the debtor's solvency, such release may be considered contrary to the purpose of the external administration and in breach of the creditors' rights, which may lead to the invalidation of the reorganisation plan. Within one month of his or her appointment, the insolvency officer must submit a reorganisation plan to the creditors' meeting for approval. The plan must also be submitted to the court. The insolvency office holder must submit a report to the creditors at the end of the external administration

(when the plan has been implemented or in the event of early termination of the external administration) or if the debtor has accumulated funds sufficient to satisfy all the creditors' claims. The creditors' meeting must consider the report and decide whether the company's solvency has been restored and then submit the report and its decision to the court. If the creditors have agreed that solvency has been restored, the court approves the report and terminates the bankruptcy proceedings. Creditors are allowed to submit their claims at any time during the external administration. Such claims are included in the register of creditors' claims and should be settled in accordance with the ranking of creditors' claims established by the Bankruptcy Law (see question 38). Therefore, no releases in favour of creditors may be created by the reorganisation plan.

Settlement agreement

The bankruptcy procedure of the settlement agreement may be started between the debtor and the creditors (or third parties) at any time during bankruptcy proceedings, subject to the full repayment of debts of the first and second-ranking creditors (see question 38). A settlement agreement is an agreement between the debtor and all third-ranking creditors, confirmed by the court, to settle the insolvent company's debts. The settlement agreement must be approved at the creditors' meeting by a simple majority of all third-ranking creditors and is subject to the unanimous consent of all secured creditors. Third parties are also allowed to participate in a settlement agreement and may secure the debtor's obligations.

The Bankruptcy Law provides a mechanism that may give effect to a settlement agreement, even if it is opposed by some creditors, as creditors who voted in favour of the settlement agreement are entitled to satisfy the claims of the creditors who voted against it.

A settlement agreement may, subject to the individual creditor's consent, include the deferral of payments to the individual creditor, payment of the debt by instalments or discounting, refinancing or sale of debts due to the creditor and debt-for-equity swaps, as well as some other measures. Unless otherwise agreed upon in the settlement agreement, any pledge or mortgage does not cease to be effective and if the debtor fails to perform its obligations under the settlement agreement towards the relevant secured creditor, such creditor may be paid from the proceeds of the sale of the security as the mortgage or pledge allows.

When the settlement agreement is approved by the court, the bankruptcy proceedings are terminated and management of the company will revert to its directors from the insolvency office holder and, provided that debts are repaid as provided for in the settlement agreement, business is conducted as before the bankruptcy proceedings. A settlement agreement approved by the court cannot be unilaterally refused or terminated by either party. However, the court may be requested to terminate or invalidate the settlement agreement. If the court does so, the bankruptcy proceedings recommence but any claims already satisfied during the bankruptcy procedure of settlement agreement are not unbound. The court may terminate the settlement agreement in relation to all creditors.

If the debtor fails to perform its obligations under the settlement agreement, creditors are entitled to apply to court for receipt of the enforcement order on recovery of outstanding claims without requesting termination of the settlement agreement.

Corporate reorganisation

In general, corporate reorganisation does not require the making of a reorganisation plan of the debts of the reorganised company. However, a creditor of the reorganised legal entity generally has the right to claim for early performance of the debtor's obligations in a judicial procedure or, if early performance is impossible, for termination of the obligation and compensation of losses.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Bankruptcy liquidation

Creditors may file a bankruptcy petition that may lead to liquidation if the company is deemed irremediably insolvent. In reviewing the

bankruptcy petition, the court must determine whether or not the company is insolvent. If the court determines that the company is not insolvent, it will dismiss the bankruptcy petition.

In general, the effects and procedure of involuntary bankruptcy liquidation are similar to the effects and procedure of voluntary bankruptcy liquidation described in question 6.

Out-of-bankruptcy involuntary liquidation

A solvent company can be liquidated pursuant to an involuntary corporate liquidation procedure in several cases, for instance:

- if registration of the company has been declared invalid, including in case of non-remediable gross violations of the law in the process of the company's foundation;
- if the company has conducted any activity without the necessary regulatory licence or approval or in the absence of membership of the relevant self-regulating organisation or of a certificate of admission to a particular type of activity issued by the relevant self-regulating organisation (if such a certificate is required by law);
- if the company has conducted any activity that is prohibited by law or violates the Constitution of the Russian Federation or other laws (provided, in the case of other laws, that the violation is gross or repeated);
- if a social organisation, a charity or other fund or a religious organisation repeatedly conducts activity contradicting its statutory purposes; and
- if it becomes impossible to achieve the aims for which the company was founded if conducting activity by such company becomes impossible or materially complicated.

Such involuntary liquidation could be initiated by the authorised bodies.

In addition, there is a simplified liquidation procedure for a 'dormant company' (a company that has not submitted its financial reports and has not performed any bank account operations within the previous 12 months). A dormant company may be removed from the state register of legal entities by the registration authorities without any liquidation procedure, provided that no creditors' claims are submitted against such company within three months of publication by the registration authorities of the relevant announcement. If any creditors' claims are submitted, the company must be liquidated in accordance with the usual liquidation procedure set out above.

If a company undergoing an out-of-bankruptcy involuntary liquidation is found to have insolvency indicators, it will be placed under general bankruptcy proceedings.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Bankruptcy reorganisation

In general, creditors cannot file a request for an involuntary bankruptcy reorganisation. A creditor may, or the debtor shall (please see question 16), file a bankruptcy petition to initiate bankruptcy proceedings. If, based on the creditor's or the debtor's petition, the court decides that the company is insolvent, it will place the debtor under supervision and appoint a supervisor (see question 7).

Corporate reorganisation

A legal entity may be involuntarily reorganised on the basis of a court judgment or decision of a government authority only in cases provided in federal law. Generally, such measures are imposed on a legal entity as a result of a violation of an antimonopoly law and order the company to commence separation or spin-off.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

There are no procedures for expedited bankruptcy reorganisations but, according to the Civil Code, it is possible to combine several types of corporate reorganisation procedure (eg, transformation and merger) into one procedure.

12 Unsuccessful reorganisations

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?

Financial rehabilitation

If the debtor fails to repay its debts in accordance with the payment schedule and the parties that provided security for the debtor's obligations fail to satisfy the creditors' claims, the schedule can be amended with the consent of the creditors. If the creditors do not agree to amend the payment schedule, the court is likely to commence external administration or winding up.

If the insolvency office holder considers that the debtor's report on the results of the financial rehabilitation does not show that the creditors' claims have been satisfied, the insolvency officer will convene a creditors' meeting. The creditors may then decide to put the debtor into external administration or commence winding up. Generally, the court will follow the decision of the creditors' meeting.

External administration

If the creditors do not approve the reorganisation plan or the approved reorganisation plan is not submitted to the court within four months (two months in some cases) of the date on which the debtor entered into external administration, the court may commence winding up.

The court may start bankruptcy proceedings at the end of the external administration if it does not approve the report of the insolvency office holder, and one month after the end of the external administration if the insolvency office holder fails to submit its report to the court.

Settlement agreement

If the debtor fails to fulfil its obligations under the settlement agreement, the bankruptcy procedure, in the course of which such settlement agreement was concluded, is reinstated by a commercial court and the general bankruptcy procedure continues.

13 Corporate procedures

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

A company that is solvent can be liquidated pursuant to a decision of its shareholders or participants and is subject to their control. The decision to liquidate the company must be made by a qualified majority of the shareholders attending the vote (subject to a quorum of more than 50 per cent) for a joint-stock company or by unanimous consent of all participants for a limited liability company.

In order to liquidate the company, a liquidation commission (liquidator) is appointed by the company's shareholders or participants. The liquidator has rights to manage the company and, in particular, to use its assets to satisfy creditors' claims. The liquidator must publish information on the company's liquidation specifying the period within which the creditors may submit their claims. Such a period cannot be less than two months after publication.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Liquidation

Bankruptcy liquidation is concluded by a court passing a relevant order after the final distribution of proceeds from the sale of the debtor's assets.

Corporate liquidation is concluded with the distribution among the company's shareholders or participants of the assets remaining after creditors' claims are satisfied. Formally, liquidations end when an entry is made in relation to the company in the state register of legal entities.

Reorganisation

Successful bankruptcy reorganisations (ie, financial rehabilitation, external administration and performance of the settlement agreement) result in the termination of the bankruptcy case.

Corporate reorganisation ends when a relevant reorganisation entry is made in relation to the company in the state register of legal entities.

Insolvency tests and filing requirements

15 Conditions for insolvency**What is the test to determine if a debtor is insolvent?**

The Bankruptcy Law sets out that a legal entity or an individual meets the insolvency criteria if such legal entity or individual fails to pay its debts as they fall due for a period of three months starting from the date when the payment obligation fell due (provided that, in the case of an individual, he or she also does not have sufficient assets to perform such obligations; however, according to court practice, this does not apply to individuals registered as individual entrepreneurs). The general rule is that the insolvency case can be opened in relation to a debtor if the above criteria are satisfied and the total amount of the creditors' claims equals or exceeds 500,000 roubles in relation to individuals or 300,000 roubles in relation to a legal entity.

The law provides for special insolvency criteria and requirements for initiating insolvency proceedings in relation to particular categories of debtors. For example, a financial organisation (including credit organisations) is considered insolvent if:

- it fails to pay its debts (amounting to at least 100,000 roubles) as they fall due for a total period of 14 days;
- it fails to comply with any court decision (arbitration award) on the recovery of funds against the financial organisation within 14 days of such decision coming into force (irrespective of the amount);
- it holds insufficient assets to pay its debts as they would fall due; or
- its financial solvency has not been restored in the course of the activity of the temporary administration.

A strategic company is considered insolvent if it fails to perform its financial obligations for an amount equal to or exceeding 1 million roubles for six months from the date on which such obligations should have been performed.

16 Mandatory filing**Must companies commence insolvency proceedings in particular circumstances?**

In some cases, the debtor is obliged to file a bankruptcy petition (eg, when satisfaction of claims of one or more creditors makes it impossible for the debtor to discharge monetary obligations or the tax payment duties or other payments in full to other creditors; when enforcement against the debtor's property is going to significantly aggravate or make impossible further business activities of the debtor; or when the debtor exhibits signs of an inability to pay or signs of insufficiency of property).

An insolvent company is obliged to file a bankruptcy petition within one month of finding that it is unable to pay its debts as they fall due.

Directors and officers**17 Directors' liability – failure to commence proceedings and trading while insolvent****If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?**

If the debtor's management fails to file a bankruptcy petition, it can be held liable for the company's debts, liabilities or other obligations that arose after the date when the bankruptcy petition should have been filed. Such liability is subsidiary (ie, members of the debtor's management will be held liable only if that debtor's assets are insufficient to fully satisfy the creditors' claims). The amount of such liability is equal to the total amount of unsatisfied claims. In addition, an insolvent company and its management may be subject to an administrative penalty for failure to file a bankruptcy petition.

Although Russian law does not expressly specify the consequences of carrying on the business of an insolvent company, it should be also noted that:

- transactions entered into by the debtor in breach of the creditors' interests or transactions that are not on an arms-length basis could be invalidated in any further bankruptcy proceedings; and
- persons exercising control over the debtor (see question 42) are, prima facie, jointly liable for the debts of the company, so if an

insolvent company continues to trade without filing a bankruptcy petition, it could increase the liability of the said persons.

18 Directors' liabilities – other sources of liability**Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?****Civil liability**

According to the Bankruptcy Law, if the debtor's assets are insufficient to satisfy all claims of the creditors as a result of actions (or omissions) of the persons exercising control over the debtor, such persons shall be liable for the debtor's obligations. Such liability is subsidiary (see above). Persons exercising control over the debtor include persons who have or had, less than three years before filing of the bankruptcy petition, the right to give binding instructions to the debtor or who could otherwise determine the actions of the debtor and generally include, inter alia, the CEO and the members of the management board. Unless proved otherwise, it is assumed that the debtor's assets are insufficient to satisfy all claims of the creditors as a result of actions (or omissions) of the persons exercising control over the debtor if:

- actions or omissions that benefit them or are approved by them, caused damage to creditors' property interests (including voidable transactions as indicated in question 39);
- any accounting documents that must be kept by the company are lost or such documents contain misleading or incomplete information as a result of which the bankruptcy procedures became significantly more difficult (in this case, the person responsible for maintaining such documents will have subsidiary liability with respect to the company's debts);
- the amount of third-ranking creditors' claims (the principal indebtedness) arising as a result of violation of tax law by the debtor or its chief executive officer or officers exceeds 50 per cent of the total amount of third-ranking creditors' claims (the principal indebtedness) as at the date of closing of the creditors' claim register (in this case, the debtor's chief executive officer or officers at the time of violation of tax law will have subsidiary liability with respect to the company's debts);
- any documents that, according to Russian corporate or securities law, must be kept by the company are lost or such documents contain misleading or incomplete information; and
- information that must be submitted to the federal registers was not submitted or contains misleading facts.

In the event of a breach of the Bankruptcy Law by the debtor's management, it can be held liable for losses caused by such breach.

If a debtor's application has been filed by a debtor with the commercial court when the debtor is capable of meeting creditors' claims in full or the debtor has not taken measures to contest unfounded claims of a claimant, the persons exercising control over the debtor (including the CEO) are liable to the creditors for the losses caused by the commencement of bankruptcy proceedings or unsubstantiated acceptance of the creditor's claims.

Additionally, the Civil Code provides that the management of a company, as well as any person de facto controlling it, shall act in the interests of the company, reasonably and in good faith. A breach of this duty can result in the liability for damages or losses.

Criminal liability

The company's management and its shareholders may be criminally liable under the Criminal Code of the Russian Federation of 13 June 1996 for:

- misbehaviour in the course of bankruptcy (concealment of assets, illegal satisfaction of creditors' claims, etc);
- fictitious bankruptcy (where a company initiates bankruptcy proceedings at a time when it is in fact able to fully settle creditors' claims); and
- intentional bankruptcy (where there was an intention to cause the bankruptcy and not to act in the company's interests but in the furtherance of personal or third-party interests).

The debtor's management may also be liable for providing misleading information in the financial or accounting statements (documents), or both, of a financial organisation (bank, insurance company, etc) if the management's intention was to suppress the fact that the organisation meets the insolvency criteria.

Administrative liability

The primary distinctions between administrative and criminal liability are that the former attaches more easily than the latter and the potential sanctions are less extreme. Offences under the Russian Administrative Offences Code include misbehaviour in the course of bankruptcy and intentionally or fictitiously causing a company's insolvency. Administrative liability attaches to the shareholders, management and the company itself.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Duties that the management owes to the corporation shift to the insolvency office holder who is appointed by the court, subject to the choice of the creditor's committee. During the bankruptcy proceedings, the insolvency office holder shall act reasonably, in good faith and in the interests of the debtor and the creditors and shall reimburse damages of the debtor caused by his or her actions (omissions).

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Liquidation

During the bankruptcy liquidation procedure (the winding up), directors' and officers' powers terminate from the date on which the court decides to commence the winding up. All powers of directors and officers are transferred to the insolvency office holder who acts on behalf of the debtor until its actual winding up. His or her main duty is to collect the property of the debtor, sell it under a tender and pay the creditors' debts.

During the corporate liquidation procedure, directors' and officers' powers terminate from the date on which shareholders adopted a resolution on formation of a liquidation commission (on appointing a liquidator). Starting from this date, the main duty of a liquidation commission (liquidator) is to identify creditors and debtors, pay their debts and collect the receivables and to distribute the rest of the property among the shareholders.

Reorganisation

In the course of the bankruptcy reorganisation, the management of the company remains in place and continues in its duties. However, in each case, the court appoints an insolvency office holder to supervise the management and to limit, to some extent, the management's authority. For example, the management will have no authority to make decisions on the payment of dividends. All transactions involving acquisition or disposal of immovables or movables of a value exceeding 5 per cent of the company's assets are subject to the prior consent of the insolvency office holder in supervision or the creditors' meeting in financial rehabilitation. Financial rehabilitation, however, imposes more restrictions on the company's business. In particular, any transactions involving the acquisition or disposal of immovables or movables and assignment of claims are subject to the prior consent of the insolvency office holder.

During corporate reorganisation, the powers of directors and officers are generally not limited. However, in public joint stock companies, shareholders are entitled to limit certain transactions or provide for a specific procedure according to which they are to be carried out.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

Generally, after the corporate liquidation or reorganisation is commenced, no specific requirements or restrictions relating to legal proceedings exist. However, there are some specifics in relation to the bankruptcy liquidation and reorganisation.

Bankruptcy liquidation

During a bankruptcy liquidation, legal proceedings against the debtor can continue. No claims against the company's assets may be enforced. All the company's obligations become due and debts may only be repaid subject to the priority rules established by the Bankruptcy Law. No interest or penalties can accrue.

Bankruptcy reorganisation procedures

There is no moratorium as such during the financial rehabilitation. However, creditors are allowed to request that the court suspend legal proceedings against the debtor's assets at any stage in the bankruptcy proceedings. During the financial rehabilitation, legal proceedings against the debtor can continue but any enforcement of claims related to debts that were due before the financial rehabilitation are stayed. During the financial rehabilitation, the debtor must repay its debts in accordance with a plan and a payment schedule. Generally, while penalties will not accrue on these debts during the financial rehabilitation, interest will continue to accrue.

During the external administration, a moratorium takes effect on the payment of debts that became due before the external administration. Legal proceedings against the debtor can continue but enforcement of claims related to debts that were due before the external administration is stayed. In general, there are no penalties but interest on debts continues to accrue. The insolvency office holder usually repays debts incurred during the external administration and debts connected with personal injury, employees' and copyright fee claims. Payment of debts incurred before the external administration but that became due after that time, is not prohibited but may be subject to a challenge on the grounds specified in the Bankruptcy Law (for instance, preferential treatment of creditors).

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

In general, when a legal entity is subject to liquidation (either bankruptcy or corporate liquidation), it may continue its business activity until exclusion of a legal entity from the state register of legal entities. However, during the winding-up procedure, the creditors' meeting may adopt a resolution on seizure of the debtor's business activities.

Subject to some exceptions, a corporate reorganisation does not impose restrictions on the company's business activities. However, the company's business during the bankruptcy reorganisation is subject to some restrictions.

As a general rule, the claims of creditors who supply goods or services to the debtor arising after the insolvency proceedings have been initiated are not included in the register of creditors' claims and such creditors do not participate in the bankruptcy proceedings. Such claims rank ahead of other claims (see also question 38).

During the financial rehabilitation, the management of the company remains in place and continues in its duties. However, in each case, the court appoints an insolvency office holder to supervise the management and to limit, to some extent, the management's authority (see question 20).

Once the company is placed under external administration, the insolvency office holder replaces the management of the company. However, shareholders or the board of directors may still take

decisions to try to return the company to solvency, such as increasing the charter capital by way of placement of additional ordinary shares. The insolvency office holder has authority to deal with all the company's assets but his or her powers are restricted. For example, any major or interested-party transactions concluded by the insolvency office holder are generally subject to the prior consent of a creditors' meeting. As a general rule, the insolvency office holder can also disclaim the debtor's contractual obligations within three months of his or her appointment.

23 Post-filing credit

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

Pursuant to the Bankruptcy Law, the insolvent company may obtain loans or credits during bankruptcy proceedings. However, obtaining a loan or credit is subject to the prior consent of an insolvency office holder or the creditors' meeting. Any claims that arise from such loans or credit rank ahead of all other claims (see question 38).

An insolvent company is not prevented, at any stage of the bankruptcy proceedings, from pledging its assets to secure the repayment of such loans or credits. The pledging of the debtor's assets is subject to the prior consent of the insolvency office holder or the creditors' meeting (committee).

Certain restrictions apply during the financial rehabilitation and the assets of a debtor cannot be pledged to secure repayment of loans or credits in accordance with the payment schedule. However, third parties are allowed to secure the repayment of loans or credit by the debtor in accordance with the payment schedule.

The Civil Code gives a lender the right to refuse a borrower to draw down (in full or in part) under an executed credit agreement if it is evident that the credit will not be repaid.

24 Sale of assets

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?

The sale of pledged or mortgaged property during bankruptcy proceedings will generally be subject to the prior consent of the relevant secured creditor.

The sale of immovables and businesses is subject to state registration and the payment of a state fee.

Under the general provisions of the Civil Code, assets should be transferred to the purchaser free of any third-party rights, except where the purchaser consents to purchase the assets encumbered with rights of third parties or where the law expressly provides that such third-party rights shall continue to exist (ie, the general rule that pledges do not terminate when assets are transferred). The Bankruptcy Law does not provide any special provisions with respect to transfer of rights attached to assets, except for sale of the entire business of a debtor under external administration or bankruptcy proceedings. In these cases, payment obligations are generally not included in the business, save for obligations of a debtor that have arisen after filing a bankruptcy petition with the court.

Bankruptcy reorganisation

Financial rehabilitation

The Bankruptcy Law does not establish special rules for the sale of some assets or the entire business of the debtor at the financial rehabilitation. Subject to the terms of the financial rehabilitation plan or the relevant consent of the insolvency officer, the debtor is free to dispose of its assets.

External administration

Subject to the terms of the external administration plan, the insolvency office holder may sell some assets or the entire business of the debtor. The relevant assets are first evaluated and then sold by the insolvency office holder through a public auction. The starting price of the sale of the debtor's assets or business is established by the

creditors' meeting on the basis of a market price determined by an independent appraiser.

Settlement agreement

The debtor may sell some assets, or its entire business, as agreed with the creditors in a settlement agreement. The Bankruptcy Law does not require that the assets be sold by public auction.

Bankruptcy liquidation

The insolvency office holder evaluates all assets of the company available at the winding-up stage of the bankruptcy case and, where possible, sells them separately or as an entire business. The procedure for sales is similar to that conducted during the external administration.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The Bankruptcy Law does not allow 'stalking horse' bids or credit bidding.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

Russian law does not provide for provisions allowing for the rejecting or disclaiming of unfavourable contracts during corporate liquidation and reorganisation. Other rules apply to the bankruptcy liquidation or reorganisation.

Bankruptcy reorganisation

The Bankruptcy Law provides special grounds for a debtor under external administration to refuse to perform contracts. A debtor may only refuse to perform contracts or other transactions if it has not begun performance, and if performance would hinder the debtor's financial rehabilitation or if performance, compared with similar transactions entered into under similar circumstances, would cause losses for the debtor. The insolvency office holder may refuse to perform the contract within three months of the company going into external administration. The insolvency office holder must notify the counterparty to the agreement of this intention. An agreement is considered terminated from the date on which this notice is given. The counterparty to the agreement may then seek compensation for losses incurred as a result of the debtor's refusal to perform the agreement.

A debtor may not refuse to perform contractual obligations in relation to agreements entered into during the financial rehabilitation if such agreements were entered into in accordance with the Bankruptcy Law.

Bankruptcy liquidation

A debtor may refuse to perform contracts or other transactions during winding up and the counterparty can claim compensation for any loss suffered as a result of the debtor's refusal.

If a debtor breaches the contract after the insolvency proceedings are initiated, the counterparty can submit a claim in accordance with the bankruptcy procedures set out by the Bankruptcy Law. Generally, any monetary claims of the creditor for payment by the debtor as liability for a breach of the contract are qualified in the manner as the general claims under the contract (ie, if such creditor's general claims under the contract are subject to inclusion in the register of creditor's claims, the claims for breach of the contract should be included in the register as well).

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The licensor or owner of IP is generally able to terminate the counterparty's right to use the IP if the counterparty enters into bankruptcy proceedings. Such termination is possible only with a court order if the opening of the bankruptcy proceedings regarding the IP holder's counterparty is recognised by the court to be an essential change of circumstances. Under Russian law, the change in the circumstances will be recognised as essential if the counterparty has changed to such an extent that, had the parties been aware of the change of circumstances at the time of the contract, the contract would not have been concluded by them or would have been concluded on different terms.

An agreement regarding the use of IP can also be terminated by the parties without a court order where the agreement expressly provides for such termination.

The same rules regarding the essential change in circumstances may be applied in case of a liquidation or a reorganisation if the court finds that these circumstances are of such character.

28 Personal data

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

The Bankruptcy Law does not provide for specific rules in relation to personal or customer data use or transfer in the course of bankruptcy reorganisations and liquidations.

General restrictions could apply in this case, for example, a prohibition on disclosing any personal data of a company's counterparties or clients as stipulated by the respective contract. As regards the personal data of individuals (ie, any information relating to the individual that may be directly or indirectly identified based on this information) Russian law sets out that, as a general rule, they can be processed subject to the relevant individual's prior consent. Personal data processing means any actions in relation to the personal data, including, but not limited to, collection, recording, storage, updating, changing and transfer (including cross-boundary transfer and transfer for commercial purposes of the personal data).

Therefore, generally, an insolvent company may transfer personal data of its employees and customers to a third party (eg, to a purchaser) subject to the prior written consent of the relevant individuals. The consent on personal data transfer should include, inter alia, an exhaustive list of companies and individuals that will receive the personal data, a description of the information that will be transferred and the purpose of such transfer. The law also provides that, in some cases, such consent is not required, for instance, if personal data processing is needed for court decision enforcement purposes (this could be relevant for insolvency cases).

The same rules apply to corporate liquidation and reorganisation.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

As stated above, the commercial courts exercise exclusive jurisdiction with respect to insolvency cases (see question 5). Insolvency cases are not arbitrable.

Arbitration of non-bankruptcy liquidation and reorganisation is rare. Moreover, such disputes, if connected with a challenge of non-normative acts, resolutions and actions of state bodies, are not arbitrable either (eg, a decision of the Federal Antimonopoly Service on refusal to approve a merger).

Creditor remedies

30 Creditors' enforcement

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?

Generally, once the debtor is placed under supervision, no execution can be levied on the pledged assets of the debtor, including on an out-of-court basis. However, a court may permit a secured creditor to levy execution over the pledged assets of the debtor during implementation of the subsequent bankruptcy procedures.

Russian law does not provide for similar rules in relation to corporate liquidation or reorganisation.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Generally, claims of unsecured creditors rank third and they are satisfied only after all first and second-ranking creditors are paid in full (see question 38). In practice, the recovery rate in relation to the third-ranking creditors is very low.

The process is often difficult and time-consuming because the courts' verification of a claim may take several months if the claim is not confirmed by a court judgment or arbitral award; and additional time may be required to identify the debtor's assets in cases where they have been siphoned off. It is not uncommon for insolvency cases to continue for two or more years.

During bankruptcy proceedings, creditors can apply for interim measures generally available in court proceedings (for instance, freezing orders, transfer of assets to be kept by third parties, etc). Creditors can also apply for specific interim measures set out in the Bankruptcy Law, such as a prohibition on the insolvent company from entering into certain transactions without the consent of the insolvency officer during the supervision. No interim measures may be obtained once the winding up has begun.

A company undergoing corporate reorganisation may grant creditors sufficient security for their claims. If such security has been granted, the creditor is not entitled to seek fulfilment in court of its claims that have arisen before the corporate reorganisation was commenced.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Creditors must be notified of creditors' meetings and of all major bankruptcy issues. The official sources for the publication of information on bankruptcies are the unified federal register of bankruptcies (available on the internet) and *Kommersant* newspaper.

During bankruptcy proceedings, creditors are generally represented by a creditors' meeting. Shareholders or participants of the debtor can also be represented in creditors' meetings but do not have any voting rights. The shareholders' representatives can appeal to court against decisions made by the insolvency officer holder and resolutions of creditors' meetings. The creditors may also form a creditors' committee (see question 33).

The creditors' meeting is convened by the insolvency officer, the creditors' committee, creditors or authorities whose claims amount to 10 per cent or more of the total creditors' claims or one-third of the total number of creditors or authorities. The agenda of the creditors' meeting shall be provided in the request for convening the meeting. The insolvency officer holder is not authorised to amend the agenda proposed by the creditors or the authorities. The creditors' meeting shall be held within three weeks (or earlier, if specified in the request) after receipt of the request of the creditors or authorities. The creditors' meeting shall take place at the location of the debtor or its management bodies.

According to the rules regarding the organisation of creditors' meetings and meetings of the creditors' committees approved by the Russian Government Order dated 6 February 2004, the insolvency office holder shall provide the creditors' meeting with documents regarding the debtor's financial condition, the status of the bankruptcy procedures and other documents that are required to decide the issue of the creditors' meeting agenda and, therefore, the creditors are entitled to request such documents to be provided by the insolvency officer.

The main reporting duties of an insolvency office holder provided by the Bankruptcy Law include the following:

- at the supervision: a supervisor will provide the court with a report regarding his or her activity and minutes of the first creditors' meeting with the opinion on the debtor's financial condition and justification of the possibility or impossibility of the financial rehabilitation of the debtor;
- at the financial rehabilitation: an administrative manager will provide the creditors' meeting with an opinion regarding the extent to which the payment schedule has been followed and a plan of financial rehabilitation based on the debtor's report;
- at external administration: an insolvency office holder will provide the creditors' meeting with the report on the results of the external administration; and
- during the winding up: an insolvency office holder will provide the creditors' meeting with a report on his or her activity and information on the debtor's financial condition and assets, etc.

Decisions made at creditors' meetings generally require a simple majority of votes of the creditors present.

During corporate liquidation and reorganisation, the liquidation commission (the liquidator) and the company shall notify the registrar and the creditors of commencement of the procedure. The company shall also make notifications through specific mass media publications.

33 Creditor representation

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?

During the bankruptcy proceedings, if the company has 50 or more creditors, a creditors' committee must be formed. The creditors' committee may consist of three to eleven members. If there are fewer than 50 creditors, the formation of a creditors' committee is optional. The members of the creditors' committee are elected at the creditors' meeting for the period of supervision, financial rehabilitation, external administration and winding up. Only individuals nominated by the creditors (or state authorities) may be elected as members of a creditors' committee. The creditors' meeting can terminate the powers of the creditors' committee at any time.

The creditors' committee represents the interests of the creditors, controls the insolvency office holder and fulfils other duties provided to it by the creditors' meeting. The creditors' committee is entitled to request information from the insolvency office holder, challenge his or her actions and take other decisions within the powers conferred on the creditors' committee by the creditors' meeting.

The creditors' meeting and creditors' committee allow creditors to influence the bankruptcy procedure. The exclusive competence of the creditors' meeting includes issues such as whether to: proceed with financial rehabilitation, external administration or winding up or enter into a settlement agreement; and approve the reorganisation plan, the financial rehabilitation plan and the payment schedule, etc.

The Bankruptcy Law does not specifically regulate the procedure for convening and holding the meeting of the creditors' committee. This is a matter for the rules of the creditors' committee approved by the committee. The creditors' committee may decide that the insolvency office holder is in charge of notifying the members of the creditors' committee about the meeting and other connected organisational matters. Decisions made by the creditors' committee require a simple majority of votes when a vote is taken by all members of the creditors' committee. The creditors' committee may elect a representative to perform its duties.

According to the Bankruptcy Law, the insolvency office holders are entitled to retain advisers (other entities) to facilitate performance of

their duties, the creditors' meeting may also make a decision on that issue. Costs for the services of advisers retained by the insolvency office holder are compensated by the debtor within the limits provided by the Bankruptcy Law. However, if a decision on retaining of advisers was made by the creditors' meeting, the general rule is that the creditors who voted for such decision must pay for the services of such advisers pro rata to the amount of their respective claims included in the register of creditors' claims as at the date of the meeting.

During the corporate liquidation, a liquidation commission (a liquidator) must be appointed. It shall act in the interest of the company and its creditors and shall administrate the company. It is formed by shareholders or the state body that commenced the procedure. The activities of a liquidation commission (liquidator) shall be funded by the company or, if the funds are not sufficient, by shareholders. No such rules apply to corporate reorganisation.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

Russian law does not provide any procedure by which the creditors can pursue the estate's remedies if the insolvency officer has no assets to pursue a claim.

35 Claims

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

Unpaid creditors are allowed to submit their claims at any time during the bankruptcy proceedings. The claims are recorded in the register of creditors' claims, which can be held either by an insolvency officer or, subject to a resolution of the creditors' meeting, by a professional securities market participant. The register is maintained in roubles; therefore, all foreign currency claims must be converted into roubles at the Russian Central Bank's exchange rate in effect on the date of the start of the relevant bankruptcy procedure. These sums will represent the amount of creditors' claims against the debtor.

To participate in the first creditors' meeting, the creditors must submit the claims to the debtor, the court and the supervisor within 30 days of the date of publication of the start of the supervision. The debtor may provide objections to the claims of the creditor. In this case, the court will decide whether these claims will be included in the creditor's register. If the court disallows the claims of a creditor, such creditor may appeal this decision (see question 5).

Creditors who fail to file their claims during the supervision may submit their claims during financial rehabilitation or external administration. Claims may also be submitted within two months of the publication of the fact that the debtor had commenced winding up.

Generally, creditors' claims not submitted within this time period are recovered out of any assets that remain after the claims submitted within this period are satisfied.

The Bankruptcy Law does not regulate the transfer of claims by creditors during a bankruptcy procedure. Therefore, these issues will be governed by general provisions of the Civil Code, according to which the transfer of claims is, by general rule, always allowed. The terms of a transfer regulating the relations between transferor and transferee, such as an acquisition discount, do not affect the amount payable by the debtor. Once the claims are transferred from one creditor to another, the respective changes shall be made to the register of the creditors' claims, otherwise the claims of the new creditor could not be satisfied and it could not participate in the creditors' meeting. Under the Bankruptcy Law, creditors' claims can only be included or excluded from the register of the creditors' claims on the basis of a court decision. Therefore, after the claims are transferred, the new creditor must procure a court decision on procedural legal succession. In practice, the new creditor can have difficulties in obtaining such court decision.

When the bankruptcy proceedings are commenced, all amounts payable by the debtor become due. An interest at the refinancing rate established by the Central Bank of Russia is accrued on outstanding amounts. The claims for contingent or unliquidated amounts are not included in the register of the creditors' claims as such.

During corporate reorganisation, a creditor may submit claims within thirty days after the second notification on reorganisation commencement is published in the appropriate format and the debtor may not disallow this claim. During corporate liquidation, a liquidation commission shall notify the creditors on the commencement of liquidation in the appropriate media and the creditors shall have at least two months starting from the date of notification to submit their claims.

36 Set-off and netting

To what extent may creditors 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 are allowed to exercise set-off or netting rights during the supervision, financial rehabilitation and winding up to the extent that these actions comply with the order of priority of the creditors' claims. It is not clear whether the rights of set-off or netting can be exercised during the period of the external administration. Creditors are not allowed to exercise set-off rights during the winding up of a credit organisation.

The Civil Code does not provide similar rules in relation to corporate liquidation and reorganisation.

37 Modifying creditors' rights

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

Under Russian law, courts cannot change the rank of a creditor's claim as this is established by law during the bankruptcy proceedings (see question 38). Nor may a court change the rank (priority) of a creditor's claim in the corporate liquidation.

38 Priority claims

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

During bankruptcy proceedings, legal costs, insolvency office holder's fees, operating costs and company expenses, as well as debts arising during the bankruptcy proceedings, rank ahead of all other claims except expenses on prevention of technological and environmental disasters and death.

As a general rule, other claims (as provided under the Bankruptcy Law) are categorised as follows:

- personal injury claims (highest ranked claims);
- employees and copyright claims (second highest ranked claims); and
- all other claims (including claims arising out of the compulsory payment and claims by secured creditors) (third highest ranked claims).

Generally, claims by secured creditors will rank first among the 'other claims' referred to above. These are paid from the company's pledged or mortgaged assets before other claims are paid. Under the Bankruptcy Law, the pledgee or mortgagee is entitled to receive up to 70 or 80 per cent (but not more than the total indebtedness under the secured obligation) from the proceeds of sale of the pledged or mortgaged assets. 15 to 20 per cent of the proceeds are used to satisfy first and second-ranking claims and 5 to 10 per cent to repay the court expenses and fees of bankruptcy managers, etc.

There are certain special separate rules in relation to the ranking of claims of creditors of credit organisations, private pension funds and developers.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

According to the Employment Code of the Russian Federation (the Employment Code), the general rule is that reorganisation does not constitute a ground for termination of employment relations. However, employees may, on their own initiative, refuse to continue working for the company after its reorganisation. In such cases, employment contracts with those employees shall be terminated as prescribed by Russian employment legislation. The employees are not entitled to any special severance payments unless otherwise provided for in their employment contracts or a collective bargaining agreement.

If the assets of a company are transferred to a new business owner, the latter is entitled to terminate the employment of the CEO of the company, their deputies and the chief accountant. If the employment contracts with these employees are terminated by the new business owner, the employees are entitled to a severance payment in the amount of not less than three months' average salary. However, based on the existing court practice, this ground for termination of employment only applies in a limited number of cases where the assets of the company are transferred from public ownership to private ownership and vice versa (eg, upon privatisation or nationalisation of a company) and does not apply in general asset deals. In particular, a change in shareholders does not generally constitute a ground for terminating the employment of the company's chairman, his or her deputies or the chief accountant.

If redundancy is a part of the company's restructuring, the company must notify its employees and any trade unions on termination of their employment at least two months (or three months in the event of mass dismissals) before such termination. The company must also notify the local employment service of the forthcoming redundancies within the same time periods. The company must also offer employees whose positions are to be made redundant vacant positions in the company that are suitable for the employees based on their qualifications and health, including less-qualified and lower-paid positions, if any exist. Should the employee refuse the proposed available vacant positions or should the company have no available vacant positions in the same territory where the employee is located, the employee's employment may generally be terminated with payment of a statutory severance payment.

Some categories of employee have preferential rights to employment and should be made redundant last. First of all, employees employed in the same position with a higher performance rate and qualification should be made redundant after colleagues with a lower performance rate. If the performance rate and qualification are equal, certain criteria provided by law must apply to determine preferential rights to employment (eg, married individuals with two or more dependents, employees who are the only working individual in their family, employees improving their qualifications on the initiative of the employer have preferential rights to employment).

Certain categories of employee are protected against dismissal at the employer's initiative, including dismissal because of redundancy (eg, temporarily disabled employees and employees on holiday).

In addition to general payments upon termination of employment, employees dismissed because of redundancy are entitled to one month's average salary as severance pay. An employee may also be entitled to his or her average salary for the second and third months after termination of employment under certain specific circumstances provided that he or she has not found new employment.

Under Russian law, voluntary or involuntary liquidation of a solvent company constitutes a stand-alone ground for employment termination. Employees dismissed because of liquidation of a company are entitled to the same payments as described above for redundancy. According to Russian law, in liquidation proceedings, such employees' claims rank second, after personal injury claims.

As to the procedure for termination of employment, the Employment Code provides that the employer, which is or plans to be liquidated, must notify each of its employees no later than two months before the termination of their employment in connection with the liquidation. The employer shall also notify the elective body of the local

trade union of the forthcoming dismissal of the employees two months (or three months in the event of mass dismissals) before such employment termination.

According to the Bankruptcy Law, employees are represented in the bankruptcy proceedings by a person elected by them. The procedure to be followed for terminating employment and the amounts payable to employees are the same as described in relation to liquidation.

40 Pension claims

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

Under Russian law, employers pay social insurance contributions to the Pension Fund of the Russian Federation, the Social Insurance Fund of the Russian Federation and the Federal Compulsory Medical Insurance Fund for all employees. In accordance with Bankruptcy Law, claims against employers in relation to social insurance contributions that have arisen after bankruptcy proceedings were initiated are included in the category of current payments that rank ahead of all other claims (see question 38). Claims for payment of social insurance contributions that should have been paid before bankruptcy proceedings were initiated are ranked third among other claims in the insolvency proceedings. These claims are asserted by authorised government bodies. No special remedies are set out in the Bankruptcy Law with respect to these claims.

In practice, companies in Russia may also choose to enter into pension agreements with private pension funds to establish corporate programmes for the benefit of their employees (in addition to payments to the Pension Fund of the Russian Federation). Employees have no claim for unpaid contributions under the said corporate programmes against the employer unless otherwise specifically agreed between the employer and the employees.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The management of the debtor, the relevant bankruptcy manager or the relevant officers of the debtor are generally in charge of compliance by the debtor with environmental laws. The debtor (as well as the relevant officers) could be subject to criminal, civil or administrative liability should the debtor breach any environmental laws. Russian law provides that any damage caused to the environment should be compensated. According to the Bankruptcy Law, in cases where termination of the debtor's business could cause technogenic or environmental disasters, or both, or the death of humans, the costs of taking measures to prevent such consequences are payable ahead of other claims. Apart from this, Russian law does not provide any special regime for compliance with environmental laws in the course of bankruptcy procedures.

42 Liabilities that survive insolvency or reorganisation proceedings

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

In accordance with Russian law, in the event of a debtor's corporate reorganisation, its liabilities are transferred to its legal successors. When a legal entity is voluntarily or involuntarily liquidated, liabilities generally cease to exist.

43 Distributions

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

Distributions to creditors may be made at any stage of the bankruptcy proceedings. Each tier of creditors must be satisfied in full before the next tier can receive any payment. Claims not satisfied because of the insufficiency of the debtor's assets are deemed cancelled.

If the amount received by the company for its business and assets is lower than the total amount of creditors' claims, then the proceeds can be distributed pursuant to a settlement agreement agreed upon by the creditors.

Security

44 Secured lending and credit (immovables)

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

The principal type of security taken on immovable property is a mortgage. A mortgage charges the debtor's title to the property and, generally, prevents its transfer without the mortgagee's consent. A mortgage does not involve the transfer of ownership of the property by the mortgagor to the mortgagee. When the liquidation of a mortgagor of immovable property is initiated, the charge created by the mortgage ceases to exist, but the mortgagee has a right to be paid his or her debt before unsecured creditors from the proceeds of sale of the mortgaged property. Under the Bankruptcy Law, the mortgagee is entitled to receive up to 70 or 80 per cent (in any case not more than the total indebtedness under the secured obligation) from the proceeds of sale of the mortgaged property.

A mortgage is subject to state registration and the payment of a state fee of 4,000 roubles by legal entities or 1,000 roubles by individuals.

45 Secured lending and credit (movables)

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

The principal type of security taken on movable property is a pledge. A pledge charges the title to the movable property and prevents its transfer without the pledgee's consent. A pledge does not involve the transfer of ownership of the property by the pledgor to the pledgee. When the liquidation of an owner or pledgor of movables is initiated, the charge created by the pledge ceases to exist, but the pledgee has a right to be paid his or her debt from the proceeds of sale of the pledged movables. Under the Bankruptcy Law, the pledgee is entitled to receive up to 70 or 80 per cent, but not more than the total indebtedness under the secured obligation, of the proceeds of sale of the pledged property. In bankruptcy proceedings, the priority right of the pledgee generally ranks third.

The Civil Code provides sellers of goods that are purchased on credit with a mandatory pledge over the goods transferred to the debtor until they are paid for, unless otherwise agreed by contract.

Although there is no registration requirement, pledges on movable property may be registered by a notary in the register of pledge notices upon application of the pledgor or pledgee, which ensures retention of the pledgee's interest in the pledged property in case of it being disposed of by the pledgor to a third party.

Both mortgages (as above) and pledges may be provided to a creditor not only by the principal debtor but also by a third party. Creditors can also secure their interest with a lien. A lien gives a creditor the right to retain the possession of a debtor's assets until the debt has been paid. Liens are created by law and are rarely contracted upon in Russia. However, the effects of a lien under bankruptcy proceedings are unclear.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Russian law does not provide for any specific grounds to annul or set aside any transactions in the course of liquidation or reorganisation. However, if a company is undergoing corporate reorganisation, creditors are entitled to request early performance of the debtor's obligations or, if such performance is impossible and the creditor was not provided with adequate security, termination of the relevant obligations and compensation for losses in connection with such termination.

As to the bankruptcy procedures, the following transactions can be invalidated by court (as well as the transactions that can be invalidated according to general grounds set out in the Civil Code):

- transactions entered into by the debtor within a year before or after the filing of the bankruptcy petition if inadequate consideration was provided by the other party to the debtor under such transaction (eg, sale by the debtor of assets at a price that is materially less than the market value of such assets);
- transactions made by the debtor within three years before or after the filing of the bankruptcy petition with the purpose of circumventing the economic interests of creditors provided the relevant counterparty knew about such purpose (eg, transfer of property by the debtor without compensation, in such a case the knowledge of the counterparty is assumed); and
- transactions entered into by the debtor within a month (in some cases six months) before or after the filing of the bankruptcy petition and resulting in the preferential satisfaction of the claims of one creditor over others (eg, a transaction that leads or could lead to a change in creditors' rankings).

Claims for invalidation of these transactions can be brought by the insolvency officer on their own initiative or pursuant to a decision of the creditors' meeting or creditors' committee, or by the creditor or a competent authority in cases where the amount of indebtedness owed to such creditor or the authority comprises 10 per cent of the total amount of claims included in the register of creditors' claims.

The limitation period for challenging all of the above transactions is one year from the date on which the relevant claimant became aware of or should have become aware of the grounds for invalidating the transaction.

An insolvency office holder may also apply to the court at any stage of a bankruptcy procedure for invalidation of any transactions concluded by the company provided that such transactions were made in violation of the bankruptcy law (eg, without relevant consent).

Invalidation of a transaction generally leads to bilateral restitution, meaning that each party returns everything received under the transaction to the other party.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Although there are no restrictions in the applicable legislation on claims by non-arm's length creditors against their corporations in bankruptcy proceedings of those corporations. The case law has developed certain criteria of determining whether a loan granted to a corporation by its related party should be subordinated. In particular, courts try to establish whether the loan was entered into on market terms, whether it was granted shortly before the commencement of bankruptcy proceedings or whether there are other circumstances indicating that the creditor acted in bad faith with a view to obtaining an opportunity to exert influence on the bankruptcy proceedings as a large creditor. However, this process has only recently started and the case law on this issue is being currently formed. Furthermore the Bankruptcy Law sets out certain grounds for invalidation of non-arm's length transactions of insolvent companies (see question 46).

Groups of companies

48 Groups of companies

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

According to Russian law, a parent corporation can be responsible for the liabilities of its subsidiary if such parent corporation is entitled to determine decisions of the subsidiary.

The parent corporation and subsidiary are jointly and severally liable for the transactions entered into by the subsidiary in performance of the parent corporation's instructions or with its consent.

In the case of insolvency of the subsidiary because of the fault of the parent corporation, the latter has a subsidiary liability in relation to the debts of the subsidiary.

The parent corporation can also be regarded as a person exercising control over the debtor or a person de facto controlling the subsidiary (see question 18 in relation to liability of such persons).

49 Combining parent and subsidiary proceedings

In 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?

Russian law does not establish any insolvency proceedings for corporate groups. Therefore, insolvency proceedings initiated regarding a parent company and its subsidiary cannot be combined for administrative purposes. Furthermore, the assets and liabilities of the parent company and its subsidiary cannot be combined into one pool for distribution purposes.

International cases

50 Recognition of foreign judgments

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?

Foreign judgments can be enforced in Russia based on international treaties.

Russia is not a signatory to any specific international bankruptcy treaty. The Bankruptcy Law also provides that, in the absence of such an international treaty, foreign judgments on insolvency proceedings shall be recognised in Russia on the basis of the principle of reciprocity.

However, in certain cases Russian courts set an exceedingly high standard of proof when establishing whether there is reciprocity between the Russian Federation and a foreign state. In particular, courts oblige parties to proceedings to adduce evidence of recognition and enforcement of Russian courts' bankruptcy rulings abroad.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model Law on Cross-Border Insolvency has not been adopted in Russia and is not being considered for incorporation into Russian law.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors have the same status as Russians, unless otherwise provided by an international treaty, but foreign debtors are not subject to Russian bankruptcy proceedings. Foreign-owned assets located in Russia should not be subject to Russian bankruptcy proceedings.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

As Russian bankruptcy law does not regulate cross-border cooperation between domestic and foreign insolvency officers, it is not possible to transfer assets from an administrative procedure in Russia to another country.

54 COMI

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?

Russia is not a member state of the European Union and the EU Regulation on Insolvency Proceedings does not apply. Russia has also not enacted the UNCITRAL Model Law on Cross-Border Insolvency. Therefore, the concept of COMI is not applicable in Russia.

55 Cross-border cooperation

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?

Foreign court decisions on insolvency (bankruptcy) are recognised in Russia based on the principle of reciprocity or international treaties.

Apart from the above, Russian bankruptcy legislation does not provide any specific rules on cross-border cooperation between domestic and foreign courts and domestic and foreign insolvency officers in cross-border insolvencies and restructurings.

In Russia there is no procedure for recognition of foreign proceedings and only foreign final judgments on the merits can be recognised (thus, for instance, no act of a foreign court on interim relief can be recognised as such act is not a final court judgment on the merits). Applications for recognition and enforcement of foreign monetary judgments (or arbitral awards) can be filed only in bankruptcy proceedings. If the proceedings on recognition and enforcement were commenced before initiation of insolvency proceedings, then the creditor may either continue them or terminate them and file an application in insolvency proceedings.

There were some attempts in Russia to recognise foreign proceedings or to cooperate with foreign courts, but they failed because of lack of legislation, as stated above.

56 Cross-border insolvency protocols and joint court hearings

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?

No cross-border insolvency protocols are currently in place in Russia, nor have any other arrangements been entered into by the Russian courts to coordinate proceedings with courts in other countries. No communication or joint hearings have taken place in cross-border cases between the Russian courts and those of other countries.



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The main legislation applicable to corporate insolvencies and reorganisations in Singapore is the Companies Act (Chapter 50) (the Act), read with its related subsidiary legislation.

Insofar as natural persons are concerned, the governing legislation is the Bankruptcy Act (Chapter 20).

On 10 September 2018, the Singapore Ministry of Law introduced an omnibus Insolvency Bill to Parliament for its first reading. Upon the Bill's passage, the Bankruptcy Act (Chapter 20) will be repealed, while provisions in the Act relating to corporate insolvency and restructuring will be removed, with a view to consolidating Singapore's corporate and individual insolvency and debt reorganisation regimes.

2 Excluded entities and excluded assets

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

The winding up of limited liability partnerships, registered business trusts, real estate investment trusts and banks are respectively governed by the Limited Liability Partnerships Act (Chapter 163A), the Business Trusts Act (Chapter 31A), the Securities and Futures Act (Chapter 289) and the Banking Act (Chapter 19).

Further, companies in certain industries may be subject to additional requirements imposed on them by industry-specific legislation (eg, designated clearing houses (Securities and Futures Act (Chapter 289)), electricity licensees (Electricity Act (Chapter 89A)), insurance broking businesses (Insurance Act (Chapter 142)) and trust companies (Trust Companies Act (Chapter 336))).

Generally, assets that are subject to security interests (eg, mortgages, charges and debentures) are excluded from the claims of creditors as the debtor is not beneficially entitled to the encumbered asset.

3 Public enterprises

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

Generally, procedures and remedies available to creditors under the Act are applicable to government-owned enterprises.

The Singapore High Court (SHC), which oversees applications for winding up, may decline to make a winding-up order on public interest grounds. The court may also make other orders, such as a judicial management (JM) order, if it considers that it would be in the public interest to do so.

4 Protection for large financial institutions

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

Singapore has not enacted legislation to specifically provide for institutions that are considered 'too big to fail'.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Bankruptcy and liquidation fall within the jurisdiction of the SHC. A bankruptcy order may be appealed to a judge in chambers and then to the Singapore Court of Appeal (SGCA). A winding-up order may be appealed to the SGCA. There is no means of appeal against a decision of the SGCA.

An appeal to the SGCA requires the appellant to deposit the sum of S\$20,000 in court for the respondent's costs.

On 20 July 2016, the Ministry of Law indicated its intent to have insolvency and restructuring cases heard by a dedicated bench of judges of the SHC. In June 2017, then-Minister of State for Law and Finance, Indraneel Rajah, reiterated the acceptance of proposals for a specialist insolvency bench, including international judges. However, a timeline for implementation has not been specified. In practice, many of the more complex restructuring cases are routinely docketed before judges with such expertise.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

A corporate debtor may be voluntarily wound up upon application by the debtor itself through its members by the passing of a special resolution.

Whether the voluntary liquidation proceeds as a members' voluntary liquidation (MVL) or a creditors' voluntary liquidation (CVL) depends on the solvency of the debtor. This is determined by the board of directors, which must issue a statutory declaration as to the debtor's solvency.

If such a declaration is made, the voluntary liquidation proceeds as an MVL. Otherwise, the winding up proceeds as a CVL. The main difference between an MVL and a CVL is that in the latter, the creditors' choice of liquidator prevails, and the creditors, often through a creditors committee, drive the progress of the liquidation. An MVL may be converted to a CVL if it is subsequently discovered that the debtor is insolvent.

Upon commencement of a voluntary liquidation, the company ceases to carry on its business except to the extent that the liquidator deems necessary for a beneficial winding up. However, the corporate state and corporate powers of the company continue until it is dissolved. Any transfer of shares not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members made after the commencement of winding up, is void.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

A corporate debtor may commence a voluntary reorganisation under the Act either via a scheme of arrangement (a scheme) or by way of an application for a JM order. In the former case, it is a debtor-in-possession process, and management retains control (albeit with court supervision), whereas in the latter case, a judicial manager is appointed. The appointment of judicial managers renders the debtor's board of directors *functus officio*.

Both local and foreign companies may avail themselves of either mode of voluntary reorganisation, although in the latter case certain statutory criteria have to be met: see question 13.

Scheme

A scheme is generally a three-stage process.

The first stage is an application to court for leave to convene a meeting of the company's creditors or class of creditors to consider and approve a compromise or arrangement. This may be brought by, among others, the company, the creditors or the judicial managers. Where leave is granted, the company will send out a notice summoning the meeting to the creditors (the creditors' meeting), together with a statement explaining the effects of the proposed scheme.

Second, at the creditors' meeting, the creditors or classes of creditors will vote to approve the scheme. The statutory threshold to approve a scheme is a majority in number representing at least three-quarters in value of each class of creditors present and voting at the meeting.

Third, if the requisite approval from the creditors is obtained, then the court has jurisdiction (but is not bound) to sanction the scheme. See also question 12.

The scheme takes effect as a statutory contract as between the company and its creditors and the creditors *inter se* once the order of court sanctioning the scheme is lodged with the Registrar of Companies (the Registrar).

The Companies (Amendment) Act 2017 (the 2017 Act) introduced several additions to the scheme regime. These are summarised as follows:

- (i) where two or more classes of creditors are voting, the court may 'cramdown' a dissenting class of creditors provided the court is satisfied that:
 - a majority in number of the aggregate number of creditors sought to be bound by the compromise or arrangement who were present and voting either in person or by proxy at the relevant meeting have agreed to the compromise or arrangement;
 - the majority in number referred to in (i) above represents three-quarters in value of the creditors sought to be bound by the compromise or proposal; and
 - the court is satisfied that the compromise or arrangement does not discriminate unfairly between two or more classes of creditors, and is fair and equitable in respect of each dissenting class. To date, there has been no reported decision as to what constitutes unfair discrimination and what would be considered fair and equitable;
- (ii) pursuant to the newly introduced section 211I of the Act, the court is empowered to sanction a proposed scheme without the company having a creditors' meeting if the court is satisfied that, had a meeting been held, it would have obtained the relevant approval of the applicant's creditors;
- (iii) under section 211B of the Act, an automatic 30-day moratorium arises once an application for leave to convene a creditors' meeting is made (or intended to be made);
- (iv) an extension of the scope of the moratorium that the court may order (that brings the moratorium in line with the automatic stay procedures applicable in JM, including a stay of realisation of security interests); and
- (v) new provisions relating to rescue-financing and the priority given to individuals or institutions providing such rescue finance.

JM order

The court will only make a JM order where it can be shown that the company:

- is or will be unable to pay its debts; and

- one or more of the following may be achieved:
- there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern;
- a scheme may be approved; or
- that the JM will enable a more advantageous realisation of the company's assets than on a winding up.

The 2017 Act also introduced several key changes to the JM regime. The salient changes are set out below:

- foreign companies may apply to be placed in JM provided that they can satisfy the court that they are 'liable to be wound up' pursuant to section 351 of the Act (the JM regime was previously limited to Singapore companies only) (see question 13);
- the solvency threshold for the court to make a JM order has been lowered; and
- the availability of 'super priority' for rescue financing in a JM (see question 22).

8 Successful reorganisations

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

Where schemes are concerned, the general test is that creditors who are present and voting are classed according to the similarity (or dissimilarity) of their legal rights.

Creditors are therefore classed according to what their relative positions would be in the realistic alternative to the scheme. Consequently, if the alternative to the scheme is compulsory liquidation, the court will consider whether creditors have been correctly classified by reference to how they would rank in a liquidation scenario.

Where there are related party creditors, the approach of the courts will likely be to disregard the votes of such creditors.

The former is easily provable. As to the latter, whether or not a particular creditor of a scheme company is considered to be a related party is a matter of fact. The SGCA indicated that the presence of factors such as those listed below will support a finding that such creditors are related parties, and that their votes at the creditors' meeting should be discounted accordingly:

- whether the scheme company controls the creditor or vice versa;
- whether the scheme company and the creditor have common shareholders who hold a less than 50 per cent but more than a de minimis stake in both companies;
- whether the creditor and the scheme company have common directors; or
- where the directors or the creditors are related by blood, adoption or marriage.

The SGCA further clarified that the mere assignment of debt from a related party to a third party does not attach related creditor status to the assignee third party. The determination of whether a creditor is a related party depends on a factual analysis of the particular creditor's connection with the scheme company.

It is settled law in Singapore that the terms of the scheme may validly release non-debtor parties (eg, third parties, guarantors or officers of the company).

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

There are various grounds on which a debtor may be placed into involuntary liquidation. The most common grounds are where the debtor is unable to pay its debts or where the creditor establishes that it is just and equitable that the debtor be wound up.

A debtor is considered unable to pay its debts if it is unable to pay its debts as they fall due (the cashflow test) or if its liabilities exceed its assets (the balance sheet test). The cashflow test is generally preferred. Where a statutory demand is served by the creditor on the debtor in respect of an undisputed debt exceeding S\$10,000 (or such other sum

where the undisputed portion exceeds S\$10,000), and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, an evidential presumption arises that the debtor is unable to pay its debts. The creditor may then rely upon this presumption in its application to place the debtor in compulsory liquidation.

The winding up is deemed to have commenced from the date the winding-up application is filed. From that date, statutory restrictions kick in to preserve the company's assets, namely:

- any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of winding up is void, unless the court orders otherwise;
- no action may proceed or be commenced against the company except by leave of the court; and
- any attachment, sequestration, distress or execution that is not perfected after the commencement of winding up is void.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Involuntary reorganisations may only be initiated by creditors in the context of a JM or by a liquidator where the debtor is in insolvent liquidation. Otherwise, see questions 7 and 9.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

See question 7. However, this is not a 'pre-packaged' sale of assets, but an expedited approval of a scheme. The court may sanction a proposed scheme under section 211I of the Act without the company holding a creditors' meeting if the court is satisfied that, had a meeting been held, the relevant approval of the applicant's creditors would have been obtained.

12 Unsuccessful reorganisations

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?

Scheme

A proposed reorganisation by way of a scheme is defeated where the requisite approval from the creditors present and voting at the creditors' meeting is not obtained or if the court declines to sanction the scheme, or if the creditors are incorrectly classed for the purposes of voting (in the which case the court does not have jurisdiction to sanction the scheme, but may now – under the 2017 Act – order a revote).

Even where the statutory threshold is met, the court may decline to sanction the scheme if it is not satisfied that the statutory majority had voted in a manner that is representative of the interests of each class of creditors in the scheme; or that the scheme is reasonable. In determining this, the court will likely consider factors such as whether the votes of wholly owned subsidiaries and related party creditors have been fully discounted, or whether creditors had assigned their debts for the sole purpose of boosting the headcount and allowing the scheme to be passed (where otherwise, it would not).

The court has a supervisory role in the performance of a scheme. The court has the power to review, reverse, modify or give such direction or make such order as the court thinks fit to 'cure' any breach of the compromise or arrangement.

JM order

The court will decline to make a JM order where it is unsatisfied that the making of such an order would achieve the goals set out in question 7.

Where a JM order is made, the judicial managers will present a statement of proposals to creditors. In this case, the threshold for approval of the statement of proposals is determined by a majority in number of creditors representing a majority in value of the company's debt.

13 Corporate procedures

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

Under the Act, the term 'corporation' includes both local and foreign companies.

The Registrar has wide powers to strike off both local and foreign companies on various grounds. This includes, but is not limited to, situations where the Registrar has reasonable cause to believe that the company is not carrying on business or is not in operation, where the foreign company has no place of business in Singapore or if a foreign company fails to appoint an authorised representative within six months after the date of the death of its sole authorised representative.

Comparatively, in liquidation, a local company is dissolved upon the application by the liquidator once the winding up has been completed. This is usually accompanied or preceded by the liquidator's final report and the declaration of a final dividend to the company's creditors (if assets are available for distribution).

Foreign companies may be wound up in Singapore only by an order of court where it can be shown that the requirements in section 351 of the Act are met. A winding-up order against a foreign company will only be made where it can be shown that the foreign company has a substantial connection with Singapore.

In this respect, the 2017 Act enumerates a list of factors to be considered in determining if such a substantial connection exists. These are:

- Singapore is the centre of the main interests of the company;
- the company is carrying on business in Singapore or has a place of business in Singapore;
- the company is a foreign company that is registered under division 2 of Part XI of the Act;
- the company has substantial assets in Singapore; or
- the company has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction.

The company has submitted to the jurisdiction of the court for the resolution of one or more disputes relating to a loan or other transaction.

Where Singapore is the principle place of liquidation of that foreign company, the local liquidators will then adopt the same procedure with respect to the dissolution of local companies.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

A JM order may be discharged upon an application by the judicial managers stating that the purposes specified in the JM order have either been achieved or are incapable of achievement.

In a court-ordered winding up, a liquidator would apply for an order that he or she be released and that the company be dissolved after realisation of all of the company's property or so much thereof as is realisable and a final dividend is given, if any, to the creditors.

In a voluntary winding up, as soon as the affairs of the company are fully wound up, the winding up is concluded in a manner similar to that in a compulsory liquidation.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

The courts generally use two tests to determine if a debtor insolvent: the cashflow test and the balance sheet test. Under the cashflow test, a debtor is deemed insolvent if it is unable to pay its debts as they fall due, whereas under the balance sheet test, a debtor is deemed insolvent if its liabilities exceed its assets.

16 Mandatory filing**Must companies commence insolvency proceedings in particular circumstances?**

Directors of insolvent companies owe fiduciary obligations to the general body of the company's creditors. Where it is clear that the company's debts cannot be repaid, the directors should – but are not obliged to – place the company in liquidation, or in a scheme or JM, as a matter of prudence. Trading while a company is insolvent constitutes an offence.

Directors and officers**17 Directors' liability – failure to commence proceedings and trading while insolvent****If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?**

Directors and officers of an insolvent company owe fiduciary duties to the company's general body of creditors. They therefore risk being in breach of these duties if they carry on the business of the company without due regard for the creditors' collective interests.

That said, there is no rule per se that a company may not carry on business if it is insolvent. However, if an officer of a company knowingly contracts a debt, which, at the time he or she had no reasonable or probable ground to expect that the company would be able to repay, then that officer shall be guilty of an offence and shall be liable on conviction to a fine of up to S\$2,000 or to a prison term of up to three months. The Act also provides that civil liability to the company for losses incurred, with no limitation of personal liability, may follow in the event that such criminal liability made out (see question 18 below).

A director may also incur criminal liability if in the course of winding up it appears that any business of the company was carried on with the intention of defrauding creditors.

Further, the court may make an order disqualifying a director from being a director or being involved in the management of a company for a period of up to five years where – in the context of an insolvent company – the director's conduct makes him or her unfit to be a director or be involved in the management of other companies.

18 Directors' liabilities – other sources of liability**Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?**

A company's directors and agents are generally not personally liable for the company's debts or obligations. However, a director of a company may be held personally liable in respect of antecedent transactions made by that company that are subsequently set aside by the court as these are considered breaches of the director's fiduciary duty to the general body of creditors (eg, by procuring an undue preference). See question 47.

A director must at all times act honestly and use reasonable diligence in the discharge of his or her duties. A director must also not make improper use of his or her position to gain an advantage for him or herself or any other person or to cause detriment to the company. A director of a company found to be in breach of the above duties will incur both civil and criminal liability:

- civil liability – the errant director will be liable to the company for any profit made by him or her or for any damage suffered by the company as a result of the breach; and
- criminal liability – the director shall be liable on conviction to a fine of up to S\$5,000 or to imprisonment of up to 12 months.

19 Shift in directors' duties**Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?**

Under Singapore law, a company director's fiduciary duty to act in the company's best interests (which means the best interests of the general body of shareholders) shifts to act in the company's creditors' best interests where the company is insolvent or near insolvency.

20 Directors' powers after proceedings commence**What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?**

In a scheme, the management of the company remains vested in the existing board of directors.

In JM, all the directors' powers are transferred to the judicial managers for the duration of the JM order, and all directors' powers of management cease.

All powers of the directors of a company in liquidation cease upon the appointment of a liquidator, except to the extent approved by the liquidator.

Matters arising in a liquidation or reorganisation**21 Stays of proceedings and moratoria****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?****Liquidation**

Once a winding-up application has been filed against the company, the company or any creditor may apply to stay or restrain any action or proceeding pending against the company and the court may do so on such terms as it thinks fit.

Once a winding-up order is made, all actions or proceedings against the company are automatically stayed and may only be proceeded with or commence with the leave of court and on such terms as the court may impose.

Reorganisations – scheme

Following the changes brought by the 2017 Act, a company may apply for an automatic 30-day moratorium provided it has made or undertakes to make as soon as practicable either an application for leave to convene a creditors' meeting or an application for the arrangement to be approved by the court without a meeting of the creditors. In its application, the company must provide the court with evidence of support from its creditors for the proposed compromise or arrangement, or, where the compromise or arrangement has not been proposed to the company's creditors, a brief description of the proposed compromise or arrangement. The moratorium may be dismissed or extended by the court depending on the circumstances of the case.

Prior to the 2017 Act, the moratorium was limited to actions or proceedings against the debtor company within Singapore only. In contrast, following the 2017 Act, the moratorium may have extra-territorial effect and may also prevent creditors from realising their security interests.

This brings the scheme moratorium more in line with the protection afforded to the debtor company by a JM order.

Creditors are entitled to challenge the moratorium or the terms thereof.

Reorganisations – JM

Upon an application for JM, a stay on all action or proceedings (including the realisation of security and execution against the company's assets) automatically arises and leave of court (subject to such terms as the court may impose) must be obtained in order to realise security or continue with any such proceedings against the company.

Where the JM order is made, any receiver or manager shall vacate office, any application to wind up the company shall be dismissed and, for the period the JM order is in effect:

- no order may be made, and no resolution may be passed, for the winding up of the company;
- no receiver or manager may be appointed over any property or undertaking of the company;
- no other proceedings may be commenced or continued against the company, except with the consent of the judicial manager, or with the leave of the court and subject to such terms as the court imposes;
- no execution, distress or other legal process may be commenced, continued or levied against any property of the company, except with the consent of the judicial manager, or with the leave of the court and subject to such terms as the court imposes;
- no step may be taken to enforce any security over any property of the company, or to repossess any goods under any chattels leasing agreement, hire-purchase agreement, or retention of title agreement, except with the consent of the judicial manager, or with the leave of the court and subject to such terms as the court imposes; and
- despite sections 18 and 18A of the Conveyancing and Law of Property Act (Chapter 61), no right of re-entry or forfeiture under any lease in respect of any premises occupied by the company may be enforced, except with the consent of the judicial manager, or with the leave of the court and subject to such terms as the court imposes.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

Liquidations

Save for the period of four weeks immediately after the making of a winding-up order, a company in liquidation is not permitted to carry on its business without express approval of the court or of the company's committee of inspection and it may only do so insofar as is necessary for the beneficial winding up of the company.

Reorganisations

Where a company is reorganising under a scheme or a JM, there is no prohibition against it carrying on its business. The terms of the scheme may provide for special treatment given to creditors who supply goods or services, allowing the company to carry on business for the duration of the scheme. In a JM, this may be sanctioned by the judicial manager.

The 2017 Act introduced 'super priority' provisions for rescue financing in scheme and JM scenarios. This is intended to incentivise and protect investors seeking to inject fresh capital into the distressed company. In general terms, where an investor comes forward to inject fresh capital, the court may order that the new investor enjoy 'super priority' in respect of such funds injected or obligations incurred, and may do so by:

- treating the debt as a cost or expense of winding up;
- giving the debt priority over all other preferential debts;
- securing the debt with a security interest over the company's property, whether subject to an existing interest or not; or
- where the property in question is already subject to a security interest, granting the rescue financier security that is subject to, equal or superior to an existing security interest.

In Singapore's first case on 'super priority' rescue financing, the SHC observed that an applicant seeking super priority for fresh capital under limb (i) should generally adduce some evidence that reasonable efforts had been expended at trying to secure financing on an unsecured basis, in order to move the court to exercise its discretion to grant 'super priority'. In respect of limbs (ii), (iii) and (iv), the applicant must show that it was unable to obtain financing from any person unless the debt arising from the financing was given 'super priority' type rights.

The court will only order the creation of a security interest equal or superior to an existing security interest over property where there is 'adequate protection' provided for the existing security holder.

In both a scheme and a JM, the creditors may collectively or individually exercise oversight by making the necessary inquiries into the

running of the company's business. Ordinarily, the judicial manager will seek the creditors' approval before proceeding with certain transactions or courses of action.

Insofar as a scheme is concerned, under the 2017 Act, a creditor may now apply to court to restrain the debtor company from disposing of its property other than in good faith and in the ordinary course of the business.

23 Post-filing credit

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

Yes. The liquidator and judicial managers are expressly authorised by the Act to do so.

Any monetary obligations incurred by the liquidator or judicial managers are payable out of the assets of the company and considered as part of the liquidator's or judicial manager's costs and expenses.

In a JM or a scheme, 'super priority' may be afforded to certain creditors who provide rescue financing (see question 22).

24 Sale of assets

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?

The sale of assets is generally governed by the law of contract. Where the asset is subject to a security interest, judicial managers may dispose of or deal with the charged property provided that the proceeds are used to discharge sums secured by the security. Any excess funds after discharging the security may be used by the judicial managers to repay the creditors. In a liquidation, the liquidator may not sell assets fully encumbered by a security interest as these are assets to which the company is not beneficially entitled.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

In theory, yes. These procedures are however not commonplace in Singapore. The general duty is that the relevant insolvency professional must take reasonable steps to obtain a fair market price for the asset sold. It has been held by the SHC that the liquidator has the power to assign a company's cause of action to a third party for value.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

A liquidator may disclaim an unprofitable contract entered into by the debtor prior to liquidation. However, the liquidator may not do so where a person interested in the contract makes an application in writing to the liquidator requiring the liquidator to decide if he or she will disclaim the contract, and the liquidator does not disclaim the contract within a period of 28 days (or such further period as is allowed by the court) after receipt of the application.

Further, the court may, on an application by a person entitled to the benefit or subject to the burden of a contract made with the company, order the rescission of that contract and award damages for the non-performance of the contract, and any damages payable to that person under the order may be proved by him or her as a debt in the winding up.

Judicial managers, unlike a liquidator, have no power to disclaim onerous contracts entered into by the debtor company prior to the JM order. Judicial managers are personally liable on any contract entered

into or adopted by them in the carrying out of their functions, and are entitled to be indemnified in respect of such liability out of the company's property. Judicial managers may, however, by giving notice to a counterparty disclaim any personal liability under a contract previously entered into by the debtor.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Contractual provisions that provide for the re-vesting of property upon insolvency are generally void on the grounds that this deprives the insolvent estate of property to which it is beneficially entitled. However, this is ultimately a question of the contract in question.

In relation to rights to use intellectual property (IP), there is no reason in principle why such a right cannot terminate upon insolvency unless the bargain between the parties conferred proprietary interests in such IP on the insolvent party.

Whether the debtor can continue to use the IP rights after insolvency or a reorganisation depends on the terms on which the IP was granted.

28 Personal data

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

The Personal Data Protection Act 2012 (No. 26 of 2012) requires organisations to protect personal data in its possession or under its control by making reasonable security arrangements to prevent unauthorised access, collection, use disclosure, copying, modification, disposal or similar risks.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Disputes arising in liquidation or reorganisation proceedings between the company and specific creditors may be referred to arbitration where the parties have agreed to do so, or where the underlying contract giving rise to the dispute provides for disputes to be referred to arbitration, and provided that the affected creditor obtains the leave of court to be excluded from any moratorium in place at the time.

Issues relating to the insolvency proceedings themselves and claims arising from statutory insolvency provisions are generally considered non-arbitrable.

Creditor remedies

30 Creditors' enforcement

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 may appoint a private receiver, pursuant to such a right provided for under the security documents. The circumstances under which a private receiver may be appointed, as well as the powers of the private receiver, are usually provided for in the security documents.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Where an unsecured creditor has obtained a final judgment against the debtor in his favour, the creditor becomes a judgment creditor and may

seek to enforce a judgment by applying for a writ of seizure and sale, applying for a garnishee order or appointing a receiver. The process typically takes between 7 to 21 days and provides a window for a competing creditor to file a winding-up application to halt the execution process, particularly in large-scale winding up.

While the court has the power to order pre-judgment attachments, it is unclear as to whether this applies solely to natural persons. A plain reading of the Debtors' Act (Chapter 77) suggest that it cannot apply to corporate debtors.

In any case, pre-judgment attachment is not common and may only be ordered in exceptional circumstances. Another recourse available to a creditor who has commenced proceedings against a debtor is to apply for an injunction to freeze the debtor's assets if the creditor can show that there is a risk that the debtor will dissipate the assets and thereby frustrate any judgment obtained against the debtor.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

In a liquidation, notice will be issued to the company's creditors, informing them of the day on which they are to prove any debts or claims they might have, at least 14 days before the day so fixed. Notice must also be given at least 14 days before a liquidator declares any dividends to a company's creditors. Where the winding up of the company is voluntary, the company's members must meet to pass a special resolution resolving to wind up the company. A director or officer of a company must submit to the liquidator a statement of the company's affairs showing, as at the date of the winding-up order, the particulars of the company's assets, debts and liabilities, the names and addresses of its creditors and the securities held by them respectively, the dates when such securities were given, and any further information as is prescribed or as the official receiver or the liquidator requires.

In a scheme, the company or any of its members must apply to the court to convene a meeting of its creditors or class of creditors. If the meeting is summoned, then the company must send out a notice summoning the meeting to the creditors, together with a statement explaining the effects of the proposed scheme and in particular stating any material interests of the directors, whether as directors or as members, creditors or holders of shares of the company or otherwise, and the effect thereon of the scheme insofar as it is different from the effect on the like interests of other persons.

Under the 2017 Act, a creditor who files a proof of debt in the scheme is now entitled to inspect the whole or any part of a proof of debt filed by any other creditor (subject to secrecy or other obligations restricting inspection).

Where a JM order is made, the judicial managers must within 60 days (or such longer period as the court may allow) send to the Registrar and to all creditors a statement of his or her proposals for achieving one or more of the purposes of whose achievement the JM order was made and lay a copy of said statement before a meeting of the creditors.

33 Creditor representation

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?

If, at a meeting of creditors summoned pursuant to a JM order, the creditors approve the judicial manager's proposals, the meeting may establish a committee for the purpose of calling on the judicial managers to furnish it with such information relating to the judicial manager's exercise of his or her functions.

In a liquidation scenario, a committee of inspection may be appointed, comprising representatives from the insolvent debtor's creditors. The liquidator may only exercise certain powers with the

permission of the committee of inspection. The committee of inspection may not receive out of the company's assets any payment for services rendered by it in connection with the administration of the company's assets except with the sanction of the court.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

Yes, the SHC has held that a liquidator may assign for value a cause of action belonging to the company (or the benefits thereof) to a third party (which includes a creditor). The fruits of any remedy pursued by that third party will enure for the benefit of the third party.

Alternatively, creditors may elect to place a liquidator in funds to pursue certain claims. Where such claims are successful, the court may make such order as it thinks just with respect to the distribution of the recovered assets and the amount of those expenses so recovered with a view to giving the funding creditors an advantage over others in consideration of the risks run by them in so doing.

35 Claims

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

Creditors' claims are submitted to the liquidator in the form of proofs of debt submitted together with relevant supporting documentation. Creditors have three months after a winding-up order is made to submit their proofs of debt, which are adjudicated upon by the liquidator. A creditor has a right of appeal to the SHC in respect of the amount admitted to proof by a liquidator.

A claim acquired at a discount is generally provable for its full face value, unless part of the full claim is waived.

Interest on claims against the company ceases upon the making of a winding-up order.

36 Set-off and netting

To what extent may creditors 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 a winding up, debts or dealings may be set off against each other where there have been mutual credits, debts or other dealings between the company and any creditor. Set-off is not possible in respect of any debt that is not provable, or which arises by reason of an obligation incurred at a time when the creditor had notice that a winding-up application was pending. Contractual set-off, unlike legal set-off, does not survive insolvency.

In the context of a company under JM, a creditor's right of set-off continues to be applicable and is not affected by the moratorium on civil proceedings against the company.

37 Modifying creditors' rights

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

Save for the answers above relating to super priority afforded to persons who provide rescue financing (see question 22), the general position is that the court may not change the priority of a creditor's claim.

38 Priority claims

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

In a winding up, the ranking of claims by unsecured creditors to be paid in priority to all other unsecured debts is as follows:

- (i) costs and expenses of the winding up;
- (ii) wages and salaries of employees up to a maximum of five months' salary or S\$12,500, whichever is less;
- (iii) retrenchment benefits and ex gratia payments up to a maximum of S\$12,500;
- (iv) work injury compensation payable to an employee under the Work Injury Compensation Act;
- (v) amounts due in respect of contributions payable during the 12 months before, on or after commencement of winding up relating to employees' superannuation or provident funds;
- (vi) remuneration payable in respect of vacation leave or death rights; and
- (vii) taxes payable.

In addition, and as noted above, the 2017 Act allows for rescue financing to be paid off with 'super priority' (see question 22).

Where the assets of the company are insufficient to meet the preferential debts specified above in (i), (ii), (iii), (v) and (vi), such debts will have priority over the claims of debenture holders under any floating charge created by the company.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

The employees might have claims in respect of unpaid wages, retrenchment benefits and ex gratia payments, work injury compensation, superannuation or provident funds and vacation leave. For the ranking in priority of such claims, see question 38. An employee's claim for salary or retrenchment benefit is each capped at S\$12,500 or five months of the employee's salary, whichever is lower. The procedures for termination as provided in the company's employment contracts are not affected by liquidation.

40 Pension claims

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

Pensions are granted priority in a company's liquidation, provided that they are payable during the 12 months before, on or after the commencement of winding up by the employer; and they are payable under an approved scheme under Singapore law.

These priorities in liquidation are not automatically imported into a winding up, although the court has the power to do so.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Legislation pertaining to the protection of the environment confers broad powers on the relevant government authorities to require any person (including companies) who has caused an environmental problem to remediate the damage. Accordingly, it is possible for the relevant government authority to require an insolvency administrator or any other third party responsible for the environmental problem to remediate any damage caused by the environmental problem.

42 Liabilities that survive insolvency or reorganisation proceedings

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

All of a debtor's liabilities are extinguished following its winding up. Similarly, if a debtor fulfils its obligations pursuant to a scheme, then its liabilities will be extinguished to the extent that is provided under the terms of the scheme, upon the conclusion of the scheme.

43 Distributions

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

A liquidator may declare interim dividends to a company's creditors.

After the liquidator has realised all of the company's property, or as much of the company's property as, in his or her opinion, can be realised, the liquidator may issue a final dividend.

In a reorganisation, the distributions to creditors will depend on the terms of the agreements reached therein.

Security

44 Secured lending and credit (immovables)

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

Security over immovable property is usually in the form of either a legal mortgage or an equitable mortgage. This is usually supported by the lodgement of the mortgage against the title of the property under the Land Titles Act (Chapter 157).

45 Secured lending and credit (movables)

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

Security over movable property is usually in the form of a fixed or a floating charge. Other forms of security include pledges and liens.

As there are only four recognised forms of security (mortgage, charge, lien and pledge), quasi-security has emerged in respect of personal property such as retention of title, sale and buy-back and hire-purchase agreements.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Liquidators and judicial managers alike may set aside antecedent transactions on the basis that they amount to either an unfair preference or a transaction at an undervalue.

A transaction at an undervalue can be annulled if it took place within five years of the winding-up application. An unfair preference that is not also a transaction at an undervalue can be set aside if made within six months of the winding-up application, or two years if the unfair preference is given to an associate of the company.

A floating charge on a company's property created within six months of the commencement of the winding up is invalid unless it is proved that the company immediately after the creation of the charge was solvent. However, such a floating charge remains valid up to the amount of any cash paid to the company at the time of or subsequent to the creation of and in consideration for the charge together with interest on the amount of cash paid at the rate of 5 per cent per annum.

A liquidator may recover any consideration received by a company's directors in respect of any property acquired by that company that is in excess of the value of the property thus acquired, the relevant clawback period being two years. Further, any disposition of a company's property, including any transfer of shares or alteration in the status of the members of the company, made after the commencement of winding up is void unless otherwise directed by the court.

Any charge created over a company's property that is registrable but not registered is void against the liquidator and any creditor of that company.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Apart from the rules against undue preferences outlined in question 46, there are no restrictions on claims by related parties or non-arm's length creditors.

Groups of companies

48 Groups of companies

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

Parent and affiliated corporations are regarded as separate legal entities. Accordingly, they will ordinarily not bear any liability incurred by their subsidiaries or affiliates. In exceptional circumstances, the court may 'lift the corporate veil' and hold liable the controller of a company: it may do so where it is satisfied that the company is an alter ego of the controller, or that the company is a mere device, façade or sham.

49 Combining parent and subsidiary proceedings

In 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?

Each member of a corporate group has its own separate legal personality. Therefore, insolvency proceedings within the corporate group against separate entities will, prima facie, proceed separately.

That said, it is possible, in the interest of saving time and costs, that liquidations of parents and their subsidiaries be heard together, or that the same liquidators be appointed over several related companies.

The assets of subsidiaries may not be pooled to the parent for distribution purposes. The only assets available for distribution purposes are the shares in the subsidiaries. However, the liquidators may choose to wind up the subsidiaries – in which case, the assets will be distributable in the main liquidation provided that the subsidiaries' own debts are fully settled first.

International cases

50 Recognition of foreign judgments

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?

The statutory regime for the recognition and enforcement of foreign judgments consists of the Reciprocal Enforcement of Commonwealth Judgments Act (RECJA), the Reciprocal Enforcement of Foreign Judgments Act (REFJA) and the Choice of Court Agreement Act (CCAA).

RECJA applies in respect of other Commonwealth countries, while REFJA applies in respect of foreign countries that afford reciprocal treatment to Singapore judgments (currently only Hong Kong).

The CCAA implements the Hague Choice of Court Convention (HCCC), to which Singapore is a signatory. CCAA applies to recognise and enforce judgments of the courts of other contracting states designated in exclusive choice of court agreements. Recognition and enforcement under the CCAA is not limited to monetary judgments.

Further, the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) has been adopted in Singapore, with modifications (Singapore Model Law) via the 2017 Act. The Singapore Model Law provides a platform for access, recognition, relief and cooperation in relation to foreign insolvency proceedings. One important practical effect of the Singapore Model Law is that it grants recognition to foreign liquidators and empowers them to apply directly to the Singapore courts for recognition of a foreign proceeding, and to participate in a

proceeding concerning the relevant debtor under Singapore insolvency law upon recognition of a foreign proceeding. Recognition of a foreign insolvency proceeding may be denied if granting recognition would be contrary to Singapore public policy, as was confirmed by the SHC in a recent decision.

If a party obtains judgment in a foreign jurisdiction to which the above statutory regime does not apply, that party may commence a common law action for the judgment debt and apply for summary judgment on the ground that there is no defence to the claim.

Singapore is not a signatory to any treaty on international insolvency.

51 **UNCITRAL Model Law**

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Yes, with effect from 23 May 2017, through the enactment of the 2017 Act.

52 **Foreign creditors**

How are foreign creditors dealt with in liquidations and reorganisations?

Following the 2017 Act, foreign creditors are treated no differently from local creditors in liquidations and reorganisations.

53 **Cross-border transfers of assets under administration**

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Singapore is a signatory to the Model Law. Under the Model Law, the foreign representative may apply for recognition of the foreign proceeding, and subsequently request that the court grant him or her the power to administer or realise all or part of the company's property in Singapore in support of the foreign administration.

54 **COMI**

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?

There is no statutorily prescribed test for the determination of the COMI. As such, the Singapore courts will look to the Model Law. Under the Model Law, a debtor's COMI is presumed to be where it has its registered office. However, this may be rebutted by evidence to the contrary (eg, evidence of another jurisdiction in which most of the debtor's dealings occur, most money is paid in or out and most decisions are made). In summary, a debtor's COMI is where the bulk of its business is carried out.

55 **Cross-border cooperation**

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 formal adoption of the Model Law codified international cooperation with other member states in parallel insolvency proceedings. In particular, the Model Law provides the basis for:

- the recognition of ongoing insolvency proceedings in one jurisdiction as being a foreign main (or non-main) proceeding, with other jurisdictions either facilitating or taking the lead of the insolvency process;
- the repatriation of locally based assets to the principal place of liquidation (the jurisdiction of the main proceeding), subject to the protection of certain statutory rights accruing to the creditors of the jurisdiction from which the assets are repatriated; and
- the communication between the respective courts or insolvency professionals engaged in the various jurisdictions involved in the cross-border insolvency, to ensure a smooth and orderly realisation of assets on a regional, international or global scale.

56 **Cross-border insolvency protocols and joint court hearings**

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?

There has been significant activity of late in relation to cross-border insolvency cooperation involving Singapore.

In October 2016, Singapore hosted a Judicial Insolvency Network (JIN) conference attended by insolvency judges from 10 jurisdictions to discuss cooperation in cross-border insolvency matters. At the conclusion of the conference, draft guidelines were prepared for consideration in the judges' respective jurisdictions. The guidelines address key aspects of communication and cooperation among courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including providing for joint hearings. The JIN conference is expected to take place every two years in various jurisdictions. JIN 2018 took place in New York City on 22 and 23 September 2018.

In February 2017, Singapore implemented guidelines for greater cooperation and communication for cross-border insolvency proceedings between its Supreme Court and the United States bankruptcy court for the district of Delaware. Under the guidelines, joint hearings involving the different courts may be held, enabling evidence to be

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recorded and arguments to be heard simultaneously. More such guidelines involving other jurisdictions are expected to follow suit.

On 21 August 2017, Singapore and China entered into a memorandum of understanding to cooperate on legal and judicial matters. This is expected to strengthen and expand opportunities for the courts of both jurisdictions to cooperate and promote wider economic progress and security.

Slovenia

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

In principle, the Slovenian Financial Operations, Insolvency Proceedings and Compulsory Winding-up Act (Official Gazette of the Republic of Slovenia, No. 126/07, as amended, hereinafter the Insolvency Act) governs:

- insolvency proceedings, which include:
 - bankruptcy proceedings over a legal entity;
 - bankruptcy proceeding over a private individual;
 - bankruptcy proceeding over an inheritance;
 - compulsory settlement proceedings; and
 - simplified compulsory settlement proceeding; and
- compulsory winding-up proceedings, which include:
 - proceedings of deletion of the company from the court register without liquidation; and
 - proceedings of compulsory (judicial) liquidation; and
- preventive restructuring proceedings.

The exception to the general rules, provided by the Insolvency Act are insolvency and reorganisation proceedings, initiated over:

- credit institutions, which are governed by special, sectoral law, namely the Slovenian Resolution and Compulsory Dissolution of Credit Institutions Act (Official Gazette of the Republic of Slovenia, No. 44/16, as amended, hereinafter Dissolution of Credit Institution Act);
- insurance companies, which are governed by special, sectoral law, namely the Slovenian Insurance Act (Official Gazette of the Republic of Slovenia, No. 93/15);
- investment fund management companies, which are governed by special, sectoral law, namely the Slovenian Investment Funds and Management Companies Act (Official Gazette of the Republic of Slovenia, No. 31/15, as amended); and
- brokerage firms, which are governed by special, sectoral law, namely the Slovenian Financial Instruments Market Act (Official Gazette of the Republic of Slovenia, No. 67/07, as amended).

2 Excluded entities and excluded assets

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

According to the Insolvency Act, private individuals, legal entities (including institutes and public institutes, cooperative societies, associations and public funds) and inheritance estates can be subject to a bankruptcy proceeding. With respect to the compulsory settlement, winding-up and preventive restructuring proceedings, those could only be initiated over legal entities.

Because of the lack of legal personality, civil partnerships cannot enter into insolvency proceedings. Only the partners of civil partnerships may be subject to insolvency proceedings.

Private individuals, performing their business activities as private entrepreneurs can be the subject of a compulsory settlement proceeding, but may be the subject of bankruptcy proceedings only in cases where such proceedings are initiated over the private individual, who acts as the private entrepreneur.

As already mentioned, customary rules on insolvency, winding-up and restructuring proceedings do not apply to credit institutions, insurance companies, investment fund management companies and brokerage firms. For such entities, special provisions set out in the special sectoral laws, as listed above (please see question 1), apply.

Generally, only certain assets of private individuals are exempted from the claims of the creditors in the bankruptcy proceeding, namely:

- certain personal belongings of the debtor (eg, clothing, objects for personal use, household appliances, which are necessary for fulfilment of basic needs of the debtor's household, in case of the bankruptcy of a farmer – animal stocks and agricultural machines and appliances, which are necessary for continuous performance of agricultural activities, etc);
- certain special categories of personal income (eg, social welfare, child support, scholarships, compensation received for elimination of effects of exceptional occurrences (storms, natural disasters, etc)); and
- personal income up to the value equal to 76 per cent of the minimum salary, as prescribed by valid regulations.

In case of legal entities, all its assets are the subject of the bankruptcy estate and are eventually sold or liquidated.

3 Public enterprises

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

Slovenian insolvency law does not provide any exemptions to the general provisions on the insolvency proceedings for government-owned enterprises. Hence, generally, the provisions of the Insolvency Act or other special, sectoral law (if the enterprise at hand falls in one of the categories of legal entities, which are subject to special regulation, as listed in question 1) apply also to such enterprises. Creditors of insolvent government-owned enterprises thus have the same rights and remedies as creditors of other insolvent private-owned entities.

The above, however, has one exception. According to the Dissolution of Credit Institution Act, the latter as a special, sectoral law, providing rules on insolvency proceedings of credit institutions, does not apply to the Slovenian Export and Development Bank, as this bank is subject to a special law – the Slovenian Export and Development Bank Act (Official Gazette of the Republic of Slovenia, No. 56/08, as amended). The latter, however, does not provide for the possibility for the mentioned bank to be subject to any insolvency proceedings over the mentioned bank.

The Insolvency Act provides only the possibility to initiate the insolvency proceedings against private individuals and legal entities. Insolvency proceedings therefore cannot be commenced against the Republic of Slovenia or any local municipality.

4 Protection for large financial institutions

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

As a response to the 2008 worldwide financial crisis and consequential costly recapitalisation procedure of all major Slovenian banks, the Dissolution of Credit Institution Act was passed in mid-2016, providing specific rules concerning the special restructuring procedure for banks, and the compulsory winding-up of banks.

The Dissolution of Credit Institution Act only applies to banks and certain other financial institutions. Its main purpose is to provide special rules for restructuring of a bank, facing problems of adequate capitalisation, through early intervention measures and resolution tools such as: the production of recovery and resolution plans, additional supervisory powers for the Bank of Slovenia as national resolution authority to intervene at an early stage, and the entrusting of the Bank of Slovenia with necessary resolution powers and tools such as the sale of business or shares, the setting up of a bridge institution, the separation of assets and the bail-in of shareholders and creditors of a failing institution. If the restructuring measures prove unsuccessful and the bank ends up in the bankruptcy, the Dissolution of Credit Institution Act provides special rules on ranking of the creditors in the course, because of certain special categories of creditors, such as ensured deposit holders, that are to be repaid with priority. Payments of subordinated claims will only be made if the first ranking creditors have been fully satisfied.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Under the Insolvency Act, all insolvency proceedings fall into jurisdiction of district courts. The competent district court is set according to the seat of the insolvent debtor.

The competent court decides on the relevant matters with decisions and orders. The orders are issued solely in relation to provision of instructions to the bankruptcy administrator on certain issues, while all other matters are decided on with decisions. If not provided otherwise, with relation to a specific type of decisions, each decision of the court issued in the insolvency proceeding may be subject to an appeal. Such appeal may be filed by each party in the insolvency proceeding (ie, the debtor, the creditor that initiated the insolvency proceeding and each creditor of the insolvent debtor, who lodged a claim against the insolvent debtor in good time), if not specifically provided otherwise with respect to certain special decisions. With regard to certain decisions of the court, the Insolvency Act may provide the right to appeal also to the insolvency administrator or other, third persons, who are not parties of the insolvency proceeding.

The Insolvency Act does not provide any requirements for posting of a security as a prerequisite for filing of an appeal. Please note, however, that filing of an appeal against the decision of the court in an insolvency proceeding is subject to payment of the court fees in accordance with the general court fees tariff.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Liquidation proceeding

Generally, a voluntary liquidation may be implemented in accordance with the general corporate rules and regulations, provided by the Slovenian Companies Act (Official Gazette of the Republic of Slovenia, No. 42/06, as amended, hereinafter Companies Act), although is certain cases (eg, in case of institutes) also other, specific provisions may apply.

A voluntary liquidation of a company under the Companies Act may be initiated by the company's shareholders, based on the decision of the general meeting of shareholders on liquidation of the company. Based on the aforementioned resolution, the liquidation is registered in the business register. A liquidation proceeding basically leads to a final dissolution of the company (the proceeding is lead by one or more

liquidators) and deletion thereof from the court and business register, provided that through the disposal of the company's assets all its creditors are fully repaid.

Bankruptcy proceedings

Under the Insolvency Act, each debtor may file for initiation of the bankruptcy proceeding, whereby no special requirements for such filing are provided. However, that the general requirement for initiation of a bankruptcy proceeding, that is the insolvency of the debtor, should nonetheless be considered, as otherwise such application is later likely to be successfully challenged by the creditors (claiming that the debtor is solvent) and thus, rejected by the court.

Based on the decision of the court on completion of the bankruptcy proceedings, the debtor (if organised as a company) will be deleted from the court and business register.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Voluntary preventive restructuring proceeding

The Insolvency Act allows filing for initiation of a voluntary preventive restructuring proceeding only with regard to legal entities: (i) that are capital companies; (ii) that are according to the Companies Act classified as small, medium or large companies; and (iii) that can be the subject of a compulsory settlement proceeding.

The voluntary preventive restructuring proceeding may be initiated by the debtor, provided that it is not insolvent yet; however, there is an imminent threat of becoming insolvent within the period of one year. The Insolvency Act provides the assumption that the above requirement is fulfilled, if the debtor acquires consent for the initiation of the aforementioned proceeding from its creditors, holding financial claims (ie, claims, based on (i) a credit facility agreement, agreement on issuance of a bank guarantee or any other agreement of similar content, entered into between the debtor and a bank or other financial institution; (ii) a financial leasing agreement or any other agreement of similar content, entered into between the debtor and a bank or other financial institution; (iii) a loan agreement or any other agreement of similar content, entered into between the debtor and the creditor, which is a non-financial entity; (iv) a suretyship; or (v) a derivative financial instrument) against the debtor, which in total exceed the 30 per cent share of the aggregate value of all financial claims existing towards the debtor.

The application for commencement of the mentioned proceeding has to include: (i) general details on the debtor; (ii) a short description of the circumstances, which provide grounds for the conclusion of the imminent risk of the debtor becoming insolvent; and (iii) a request for initiation of the preventive restructuring proceeding. Such application has to be supplemented with: (i) a list of all financial claims as per the status on last day of the last calendar quarter prior to the filing of the application; (ii) an opinion of the certified auditor, who reviewed and checked the mentioned list of financial claims and issued a confirmation without any reservations; and (iii) statements of creditors, on which the signatures of the legal representatives are notarised, consenting with the initiation of the mentioned proceedings.

After the voluntary preventive restructuring proceeding is initiated (the court issues and adequately publishes decision on the initiation), all ongoing enforcement proceedings are being stalled and no decision on enforcement of claims can be issued against the debtor. Please note that the mentioned effects occur only with respect to the financial claims, listed on the list of financial claims, presented by the debtor together with its application for initiation of the proceeding. Further to the above, with respect to the listed financial claims, the period for their time-barring does not run and the debtor is not late paying the principal amount of those claims.

If the application of the debtor is accepted and the court initiates the preventive restructuring proceedings, the debtor (now under the protection against its creditors) has three (or in case of large company, five) months to present the court for its final approval the agreement on financial restructuring of its obligations towards its financial creditors. The court accepts and approves the agreement, provided:

- the agreement has been concluded between the debtor and:
 - creditors, holders of regular financial claims, listed in the list of financial claims, which present at least 75 per cent of the

- aggregate value of all regular financial claims, listed on the mentioned list; and
- provided that the agreement extends also to secured financial claims, creditors, holders of secured financial claims, listed in the list of financial claims, that present at least 75 per cent of the aggregate value of all secured financial claims, listed on the mentioned list; and
- the signatures of representatives of such financial creditors on the agreement on preventive restructuring have to be notarised; and
- the agreement has been audited by certified auditor, who issued a confirmation without any reservations.

If the court accepts and approves the agreement on financial restructuring, the agreed restructuring of the financial claims becomes valid in respect to all creditors, holders of regular financial claims against the debtor, who acceded to the agreement and all creditors, holders of secured financial claims against the debtor, who acceded to the agreement.

Further to the above, the validity of the agreement extends also to the regular financial claims or secured financial claims (provided those are subject of restructuring) of those creditors who did not consent with the agreement and thus did not accede thereto; however, only in limited extent, as follows:

- with respect to the regular financial claims – reduction of the claims or prolongation of the due date for their payment; and
- with respect to the secured claims – prolongation of due time for their payment or reduction of interest rates.

Compulsory settlement proceeding

Under the Insolvency Act, the compulsory settlement proceeding may be initiated over: (i) a legal entity that is organised as a company or cooperative, unless specifically provided otherwise in respect of a company or cooperative concerning the activities it performs; or (ii) private entrepreneur.

The compulsory settlement proceeding may be initiated over the insolvent debtor either by the debtor itself or any of its personally liable shareholders. The application for the commencement of the mentioned proceeding shall include:

- a report on the financial situation and operations of the debtor;
- an auditor's report, with the auditor's opinion without reservation;
- a financial restructuring plan;
- a report of a certified business evaluator containing his or her unqualified opinion. Such report has to contain the assessment of the evaluator whether: (i) the debtor is insolvent and (ii) estimation, whether the degree of confidence exceeds 50 per cent that the execution of the financial restructuring plan shall enable such financial restructuring of the debtor so as to result in his or her liquidity and solvency and the confirmation of compulsory settlement, proposed by the debtor, would provide the creditors with more favourable payment conditions for their claims than would be the case in bankruptcy proceedings initiated against the debtor; and
- evidence of the advance payment of the costs of such proceedings.

Based on the proposal for commencement, the debtor may offer to creditors, holders of unsecured claims:

- restructuring of their claims through a reduction of their claims or prolongation of their due times, whereby all creditors shall be treated equally, meaning that the claim of each creditor shall be reduced equally, or the time periods for their repayment shall be prolonged for the same time limits, or there shall be an equal change in interest rate for all such creditors, from the initiation of compulsory settlement proceedings until the expiry of the time limit for the payment of interest; or
- in case the debtor is organised as a capital company, restructuring of their claims through reduction and suspension of the maturity of their unsecured claims; or transfer of such claims to the debtor as an in-kind contribution through the procedure of increase of the debtor's share capital.

The court accepts the application for initiation of the compulsory settlement proceedings and issues a decision on initiation thereof, if the following conditions are fulfilled:

- the application has been filed by an entitled entity;
- no procedural obstacles exist (ie, compulsory settlement is not permitted if it is applied for before the expiry of:
 - three years from the day when the debtor has settled all liabilities from a previous compulsory settlement; or
 - two years after the previous compulsory settlement proceedings have been terminated because of withdrawal of the application; or
 - two years following the decision of the court, on the basis of which the court has terminated the previous compulsory settlement proceedings because of a successful objection of the creditor; or
- the application proposes the restructuring of the debtor's obligations, which is in line with the scope of the Insolvency Act;
- the content of the application for initiation of the compulsory settlement proceedings includes all required documentation; and
- the provided documentation is in line with the requirements of the Insolvency Act.

Together with the decision on initiation of the compulsory settlement proceeding, the court also issues a call to the creditors to lodge the claims that they hold against the debtor within the period of one month.

The decision on the final confirmation of the proposal for financial restructuring of the debtor's obligations through the compulsory settlement proceedings is made by the creditors, holders of timely and duly lodged unsecured claims against the debtor by voting. For voting, the aggregate value of each creditor's claim is adjusted by multiplying its aggregate value with an adjustment factor, prescribed by the Insolvency Act (which depends on the nature and certain qualities of such claim). The proposal for financial restructuring of the debtor through the compulsory settlement proceeding is accepted, if confirmed by the creditors, whose aggregate value of adjusted claims equals at least three-fifths of the aggregate value of all adjusted claims, which have been timely lodged in the proceeding and confirmed and accepted by the insolvency administrator (see question 35). The accepted compulsory settlement is finally confirmed by a decision of the insolvency court, which shall be issued within three working days of being notified on the voting results by the insolvency administrator.

Generally, an approved and confirmed proposal for restructuring of the debtor's obligations through the compulsory settlement proceeding affects all unsecured claims of the creditors towards the debtor that occurred up to the initiation of compulsory settlement proceedings.

Please note that, except for in certain special cases, the compulsory settlement proceeding does not affect:

- secured claims;
- priority claims;
- rights of exclusion; and
- obligations of:
 - sureties; and
 - persons liable to recourse, related to any affected unsecured claim.

8 Successful reorganisations

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

Voluntary preventive restructuring proceeding

Only the creditors and holders of financial claims can be parties in the voluntary preventive restructuring proceeding. For the purpose of the aforementioned proceeding, the creditors are classified into two groups – regular creditors, whose financial claims are not secured; and secured creditors, whose financial claims are secured by collaterals.

Compulsory settlement proceeding

For the purposes of the compulsory settlement proceedings, creditors are classified into the following groups:

- unsecured creditors;
- secured creditors (holding rights of separate settlement); and
- priority creditors (holder of priority claims – see also question 38).

The Insolvency Act does not provide for the possibility that the agreement on financial restructuring would release or in any way amend the non-debtor parties from their liability.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Under Slovenian law, there are two possibilities for placing a debtor into involuntary liquidation, namely bankruptcy proceedings and compulsory liquidation proceedings.

With respect to the conditions under which a debtor may be placed into a bankruptcy proceeding, please see question 15.

With respect to the compulsory liquidation proceeding, however, the Insolvency Act provides that such proceeding may only be initiated: (i) ex officio, if so required by the law, or (ii) on the basis of a request, filed by a person who is legally entitled to file such request. Based on this, the creditors are not entitled to initiate such proceedings.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Aside from the general provisions of the Insolvency Act in respect to compulsory settlement (see question 7) the Insolvency Act also provides the possibility for the creditors of a capital company that, according to the Companies Act has a status of a small, medium or large company, to initiate the compulsory settlement proceeding over such company.

The application for initiation may only be filed by financial creditors of the debtor (for a definition of financial creditor, see question 7) holding more than 20 per cent of the aggregate value of all financial obligations of the debtor, as reported in the last yearly business report.

The application for the commencement of the mentioned proceeding shall (aside from general information on the debtor) include:

- (i) statements of the creditors who filed the application, that they consent with the initiation of the compulsory settlement proceeding (signatures of the creditors or their statutory representatives on such statements shall be notarised);
- (ii) with respect to each creditor from point (i), a report of an auditor in which the latter established (without any reservations):
 - the aggregate amount of financial obligation of the debtor (as reported in the debtor's last business report);
 - the aggregate value of financial claims of the creditor as per the cut-off date, which shall be the same as the cut-off date of the last business report of the debtor; or
 - the proportion, which the value of financial claims of the individual creditor (from point (ii) above) represents in the aggregate value of financial obligations of the debtor (as established under point (i) above).

If the application is approved by the court and the compulsory settlement proceeding is initiated, the creditors are obliged to present the final proposal for restructuring of the debtor's claims, which shall be included in the financial restructuring plan of debtor's obligations, within three months following the date of initiation of the proceedings. A proposal for compulsory settlement may in the same period be filed also by the debtor itself, whereby in case the court receives two proposals, the proposal of the creditors has priority and is to be voted on. With respect to the procedure of acceptance and confirmation of the proposal for restructuring of debtor's financial obligations through the compulsory settlement proceeding, see question 7.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Under the Insolvency Act, an expedited compulsory settlement proceeding may be initiated over a debtor, who has a status of a micro

company under the Companies Act or is a private entrepreneur, whereby such proceeding may only be initiated by the debtor itself.

The Insolvency Act provides the following main simplifications in the expedited compulsory settlement proceeding compared to the regular compulsory settlement proceeding:

- (i) the debtor's application for initiation of the proceeding does not need to include any auditor's opinions; the debtor shall only provide a statement that the report on its financial status is true and correct and reflects their true financial situation and business operations (the statement has to be made in the form of a notarial deed);
- (ii) within one month following the filing of the application, the debtor is obliged to provide an updated list of all unsecured claims that the creditor holds, and that shall be affected by the compulsory settlement proceeding, together with the statement of the debtor that the provided list is final and true (the statement has to be made in the form of a notarial deed);
- (iii) there is no lodging of creditors' claims procedure;
- (iv) all creditors whose claims were included in the updated list of all unsecured claims have the right to vote on the proposal for restructuring of obligations through the compulsory settlement proceeding; and
- (v) the above-mentioned proposal is accepted if confirmed by:
 - creditors, whose aggregate value of claims (included on the updated list of unsecured claims from point (ii) above) represents at least three-fifths of the aggregate value of all unsecured claims, included in the mentioned list; and
 - more than half of all creditors whose unsecured claims against the debtor have been included in the above-mentioned list.

12 Unsuccessful reorganisations

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?

Voluntary preventive restructuring proceeding

The Insolvency Act provides the following reasons for termination of the preventive restructuring proceedings, if:

- the insolvency court issuing the decision of rejecting of the proposal for preventive restructuring on procedural grounds (because of, for example, lapse of deadlines, provided for filing of the agreement on financial restructuring; filing incomplete proposal for approval of the agreement on financial restructuring, whereby the filing is not completed within the set deadline, etc);
- termination is requested by creditors, whose aggregate value of financial claims towards the debtor, listed on the list of financial claims, exceed the 30 per cent of the aggregate value of all listed financial claims;
- termination is requested by the debtor; or
- the debtor is in delay with payment of the salaries (only up to the minimum salary) to its employees or payment of social contributions for more than 15 days.

Following the rejection of the debtor's application for approval of the agreement on financial restructuring, the court issues a decision containing the warning to all creditors that the consequences of the previously initiated voluntary preventive restructuring proceedings (see also question 7) will expire within a month of the issuance of the respective decision, if none of the creditors will file for initiation of the compulsory settlement proceedings over the debtor. After the expiry of this one-month period, if neither the debtor, nor any of the creditors, files for initiation of the compulsory settlement proceedings over the debtor, the court issues a decision on termination of the preventive restructuring proceedings.

The Insolvency Act provides no special consequences for the case if the debtor fails to perform its obligations under the agreement on financial restructuring. In such case, the creditors may start with the enforcement of their restructured claims or, should the required conditions be fulfilled, file for initiation of an insolvency proceeding over the debtor.

Compulsory settlement proceedings

Under the Insolvency Act, each creditor or the insolvency administrator may object the debtor's application for initiation of the compulsory

settlement proceeding, by claiming (and proving) the non-existence of conditions for the initiation of the compulsory settlement proceedings:

- (i) if the debtor is not insolvent and can meet all obligations in full and in time;
- (ii) if the insolvent debtor can meet its obligations to a greater extent and within shorter time limits than offered by the compulsory settlement petition;
- (iii) if the degree of confidence that the execution of the financial restructuring plan would enable the financial restructuring of the debtor, which would provide for its liquidity and solvency, is lower than 50 per cent;
- (iv) if the degree of confidence that the confirmed compulsory settlement, proposed by the debtor, would ensure the creditors more favourable payment conditions for their claims than would be the case in initiation of bankruptcy proceedings against the debtor is lower than 50 per cent; or
- (v) if the insolvent debtor acts contrary to limitations and requirements, provided by the Insolvency Act in respect to management of the debtor after the initiation of the compulsory settlement proceeding.

The objection shall be filed within three months of the issuance of the announcement of the initiation of the compulsory settlement proceeding.

If the reason for objection under point (i) above is proven, the court rejects the debtor's proposal for financial restructuring through the compulsory settlement proceedings. In such case the creditors may enforce the payment of their claims through the regular enforcement proceedings. If, however, any of the reasons for objection from points (ii) through (v) above is proven, the court terminates the compulsory settlement proceedings and initiates ex officio the bankruptcy proceeding over the debtor.

Further to the above, any creditor whose claim is affected by the confirmed compulsory settlement may request annulment of the confirmed compulsory settlement, if the insolvent debtor may pay the claims of the creditors who are affected by the confirmed compulsory settlement, in the total amount of their unsecured claims. A lawsuit requesting the annulment shall be filed within six months of the due date for payment of claims as determined in the confirmed compulsory settlement. Furthermore, any creditor whose claim is affected by the confirmed compulsory settlement may request the annulment of the confirmed compulsory settlement, if this has been obtained by fraud. A lawsuit requesting the annulment on such grounds shall be brought forward within two years following the finality of the resolution on confirmation of the compulsory settlement.

If the debtor fails to perform under the approved plan of restructuring of its financial obligations, any creditor may enforce the payment of the claim through the enforcement proceeding (approved compulsory settlement has a quality of an enforcement title), or file for initiation of the bankruptcy proceeding over such debtor, provided that the general conditions for initiation of the bankruptcy proceeding (see question 15) are fulfilled.

13 Corporate procedures

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

The Companies Act provides the standard procedures for dissolving of a company (called 'liquidation'; see also question 6).

The liquidation proceedings are quite different from insolvency proceedings as they presume liquidity and solvency of the company, whereby all creditors of the company have to be repaid in full and thus do not require any involvement of the court, apart from deletion of the company from the business register. Furthermore, no administrator (in the meaning as provided by the Insolvency Act, being the adequately licensed expert) is present as the liquidator who leads the liquidation proceeding is usually one of the previous members of the company's management. There also exist no strict deadlines in liquidation in respect to performance of certain acts. Finally, the liquidation proceeding may at any time be terminated by the general meeting of the company with the company returning to the ordinary performance of its business activities, compared to the bankruptcy proceeding, which is

final and always leads to the dissolution of the company and its deletion from the companies register.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Liquidation proceeding

Under the Companies Act, a liquidation proceeding is formally concluded when, based on the resolution of the general meeting of the shareholders, accepting the proposed distribution of the company's assets and statement of the liquidator that all assets have been distributed in accordance therewith, the court deletes the company from the business register.

Voluntary preventive restructuring proceeding

According to the Insolvency Act, the preventive restructuring proceeding concludes with the decision of the court, approving the concluded agreement on financial restructuring of the debtor.

Compulsory settlement proceeding

Based on the report of the insolvency administrator that the proposal for restructuring of the debtor's obligations against unsecured creditors was approved and accepted by the required majority of the creditors, the insolvency court issues a decision on confirmation of the compulsory settlement. After such a decision of the insolvency court becomes final, it represents the enforcement title with respect to all unsecured claims affected by the respective compulsory settlement. All other court decisions, settlements and decisions of other competent authorities, issued with respect to any affected unsecured claim, prior to the decision on the confirmation of the compulsory settlement, lose the quality of being an enforcement title with respect to such part of the relevant unsecured claim, which has been restructured (ie, reduced principle, prolonged maturity date, reduced interest rate) through the compulsory settlement proceeding.

Bankruptcy proceedings

After the entire assets of the debtor are realised and the final distribution to the creditors is performed, the court issues, on the basis of a final report of the bankruptcy administrator, a decision on conclusion of the bankruptcy proceedings. After such decision becomes final, the debtor is deleted from the court and business register.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

Under the Insolvency Act, a debtor becomes insolvent if he or she fulfils one of the following criteria for determination of the insolvency: long-term illiquidity or long-term inability to duly pay its obligations.

Under the Insolvency Act, it is assumed (if not proven otherwise) that the debtor is illiquid if:

- with respect to the debtor, who is a legal entity, private entrepreneur or private individual, who performs his or her business activities as his or her profession (eg, lawyer, doctor, notary, farmer, etc):
 - if the debtor is in delay with payment of one or several obligations towards its creditors, the value of which exceed 20 per cent of the aggregate value of its obligations, as per status of the last published annual business report; or
 - if the financial means, available on the debtor's bank accounts do not suffice for repayment of the debtor's obligations under the final court decision on enforcement of obligations or enforcement draft and such status lasts uninterruptedly for last 60 days, or with interruptions for more than 60 days within last 90 days; or
 - does not hold a bank account in Slovenia;
- with respect to the debtor, who was the subject of compulsory settlement proceedings or simplified compulsory settlement proceedings, which were concluded with a final approval of such compulsory settlement, if the debtor runs late for more than two months with:
 - payment of any of its obligations under the approved compulsory settlement;

- payment of any of its obligations towards the secured creditors, which occurred prior to commencement of such compulsory settlement proceedings; or
- fulfilment of any other acts of financial restructuring provided in the financial restructuring plan (prepared as part of the preparatory documentation for initiation of the compulsory settlement proceedings);
- with the debtor, who is a private individual (a consumer), if:
 - he or she is two or more months late fulfilling one or several obligations, in the aggregate value exceeding three times the value of its regular monthly salary, compensation or any other personal income that such person is receiving regularly, in the period not exceeding two months; or
 - he or she runs late fulfilling obligations with aggregate value exceeding €1,000, provided that he or she is unemployed and does not receive any other regular personal income.

It is further assumed (if not proven otherwise), that the debtor has a long-term inability to duly pay its obligations, if:

- the value of the debtor's assets is lower than the sum of all debtor's obligations (indebtedness); or
- with respect to the debtor, who is a capital company, if the loss, generated in the current calendar year, combined with the losses brought forward from previous business years, exceeds half of the total value of the company's share capital and such loss cannot be covered with profits brought forward from previous business years or capital reserves of the company.

Finally, the Insolvency Act assumes, without any possibility to prove otherwise, that the legal entity, private entrepreneur or private individual who performs business activities as his or her profession became long-term illiquid, if such debtor runs late for more than two months with:

- payment of salaries (up to the amount of the minimum salary) to its employees; or
- payment of taxes and social welfare contributions, which the employer is obliged to pay together with payment of the salaries to its employees and such delay exists also on the last day prior to filing for bankruptcy.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

If the company becomes insolvent, all payments and taking of new financial obligations that are crucial for normal performance of its business operations shall cease immediately (except in relation to such payments and taking of new financial obligations). The management is obliged to prepare within one month a report on actions of financial restructuring (that shall eliminate insolvency) of the company and present such report to the supervisory board. Such report shall (among other things) also include the opinion of the management on whether the chances of performing a successful financial restructuring of the company would enable the company to become solvent again.

If the opinion of the management of the company is that the chances for successful restructuring are lower than 50 per cent, or the opinion of the management on the chances for successful restructuring are higher than 50 per cent, but afterwards the company fails to raise the required new capital by recapitalisation of its existing shareholders, the management is obliged to prepare and file (in a rather short deadline of three days) a complete proposal for initiation of the bankruptcy proceedings.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

The management of the insolvent company may be held personally liable by the creditors for the damages incurred because of lower

repayment of their claims in the bankruptcy proceedings as a result of the management's failure to perform in a timely fashion the required actions for the case of insolvency or failure to act in accordance with the prohibition of performing the payments or taking of new financial obligations (see question 16).

The Insolvency Act assumes (if not proven otherwise) that the damages incurred to the creditors because of failure or omission of required acts and actions of the management of the insolvent company equal the difference between the value of the creditor's claim and the value of repayment of such claim, achieved by such creditor in the bankruptcy proceedings. Such damages shall be repaid by all managers jointly and severally.

Please note that the manager's liability under the Insolvency Act is limited up to twice the aggregate value of all incomes of such individual manager, related to his or her position in the insolvent company in the business year of the act or omission that caused the occurrence of damages.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Civil liability

Apart from the liability of the members of the company's management provided for in the Insolvency Act, the Companies Act provides further liabilities of a company's management members. Generally, managing directors of a limited liability company and members of the management board of a joint stock corporation are required to act and exercise their powers in the affairs of the company with the diligence of a prudent businessperson. If they fail to do so, they are jointly and severally liable to the company for any incurred damage. The obligation to perform its acts as members of the company's management with the expected diligence includes also the duty to act adequately, should the company be faced with a financial, solvency or liquidity crisis.

Criminal liability

Further to the above-mentioned civil law liability, Slovenian Criminal Code (Official Gazette of the Republic of Slovenia, No. 55/08, as amended: Criminal Code) provides also the possibility to hold the corporate officers and directors liable for commitment of the following criminal acts:

- criminal act of fraudulent bankruptcy – this arises if a person (ie, the debtor or any third person) with the intention to avoid fulfilment of a debtor's obligations or liabilities, causes the debtor's financial position to deteriorate and thereby causes bankruptcy or deletion of the company from the register without liquidation. The perpetrator may be punished by imprisonment of six months to five years, and in case of grater damages incurred to the creditors, by imprisonment of one to eight years; or
- criminal acts of intentional defrauding of creditors – this arises when the debtor, knowing of its own or another party's inability to repay all of its creditors, gives a preferential treatment to one of the creditors, while the other creditors suffer serious damage as a consequence of such preferential treatment. The perpetrator may be punished by imprisonment of a maximum term up to five years.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

The Insolvency Act does not provide for a shift of director's duties to creditors when an insolvency or reorganisation proceeding is likely.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

According to the Companies Act, a company may have one or more liquidators appointed, whereby the liquidator or liquidator(s) may be (and usually are) one or several of the former members of the company's management. Please note, however, that the general assembly of the shareholders may also decide to appoint a third person to be the liquidator. In such case, the management is recalled and their duties cease.

Under the Insolvency Act, the powers that remain in the hands of the directors after the insolvency proceedings are initiated depend on the type of the proceeding, namely:

- in the voluntary preventive restructuring proceeding, the company subject thereto continues to be run by its existing management with their full powers;
- in the compulsory settlement proceedings, the management of the company subject thereto remains in position, however, their powers are limited by:
 - monitoring performed by the insolvency administrator, who shall have access to all information and data related to performance of the debtor's business activities and may, if he or she deems it necessary, propose to a court to prohibit certain anticipated acts or actions by the debtor's management, should such acts present a violation of the rules on compulsory settlement; and
 - the obligation to acquire a prior consent of the insolvency court with respect to certain acts and actions, namely:
 - disposal of assets (except in the scope, necessary for performance of regular business activities);
 - entering into loan or any other credit facility agreements;
 - issuing of suretyships; and
 - performance of any acts or actions that would result in unequal treatment of creditors or hindering of performance of the proposed financial restructuring; and
- in the bankruptcy proceedings, the management of the debtor is deemed recalled and all powers and authorisations of the management cease immediately after the proceeding is initiated.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

Ongoing litigation proceedings

The Slovenian Civil Procedure Act (Official Gazette of the Republic of Slovenia, No. 26/1999, as amended, Civil Procedure Act) provides the initiation of a bankruptcy proceeding (by a final decision of the court) as a grounded reason for staying of the ongoing litigation proceeding. As long as the litigation procedure is stayed, no party can perform any actions in the procedure and the court does not issue any decisions. Further to that, because of the stay of proceedings no procedural deadlines are running, and all deadlines start to run anew, when the proceedings are reopened.

The stayed litigation proceeding is reopened (on the basis of a decision of a court) on the basis of a statement, issued by the bankruptcy administrator on taking over and continuing of the proceedings or, when the court, based on request of other parties in the procedure, invites the administrator to do so (and sets a deadline therefor).

Enforcement proceedings

Under the Insolvency Act, except in some exceptional cases, no new enforcement proceeding can be initiated against an insolvent debtor.

With respect to the ongoing enforcement proceedings, the Insolvency Act provides as follows:

- in compulsory settlement proceedings: all ongoing enforcement proceedings are being stayed and are re-opened only on the basis of the decision of the court, which runs the compulsory settlement proceedings for which the Insolvency Act specifically provides to

be the grounds for re-opening of enforcement proceedings (eg, a final decision on confirmation of the compulsory settlement);

- in bankruptcy proceedings:
 - ongoing enforcement proceedings in which, until the initiation of the bankruptcy proceedings, the creditor has not acquired a right of a separate settlement, are terminated with initiation of the bankruptcy proceedings;
 - ongoing enforcement proceedings in which, until the initiation of the bankruptcy proceedings, the creditor has acquired a right of a separate settlement, but a sale of the property of the debtor on which such right has been established has not been performed prior to the initiation of the bankruptcy proceedings, are stayed; and
 - the initiation of the bankruptcy proceedings do not influence the ongoing enforcement proceedings in which, until the initiation of the bankruptcy proceedings, the creditor has acquired a right of a separate settlement, and the sale of the property of the debtor on which such right has been established has already been performed prior to the initiation of the bankruptcy proceedings. Such enforcement proceedings are completed in accordance with relevant rules and regulations of the enforcement law (eg, rules on distribution of purchase price, rules on transfer of ownership, etc).

Voluntary preventive restructuring proceedings

Under the Insolvency Act, no enforcement proceedings may be initiated against the debtor with respect to any financial claim, being included in the list of financial claims of the debtor (see question 7) after the initiation of the voluntary preventive restructuring proceedings. All such proceedings that are already ongoing are stayed.

Under the Insolvency Act, the creditors cannot apply to the court to lift the above-mentioned moratorium on initiation of enforcement actions.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

Continuation of business activities in liquidation proceedings

Under the Companies Act, the company in liquidation is allowed only to complete the unfinished businesses activities. Entering into new business activities (eg, accepting new orders, entering into new delivery contracts, etc) is permitted solely on the basis of an explicit consent of the general meeting of the shareholders.

Continuation of business activities in voluntary preventive restructuring proceedings

The debtor is permitted to continue only with its regular business activities.

Continuation of business activities in compulsory settlement proceedings and bankruptcy proceedings

As a general rule, under the Insolvency Act, an insolvent debtor is permitted to perform only those payments and to undertake those new obligations that are vital for performance of regular business activities. Furthermore, in bankruptcy proceedings the business activities that were also started prior to its initiation may be completed solely on the basis of a special permission, issued by the bankruptcy court. Such permission is, however, issued on the basis of (among other things) the consent of the creditors' committee.

Concerning the position of suppliers of the debtor in bankruptcy proceedings who continues with performance of his or her business activities, such suppliers of goods or services are paid as costs of the bankruptcy proceedings and are repaid prior to first distribution of the bankruptcy estate.

23 Post-filing credit

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

The bankruptcy administrator may enter into loan and other credit facility agreements; however, only to secure the required financial means for continuation of the debtor's business activities, and on the basis of a special consent of the insolvency court (the latter has to issue a new consent with respect to entering into each new loan or other credit facility agreement). Repayment of such loans is considered to be a cost of bankruptcy proceedings and is thus made prior to the first distribution of the bankruptcy estate.

The debtor in a compulsory settlement proceeding may obtain a loan or other credit facility only on the basis of the express consent of the court, and to the aggregate value of financial means needed by the debtor in respect of continuation of its regular business activities or covering of costs of compulsory settlement proceedings. As such loans are entered into by the debtor after the initiation of the compulsory settlement proceeding, the latter does not have any influence thereon and the loans have to be repaid in full.

24 Sale of assets

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?

Liquidation proceeding

The Companies Act does not provide any special rules on sale of assets of the legal entity in liquidation. The sale of such assets is thus subject to ordinary rules on sale of property.

Bankruptcy proceedings

Each sale of assets of the debtor in bankruptcy proceedings by the bankruptcy administrator is permitted solely on the basis of a prior final decision of the insolvency court. Generally, sale of assets may only be performed on the basis of a public auction or a call for binding bids. Only if such procedures are not successful, the sale of assets may be performed on the basis of direct negotiations with the buyer who made the offer in the procedure of a call for non-binding bids, which was carried out prior to the beginning of direct negotiations.

The assets are always sold 'free and clear' of the following encumbrances, established in favour of third persons: (i) lien or mortgage; (ii) prohibition of sale or encumbrance; or (iii) personal servitudes, real charge or right to build.

In case the assets are sold as a whole business, the purchaser becomes the owner not only of all movable assets and real property pertaining to such whole business, but as a universal legal successor also of all other rights associated with such whole business (eg, trademarks, concessions, etc).

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The Insolvency Act does not provide for the possibility of 'stalking horse' bids. This is true also for credit bidding, although the Slovenian insolvency courts allow in their practice that in case the creditors are purchasers of certain items from the bankruptcy estate, the purchase price for such items may be set off with their claim against the debtor, which in our opinion has the same effect.

Further to the above-mentioned, the Insolvency Act also provides the possibility that the assets that cannot be realised by the bankruptcy administrator through the course of the bankruptcy proceedings are offered to the creditors for their takeover. If a creditor agrees with such takeover, his or her claim is reduced by the appraised value of the unrealised assets.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

Liquidation proceeding

Under the Companies Act, the legal entity in liquidation is obliged to complete all of its obligations under the existing agreements. Any withdrawal from an agreement that has not been entirely fulfilled by this entity may only be performed in consent with the opposite parties of the agreement (consensual termination of the agreement).

Compulsory settlement and bankruptcy proceedings

The debtor in the compulsory proceedings may unilaterally withdraw only from a mutually unfulfilled bilateral (or multilateral) agreement (ie, any agreement that has not been entirely fulfilled by both or all parties to such agreement). Such withdrawal may, however, be performed solely on the basis of a special consent of the insolvency court. As a result, the mutual obligations under such agreement that have already been fulfilled by the parties are deemed to be set off. If the obligations of the debtor under such agreement are not set off entirely (meaning that the debtor has received a greater fulfilment than the one given to the opposite party), than the opposite party retains the claim for payment of such difference, whereby such claim is exempted from the conditions of the final compulsory settlement (ie, the claim will have to be fully repaid).

The above applies also in cases where a mutually unfulfilled agreement is withdrawn from by a debtor in a bankruptcy proceeding. The claim that the opposite party acquires on the basis of uncomplete set-off of fulfilments, performed by the parties under such agreement, however, is repaid as a claim of a regular (unsecured) creditor from the bankruptcy estate.

The initiation of a bankruptcy proceedings does not influence the obligation of the opposite party to complete all its obligations under the existing agreement. If this is not performed, the debtor (through bankruptcy administrator) may claim such fulfilment or all damages incurred to the debtor as a result of uncomplete fulfilment.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

There are no special provisions on IP licensing agreements in the Insolvency Act. Generally, the licensors have to fulfil all their obligations towards the insolvent debtor, unless the agreement is withdrawn from by the debtor itself on the basis of special rules on withdrawal from mutually unfulfilled agreement (see question 26).

28 Personal data

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

Transfer of personal data to a purchaser is subject to the provisions set out in the Slovenia Personal Data Protection Act (Official Gazette of the Republic of Slovenia, No. 86/04, as amended) and as of 25 May 2018 the GDPR (in scope, although this has not yet been implemented into other Slovenian laws).

According to the GDPR, the transfer of a customer's personal data collection (as a part of an asset deal) is only possible if the debtor informs the respective data subjects about the envisaged data transfer. For transferring of sensitive data, explicit consent of each individual data subject affected by such transfer has to be obtained prior to such transfer. The transfer of such personal data collection is much easier if the transfer occurs as part of the sale of a whole business, where the purchaser is deemed the universal legal successor and thus no further restrictions to such transfer apply.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Under the Insolvency Act, Slovenian courts are exclusively competent for resolving all issues directly related to an insolvency proceeding.

Arbitration agreements entered into by the debtor prior to the initiation of an insolvency proceeding do not cease automatically but may be: withdrawn from by the administrator based on rules on withdrawal from mutually unfulfilled agreements (see question 26); or challenged by the insolvency administrator based on rules on challenge of agreements, entered into prior to initiation of the insolvency proceeding (see question 51).

Arbitration as a form of dispute resolution can, however, be used in cases where the insolvency administrator has entered into an agreement (see question 22) as the representative of the debtor and is thus bound by the contractual provisions and any arbitration agreement contained therein.

Creditor remedies

30 Creditors' enforcement

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?

As already mentioned above (see question 21) the decision on initiation of the insolvency proceedings imposes an automatic stay with regard to litigation or enforcement proceedings initiated against the debtor. Unsecured creditors can no longer enforce any of their rights in legal proceedings outside the insolvency proceedings.

The above, however, does not also apply to secured creditors. If such creditor namely holds the right to carry out an out-of-court sale of assets that are the subject of the security and thus of the right to separate settlement, this creditor also retains the right after the initiation of bankruptcy proceedings and may continue to enforce their claims by seizing and selling of the debtor's property.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

As long as there is no insolvency proceeding initiated against the debtor, unsecured creditors may enforce their claims in accordance with the provisions of the Slovenian Claim Enforcement and Security Act (Official Gazette of the Republic of Slovenia, No. 51/98, as amended, hereinafter the Enforcement Act), provided that they already dispose with an enforceable instrument (final court judgment, enforceable notarial deed, etc).

In such enforcement proceedings, the creditor will normally try to enforce its claim against the real property, receivables, rights and any other assets of the debtor and may, among others, apply for establishment of a mortgage over the debtor's real property or lien on the debtor's movables. If such mortgage or lien is established, the creditor becomes a secured creditor and may, in case bankruptcy proceedings are initiated over the debtor, request repayment of its claim from proceeds gathered by the sale of such encumbered property.

Please note, however, that enforcement procedures under the Enforcement Act are usually very time consuming.

Further to the above, the Slovenian law also enables pre-judgment attachments, which, however, do not form a legal ground for establishment of the rights for priority repayment in the bankruptcy proceeding (ie, right to separate settlement).

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Under the Insolvency Act, all decisions of the insolvency court are published on the insolvency publications portal (eObjave), which is run by the Slovenian Agency of the Republic of Slovenia for Public Legal Records and Related Services. Thus, the creditors should pay attention to all public notifications, published on the mentioned portal and should track the publications thereon in respect to certain entities, should they suspect such entities may become insolvent.

Further to the above, the bankruptcy administrator is obliged to publish regular reports on the developments in the bankruptcy proceedings (once every quarter). If there have been any exceptional developments in the proceedings, the administrator informs the creditors thereabout with a special report, which again is published on the above-mentioned portal.

In cases of compulsory settlement proceedings and, if so requested by the creditors, also in the bankruptcy proceeding, a special creditors' committee may also be appointed (see question 33). The committee has regular sessions (at least once every quarter) and discusses all opened issues related to the bankruptcy proceeding and motions and proposals related to certain acts and actions of the administrator, filed either by the administrator or any other creditor. The creditors' committee has the right to inspect the business records of the insolvent debtor and the entire documentation related to the bankruptcy proceeding.

33 Creditor representation

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?

Under the Insolvency Act, in each compulsory settlement proceedings and, if so requested by the majority of creditors, also in case of a bankruptcy proceeding, a creditors' committee is appointed that represents the interests of the largest creditors of the insolvent debtor. The creditors' committee is composed of between three and 11 members (depending on the aggregate number of all creditors of the insolvent debtor). In case of the compulsory settlement proceeding, the members of the creditors' committee are representatives of the largest creditors (depending on the value of their regular claims, lodged into the insolvency proceeding), who are appointed by the insolvency court. In the bankruptcy proceeding, however, the members are being voted on, whereby each creditor may delegate a member, who needs the support of a majority of all creditors to be elected as a member of the committee.

The committee:

- gives (non-obligatory) opinion on or (obligatory) consent to certain decisions in the insolvency proceeding;
- discusses and reviews the reports of the insolvency administrator; and
- performs other assignments, if so provided in the Insolvency Act.

The Insolvency Act does not specifically regulate retaining of the advisers to the members of the creditors' committee, but at the same time does not expressly prohibit such retaining by an individual member, if such member deems that necessary. However, such experts are retained at the member's own cost and the member cannot claim repayment of those costs from the debtor in the insolvency proceeding.

Please note that under certain special conditions, in compulsory settlement proceedings the Insolvency Act also permits the formation of the committee of secured creditors. In such case, all secured creditors holding secured claims against the debtor are members of this committee.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

According to the Insolvency Act, the creditors themselves may pursue the bankruptcy estate's legal remedies related to clawback claims and liability claims against former members of the management. In such cases, the creditors may file legal remedies in their own name, but always solely for the account of the bankruptcy estate, who shall be the final beneficiary of any fruit resulting from such legal remedy.

35 Claims

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

In case an invitation of an insolvency proceeding is initiated, the decision of the court on the initiation, together with the call to creditors to lodge their claims into the proceeding, are published on the eObjave portal immediately (see also question 32). The creditors are required to lodge their claims (together with all associated rights of separate settlement towards the insolvent debtor) within:

- a one-month period following the above-mentioned publication in case of a compulsory settlement proceeding; or
- a three-month period following the above-mentioned publication in case of a bankruptcy proceeding.

If a claim is not lodged within the mentioned deadlines:

- in case of a compulsory settlement proceeding: the claim of the creditor still exists; however, such creditor does not have any rights in the compulsory settlement proceeding (eg, cannot decide whether the proposal for compulsory settlement made by the debtor is acceptable or not), whereby such creditor is bound by all results and consequences of the successfully completed proceeding (eg, its claim is reduced, prolonged, etc); and
- in case of a bankruptcy proceeding: if the claim or associated right to a separate settlement is not lodged, such claim or right ceases.

Following the expiry of the period of lodging of the claims, the administrator shall attest all the lodged claims and associated rights and prepare a list of attested claims that includes the decision on whether the claim is accepted and recognised or rejected. The creditor may: (i) object the decision of the administrator with regard to his or her own claim or right of separate settlement; however, only because of procedural reasons (eg, the administrator has not considered the creditor's timely lodged claim or right of separate settlement, data on such claim or right are incorrect, etc); or (ii) object against the lodged claim or right of separate settlement of another creditor (eg, claiming such claim is not existing). The administrator has to take a position with respect to such objections and prepare an amended list of lodged claims. Creditors may again file an objection against such list of attested claims (again solely because of certain procedural reasons, eg, their prior objection has not been considered, data on the prior objection are incorrect, etc). Based on the amended list of attested claims and potential objections of creditors filed against such list, the insolvency court decides by a decision on (i) objections of creditors, filed against the amended list of attested claims; (ii) which claims or rights of separate settlement are finally accepted and recognised or rejected; (iii) (only in case of compulsory settlement proceeding) which claims have been plausibly demonstrated; and (iv) (only in bankruptcy proceeding) who (either the debtor or the creditor) shall, in other procedures, exercise a claim to establish the existence or non-existence of a rejected claim.

According to the Insolvency Act, the lodgement of a claim into an insolvency proceeding must include: (i) the exact value of the principal; (ii) if the creditor is also claiming interest – a capitalised value of all interests accrued from the date of the final maturity of the claim up to the date of initiation of the insolvency proceeding; (iii) all costs incurred in relation to enforcement of the claim; (iv) if the creditor has lodged its

claim as conditional – the exact description of the conditions precedent or resolutive conditions related with payment of the claim.

Under the Insolvency Act, transfer of lodged claims to a new creditor are allowed. In order to become the party of the proceeding, the acquirer of such claim has to notify the insolvency administrator on the acquisition of the claim and offer sufficient evidence on acquisition thereof (eg, a copy of the agreement on assignment, etc) The price under which the claim was acquired by the new creditor has no influence on the claim of the acquirer of the claim against the insolvent debtor – the acquirer can claim at full face value. Under Slovenian law, interest accrued to the principal of the claim is associated with the principle and shares its status – thus, if the principal is transferred to the new acquirer, the interest is transferred too. The original creditor may therefore not only claim repayment of the interest accrued, without claiming also repayment of the principal.

36 Set-off and netting

To what extent may creditors 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?

Under the Insolvency Act, the mutual claims (whereby, as of the date of initiation of the insolvency proceeding, all non-monetary claims are transformed into monetary claims by the law) under the market prices or values at the initiation of the insolvency proceeding are deemed to be set-off by the law. The law does not provide any possibility for the creditors to be deprived of such right.

The provisions on the voluntary preventive restructuring proceeding do not provide any special option for setting off of mutual claims. However, such set-off may be performed based on the agreement between the debtor and the creditor after the restructuring is completed.

37 Modifying creditors' rights

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

Under Slovenian insolvency law, the insolvency court has no competence to modify the rank (priority) of a creditor's claim. All creditors with claims of the same rank shall always be treated equally.

38 Priority claims

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

Apart from the employee-related claims, the Insolvency Act provides the following priority claims:

- compensations for accidents related to work for the debtor, and occupational diseases;
- taxes and contributions that had to be paid together with salaries or other work-related payments; and
- claims related to loans and credit facilities, provided to the debtor under laws on saving or restructuring of legal entities; or sureties granted for such loans.

According to the Insolvency Act, the priority claims have priority solely against the regular (unsecured) claims of creditors (ie, priority claims are being repaid from the general insolvency estate prior to other unsecured claims). In no case is repayment of such claims prioritised against any secured claim (which are repaid from the value of the assets, subject to the security) and shall be repaid immediately after the repayment of the costs of the bankruptcy proceeding.

Besides the above-mentioned priority claims, the Insolvency Act also recognises super-senior claims of the debtor. These are the claims deriving from contracts concluded by, or other legal transactions executed by, the debtor in the compulsory settlement proceeding that ran prior to the initiation of the bankruptcy proceedings, but was terminated because of the initiation of the bankruptcy proceedings. Such super-senior claims shall be repaid from the general bankruptcy estate; however, prior to the repayment of the priority claims.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Liquidation proceeding

The Companies Act provides no special provisions with regard to termination of employees' contracts in the liquidation procedure. Thus, general provisions of Slovenian employment law apply in such cases, whereby the entity cannot be liquidated unless all claims of its workers (who become the entity's creditors) are fully repaid.

Restructuring and compulsory settlement procedure

As the purpose of the restructuring proceedings under the Insolvency Act is to rescue the entity and ensure solid grounds for continuation of its business activities, the Insolvency Act provides no special rules with regard to termination of employees' contracts in the above-mentioned proceedings. Thus, general provisions of Slovenian employment law apply.

Bankruptcy proceeding

Under the Slovenian Employment Relationship Act (Official Gazette of the Republic of Slovenia, No. 21/13, as amended, hereinafter the Employment Relationship Act), the bankruptcy administrator may, following the initiation of the bankruptcy proceeding, terminate work contracts with all employees whose services shall no longer be needed (some workers may remain employed for the purposes of completion of the already initiated deals) with 15 days' notice period. Employees are entitled to receive payment of severance pay in accordance with the Employment Relationship Act, whereby their claims are considered as priority claims (see question 38).

In case of termination of employment agreements to a larger number of employees, the administrator has to also inform the trade unions organised by the debtor on anticipated terminations and consult with the trade unions on potential limitations of the number of terminations and acts for mitigation of consequences deriving from anticipated terminations. The administrator must inform the competent office of the Employment Service of Slovenia of the anticipated termination of a larger number of employment contracts.

40 Pension claims

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

Under the Insolvency Act, unpaid employer's contributions to the general Slovenian pension scheme run by the Pension and Disability Insurance Institute of Slovenia (membership is obligatory for all employees who are working in Slovenia) are considered as work-related contributions, which have to be paid together with monthly salary or other work-related payments and hence have the status of priority claim in the bankruptcy proceeding.

Payment of contributions in other forms of pension-related saving schemes (pension savings schemes run by banks, pension funds run by pension insurance companies, etc) are entirely the decision of each individual worker (each worker pays only for himself or herself) and thus are not specifically governed by the Insolvency Act.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Under the Insolvency Act, the costs of environmental remedies or damages caused by past business activities of the debtor are deemed costs of the insolvency proceeding and shall thus be covered in full from the general bankruptcy estate, prior to its distribution to creditors. If

the funds available in the estate do not suffice for financing such environmental remedies, the bankruptcy proceeding is concluded without distribution of the estate to the creditors (the entire estate is used for financing of environmental remedies), while the financing of the remaining required remedies is taken over by the Republic of Slovenia (and financing of those from its budget).

42 Liabilities that survive insolvency or reorganisation proceedings

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

Under the Insolvency Act, the general consequence of a completed insolvency or restructuring proceeding is that the remainder of any creditor's claim (ie, a part of the claim that is not repaid by the debtor in accordance with the terms of the insolvency or restructuring proceedings) does not cease but is transformed into a natural obligation whose repayment cannot be claimed (by way of official, legal proceeding) by the creditor anymore, but still can be validly fulfilled by its debtor (or by any third person in their name and for their account of the debtor) voluntarily.

In case of a concluded bankruptcy proceeding, the claims of the creditors are revived (to the value, not been repaid through the previous proceeding) should new additional assets of the debtor be found after the conclusion of the bankruptcy proceeding.

43 Distributions

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

Liquidation proceeding

Under the Companies Act, the distribution of the assets of the liquidated entity is performed only after the liquidator actually liquidates all assets of the respective entity and on this basis establishes that the assets suffice for repayment of all creditors. Based on this assessment, the liquidator issues a liquidation report, which is reviewed and confirmed by the general meeting of the shareholders. The actual distribution of assets must follow within 30 days of the confirmation of the distribution plan by the general meeting of shareholders.

Voluntary preventive restructuring proceeding

Under the Insolvency Act, in case of a restructuring, there is no general distribution of the assets. The restructured financial claims of the financial creditors are being repaid regularly, in accordance with the terms and provisions of the confirmed agreement on the financial restructuring.

Bankruptcy proceeding

The Insolvency Act provides for the following distributions of the bankruptcy estate (whereby the conditions for such distribution may vary):

- priority distribution (ie, the distribution of the bankruptcy estate in which the priority claims are repaid) shall be made as follows:
 - the first priority distribution is whenever there is sufficient cash available in the bankruptcy estate for payment of at least half of the value of recognised, unsecured, duly lodged priority claims; and
 - any further priority distribution is whenever the value of the estate suffices for repayment of at least 10 per cent of the value of recognised, unsecured, duly lodged priority claims;
- general distribution (ie, the distribution of the bankruptcy estate, in which the unsecured claims are repaid) shall be made as follows:
 - the first distribution is to be made when the value of the estate suffices for repayment of at least half of the value of recognised, unsecured, duly lodged claims (if this situation arises prior to six months after the initiation of the bankruptcy proceeding);
 - in other cases when the value of the estate suffices for repayment of at least 10 per cent of the value of recognised, unsecured, duly lodged claims; or
 - every further distribution has to be made when the value of the estate suffices for repayment of at least 10 per cent of the value of recognised, unsecured, duly lodged claims;
- distribution of special bankruptcy estate (ie, the distribution of the financial means, gathered by selling of the assets of the debtor, on

which the right to a separate settlement exists) shall be made within eight days of receipt of the full purchase price for the sold assets.

Security

44 Secured lending and credit (immovables)

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

According to the currently valid Slovenian Law of Property Code (Official Gazette of the Republic of Slovenia, No. 87/2002, as amended, hereinafter Law of Property Code) a mortgage is the only type of security taken on immovable property. The mortgage is validly created and established solely after it is registered in the Land Register. Under the Law of Property Act, there are two types of mortgage – a regular mortgage and a directly enforceable mortgage. The latter is established on the basis of an agreement, entered into in the form of a directly enforceable notarial deed and its major advantage is that it can be directly enforced in case the debtor falls into a delay in the fulfilment of its obligations (in case of a regular mortgage, the creditor must file a law suit to ensure the enforcement of the established mortgage).

45 Secured lending and credit (movables)

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

The principal types of security that are taken on movable (personal) property under the Slovenian law are as follows:

- Lien – pursuant to the Slovenian Law of Property Code, a lien may be established on each movable, whereby the latter is transferred into possession of the creditor.
- Non-possessory lien – the Slovenian Law of Property Code provides that a lien may be established on a movable without transferring the latter into the possession of the creditor (the movable remains in possession of the debtor). A non-possessory lien is established on the basis of an agreement entered into between the debtor and the creditor in the form of a directly enforceable notarial deed. In certain cases, when a special register of non-possessory liens exists (eg, a register of liens on stocks, equipment, vehicles, cattle, railway carriages, etc), such lien is, however, established only after being registered in this register.
- Retention of title – pursuant to Slovenian Obligations Code (Official Gazette of the Republic of Slovenia, No. 83/2001, as amended, hereinafter Obligations Code) a seller of movable property may retain the title over such movable until full repayment of its purchase price. If the bankruptcy proceeding is initiated over the purchaser, the retention right of the seller can only be invoked if the signature of the purchaser on the agreement, establishing the retention right, was notarised.
- Retention right – pursuant to the Obligations Code, a seller may retain in his or her possession a movable until full repayment of its purchase price.
- Fiduciary transfer of assets – under fiduciary transfer of assets, a debt is secured by transfer of certain movables to the creditor (acting as fiduciary), possession of which is, however, retained by the debtor.
- Fiduciary transfer of receivables – a fiduciary transfer of receivables owed to the debtor by their own debtors.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Liquidation proceeding

Under the Obligations Code, each creditor may claim annulment of certain acts performed by the debtor to the detriment of its creditors. A legal act shall be deemed to have been done to the detriment of creditors if, because of the act, the debtor does not have sufficient assets to fulfil the creditor's claim.

A disposal of assets against a payment may be challenged by any debtor if the fact that the creditors were being damaged by such disposal

was known or should have been known to the debtor and the third person with whom or for whose benefit the disposal was performed. If this third person is the debtor's spouse or is related to the debtor, it shall be presumed that such person knew that through such disposal the debtor was acting to the detriment of the creditors.

For disposals of assets and equivalent legal acts free of charge, the debtor shall be deemed to have known that such disposal was to the detriment of the creditors, and the matter of whether the third person knew or should have known of such shall not be a requirement for a challenge thereto.

The deadline for filing of the lawsuit challenging the disposal is, in the case of disposal against the payment, one year and, in the case of free of charge disposals, three years, following the day when the disposal has been performed.

Bankruptcy proceeding

In case of a bankruptcy proceedings, the above cited rules on changeability of the debtor's disposals do not apply, but the special rules on clawback actions in the bankruptcy proceedings are as provided in the Insolvency Act.

These special rules apply to all legal transactions and other legal actions that the debtor in bankruptcy has concluded or carried out in the period as of the beginning of the 12 months prior to the introduction of bankruptcy proceedings up to the initiation of bankruptcy proceedings (the 'challengeable period').

Any legal action of the debtor in bankruptcy, carried out within the challengeable period, shall be challengeable:

- (i) if the consequences of such action are:
 - either a decrease in the net value of assets of the debtor in bankruptcy, so as to enable other creditors to receive payment for their claims in a smaller portion than if the action had not been done; or
 - a person to the benefit of whom the act has been executed has acquired more favourable payment conditions for a claim against the debtor in bankruptcy; and
- (ii) a person to the benefit of whom the act was executed, at the time when such act has been executed, was aware of, or should have been aware of the fact that the debtor was insolvent.

A legal action of a debtor in bankruptcy on the basis of which another person came into possession of the debtor's assets without being liable to execute its counter-fulfilment, or for a counter-fulfilment of small value, shall be challengeable irrespective of the satisfaction of the condition provided for in point (ii) above.

Further to the above, if a creditor to the benefit of whom an action was carried out does not prove otherwise, it shall be considered that the condition referred to in point (i) above is satisfied if:

- (i) the action was carried out in order to fulfil the liabilities of the debtor in bankruptcy on the basis of a bilateral contract or another bilateral legal transaction to the benefit of the creditor who performed the counter-fulfilment prior to the performance of the debtor in bankruptcy;
- (ii) the creditor, as a result of a legal action of the debtor in bankruptcy, acquires the position of a creditor with the right to separate settlement concerning payment of the claim that arose prior to such act being performed; or
- (iii) if the act has been performed during the course of the compulsory settlement proceedings contrary to the general prohibition of entering into any new business activities.

If the creditor to the benefit of whom an action was carried out does not prove otherwise, it is considered that the condition referred to in point (ii) above is satisfied, if:

- the creditor has received fulfilment of a claim prior to its maturity, or has received fulfilment in a form and manner that, according to business practices, usages or practice that existed between the creditor and the debtor in bankruptcy, is not considered as a normal form or manner of fulfilment of liabilities based on legal transactions having characteristics equal to those of the legal transaction that represented the basis for the execution of fulfilment of the debtor in bankruptcy; or
- the action was carried out within the last three months prior to the introduction of bankruptcy proceedings.

A clawback lawsuit shall be filed within 12 months of the publication of the notice of initiation of bankruptcy proceedings. If the clawback procedure is successful, the creditor who has acquired on the basis of such act any fulfilment of its claim, shall return to the debtor in bankruptcy what he or she has received on the basis of the challenged legal action, and if this is no longer possible, pay financial compensation at prices valid at the time of the issue of this court decision.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Beside the claims that the related parties have under the general provisions of the Companies Act on capital maintenance, the Insolvency Act provides no such specific restrictions. Rules and regulations on changeability as described in question 46 should be taken into consideration.

Groups of companies

48 Groups of companies

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

In general, the assets of a parent (and also affiliated) company shall always be separated from the assets of subsidiaries (and affiliates). The Insolvency Act therefore does not contain any provisions regarding responsibilities of a parent or affiliated company in case an insolvency proceeding is initiated over one of the group companies.

Generally, according to the Companies Act, if a controlling company causes a controlled company to enter into a transaction or to undertake or refrain from undertaking any act that is disadvantageous for such controlled company, without compensating such disadvantage by the end of the financial year or granting to the controlled company an entitlement to any measures serving as compensation for this, such controlling company shall be liable for any damage incurred to the controlled company.

49 Combining parent and subsidiary proceedings

In 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?

The Insolvency Act does not provide any special procedural rules regarding the simultaneous insolvency proceedings against a parent and its subsidiary company. The proceedings remain independent of one another and the assets and liabilities are not combined.

International cases

50 Recognition of foreign judgments

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?

The Insolvency Act includes rules on cross-border insolvency proceedings.

These provisions apply insofar as no international treaty or the EU Council Regulation (EU) 848/2015 on Insolvency Proceedings is applicable in the respective case.

Most importantly, assets located outside Slovenia may become subject of the insolvency proceedings in Slovenia. Further, Slovenian courts will recognise and enforce foreign insolvency proceedings insofar as the standards of the foreign insolvency proceeding are comparable to Slovenian insolvency proceedings and provided that the debtor's centre of main interests (COMI) is located in the country where such proceedings took place.

Directives 2001/17/EC on the reorganisation and winding up of insurance undertakings (replaced by Directive 2009/138/EC) and 2001/24/EC on the reorganisation and winding up of credit institutions were both implemented in the Insolvency Act.

Update and trends

The Insolvency Act has undergone several substantial amendments since it entered into force in October 2008 and reflects all good practices, which have proven useful in comparable legal systems across Europe.

Therefore, there exist no plans for any new amendments in the near future. Notwithstanding the aforesaid, there are, however, discussions to improve organisation of the sale processes in insolvency proceedings. The general idea is to enhance use of the online bidding portals for selling auctions in insolvency proceedings, which would enable presence and bidding to a much wider audience and at the same time considerably lower the costs of such proceedings.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Slovenia fully adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2007.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Generally, foreign creditors are treated on an equal footing with Slovenian creditors and may use all legal remedies provided under the Insolvency Act for protection of their legal status. Under the Insolvency Act, however, the foreign creditors shall be informed directly by the administrator on initiation of the bankruptcy proceedings.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

According to article 49 of EU Council Regulation (EU) 848/2015 on Insolvency Proceedings, any assets remaining in Slovenia can be transferred to the administrator in another EU member state only if all claims in Slovenian insolvency proceedings have been repaid.

Other than such transfer of surplus assets, Slovenian law does not provide any mechanism to transfer assets subject to insolvency proceedings in Slovenia to an administration in another country.

54 COMI

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?

Under the Insolvency Act, if not proofed otherwise, the country of the company's registered seat is deemed as the COMI.

55 Cross-border cooperation

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 Insolvency Act permits recognition of foreign insolvency proceedings. Generally, recognition of these proceedings is subject to general rules on the recognition and implementation of foreign court rulings provided for by the act governing international private law and procedure and special rules provided by the Insolvency Act.

A foreign insolvency proceeding is recognised in Slovenia on the basis of the request by the foreign insolvency administrator if:

- all required documentation (ie, a certified copy of the decision of the foreign court on the initiation of insolvency proceedings, or a statement by the foreign court certifying that foreign insolvency proceedings have been initiated and a foreign administrator has been appointed and a request for recognition in the form of a statement of the foreign administrator indicating all the foreign insolvency proceedings conducted against the debtor of which he or she is aware) is attached to the request for recognition;
- the procedure that is the subject of the request for recognition has the characteristics of foreign court insolvency proceedings (ie, court or administrative procedure conducted in a foreign country for the joint account of all creditors of the debtor because of financial restructuring or liquidation of the debtor, and under the supervision of which of the realisation of the assets and management of operations of the debtor shall be carried out by a foreign court or an administrator appointed by a foreign court);
- a foreign administrator has the position of the foreign administrator;
- the debtor has his or her centre of main interests or establishment in the foreign country in which the procedure is conducted that is the subject of the request for recognition; and
- if no obstacles exist for the recognition (ie, negative impact on the sovereignty, safety and the public interest of the Republic of Slovenia).

56 Cross-border insolvency protocols and joint court hearings

**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?**

We are not aware of any such protocols or hearings.



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

Insolvency, winding-up (liquidation) and business rescue (reorganisation) in South Africa are governed by the Insolvency Act 1936, the Companies Act 2008 and the Companies Act 1973. The Insolvency Act governs the position when a natural person becomes insolvent. Private companies are, however, also subject to a number of provisions in the Insolvency Act. The liquidation of solvent companies is governed by the Companies Act 2008. Insolvent companies fall to be liquidated in terms of the Companies Act 1973. Business rescue is dealt with in the Companies Act 2008.

2 Excluded entities and excluded assets

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

Some state-owned companies enjoy limited protection.

3 Public enterprises

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

The same winding-up procedures apply as for private and public companies.

4 Protection for large financial institutions

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

In terms of legislation anticipated to be imminently implemented, systemically important financial institutions or a systemically important financial institution within a financial conglomerate may not, without the concurrence of the Reserve Bank, be subjected to winding-up or business rescue proceedings.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Applications for sequestration of any person or the liquidation of a company must be brought in the High Court. Where an order for the winding-up or the refusal of the winding-up of a company has been made by one judge sitting as a court of first instance, an appeal, on leave having been granted by the court appealed from, lies to a court of a full bench of the division of three judges. Security must be posted. The amount of security is normally determined by the Registrar of the High Court.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

In terms of the Companies Act 1973, an insolvent corporate debtor may be wound up voluntarily by making use of either the creditors' or the members' voluntary winding-up procedure. The requirements for a voluntary winding up of a company by the members (shareholders) are that a special resolution resolving that it be so wound up by the members be passed by the company, submitted to the Master of the High Court and registered with the Companies and Intellectual Property Commission (CIPC). Unless the Master has dispensed with the furnishing of security, security must be furnished to the Master for the payment of the debts of the company. Notice of the voluntary winding up of the company must be given in the Government Gazette. Voluntary winding-up proceedings may be carried out either through CIPC or the court.

There is also provision for a creditors' voluntary winding up, which can be commenced by way of a special resolution of the shareholders of the company stating that it is a creditors' voluntary winding up. The directors of the company must compile a statement as to the affairs of the company and such statement must be presented at a meeting of the shareholders called for the purpose of passing the special resolution. The resolution must also be registered with the CIPC. A copy of the resolution must be submitted to the Master and notice of the voluntary winding up of the company in the Government Gazette must be given.

The effect of voluntary winding up on a company is that the company, from the commencement of the winding up, ceases to carry on its business, except insofar as the continued business may be required to be to the benefit of the winding-up procedure. Apart from the ceasing of the company's business, the company remains a juristic person and retains all its powers. The powers of the directors of the company also cease (unless those powers are extended by the liquidator or the creditors in a creditors' voluntary winding up or the company in a general meeting in a members' voluntary winding up).

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

If the board of a company has reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company, it may resolve that the company voluntarily begins business rescue proceedings and be placed under supervision. A resolution to this effect may not be taken if winding-up proceedings have been initiated by or against the company. Business rescue proceedings commence when the company files a resolution to place itself under supervision in terms of section 129(3) of the Companies Act 2008 or applies to the court for consent to file a resolution. An affected person may at any time after the adoption of the resolution, until the adoption of a business rescue plan, apply to a court for an order setting aside the resolution, setting aside the appointment of the business rescue practitioner or requiring the practitioner to provide security in an amount to be determined. An 'affected person' means a shareholder or creditor of the company, any registered trade union representing employees of the company and, if any of the employees of the

company are not represented by a registered trade union, each of those employees or their representatives.

During a company's business rescue proceedings, the company may dispose of property only in the ordinary course of its business, in a bona fide transaction at arm's length for fair value approved in advance and in writing by the business rescue practitioner, or in a transaction embodied as part of a business rescue plan. Unless the business rescue practitioner consents in writing, no person may exercise any right in respect of any property in the lawful possession of the company irrespective of whether the property is owned by the company. The directors of the company must continue to exercise the functions of directors, subject to the authority of the business rescue practitioner. The directors must cooperate with the business rescue practitioner.

8 Successful reorganisations

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

A business rescue plan may propose an order of preference in which the proceeds of property of the company will be applied to pay creditors if the proposal is adopted. The creditors of a company in business rescue can be classified as any existing creditors of the company, independent creditors (including employees to whom deferred compensation is due), employees and providers of post-commencement finance.

If any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee before the beginning of the business rescue proceedings and had not been paid to that employee before the beginning of the proceedings, the employee is a preferred unsecured creditor of the company. See question 23.

Unless a longer period has been allowed by the court or the holders of a majority of the creditor's voting interests, the company must publish a business rescue plan within 25 business days after the date of the business rescue practitioner's appointment. The practitioner must, within five business days after publishing a business rescue plan, convene a meeting of creditors and any other holders of a voting interest, to consider the plan. Employee representatives must be given an opportunity to address the meeting, and the plan must be voted on at the meeting. Any releases from liability must be approved according to the business rescue plan.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

When a company is unable to pay its debts, it may be wound up by the court. A company is deemed to be unable to pay its debts if a creditor has served, on the company's registered address, a letter of demand for the amount due and the company has neglected to pay the amount due within three weeks from the date of receipt of the letter of demand; a creditor has obtained a judgment against the company and the sheriff's return of service indicates that the company has insufficient movable property to satisfy the judgment; or if it is proved to the satisfaction of the court that the company is unable to pay its debts. A court must have regard to the contingent and prospective liabilities of a company when it makes a ruling on whether a company is unable to pay its debts.

A creditor may apply to court for the winding up of a company that is unable to pay its debts. The winding-up application and annexures must be lodged with the Master and served on every trade union (that represents an employee of the company), the employees, the South African Revenue Services and the company itself. The proceedings for an involuntary liquidation differ materially from the proceedings for a voluntary liquidation in that in the first instance an application must be made to court. The company remains a juristic person until it is deregistered. The assets and other property of the company fall under the control of the Master until such time as a provisional liquidator is appointed. See further question 20 below. All legal proceedings against a company for which a winding-up order has been granted are immediately suspended until a liquidator is appointed.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

If a company has not adopted a resolution that it voluntarily begins business rescue proceedings, any affected person (as defined in question 7) may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings. Notice of the application must be given to the company, CIPC and the other affected persons.

The court may grant the order, if it is satisfied that a company is financially distressed; the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters or it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect of rescuing the company. If the court dismisses the application for business rescue, the court may make an order placing the company under liquidation.

In addition to the effects discussed in question 7, if liquidation proceedings have already been commenced by or against the company at the time such an application for the company to be placed under business rescue is made, the application suspends those liquidation proceedings until the court has adjudicated upon the application or the business rescue proceedings end, as the case may be. The material difference between voluntary and involuntary business rescue proceedings is that a court order is required to approve involuntary rescue proceedings.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

There are no specific procedures other than the procedures discussed above.

12 Unsuccessful reorganisations

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 business rescue plan will fail unless it is supported by more than 75 per cent of the creditors' voting interests and at least 50 per cent of the independent creditors' voting interests. If the vote is passed by these requisite voting percentages, the plan is approved on a preliminary basis, provided that the plan does not alter the rights of the holders of any class of the company's securities. If the adoption of a business rescue plan fails, the practitioner may seek a further vote for the approval from the holders of voting interest to prepare and publish a revised plan or advise the meeting that the company will apply to a court to have the result of the vote by holders of voting interests or shareholders set aside. If no application is made to court, any affected person may call for the vote of approval to prepare and publish a revised plan, apply to court to set aside the result of the voting, or to make a binding offer to purchase the interests of persons who opposed adoption of the business rescue plan at a value independently and expertly determined. If no person takes any action, the business rescue practitioner must promptly file notice of termination of the business rescue proceedings.

The implementation of a business rescue plan is effectively in the hands of the business rescue practitioner as the company is under the business rescue practitioner's supervision. The business rescue practitioner has full management control in substitution for its board and pre-existing management.

13 Corporate procedures

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

The Companies Act 2008 makes provision for the CIPC to remove a company's name from the register of companies when it receives a request from a company and it is satisfied that the company has ceased

to carry on business and has no assets or there is no reasonable probability of the company being liquidated. An alternative ground for the removal of a company's name from the register is if the company has failed to file annual returns for two or more years in succession and has failed to give satisfactory reasons for such failure to the CIPC. Dissolution of a company is determined by a decision of the CIPC provided, however, that the removal of the company's name from the register of companies does not affect the liability of any former director or shareholder of the company.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

The liquidator must submit an account to the Master for confirmation. The liquidator distributes the assets of the company or collects the contributions from the creditors in accordance with such account. The Master will file a certificate of winding up when the affairs of the company have been completely wound up.

Business rescue proceedings end when the court sets aside the resolution or order that began those proceedings or has converted the proceedings to liquidation proceedings. The proceedings will further also come to an end when the practitioner files with the CIPC a notice of the termination of business rescue proceedings or when a business rescue plan has been adopted and the practitioner has subsequently filed a notice of substantial implementation of that plan.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

The basic test that is applied to determine the solvency of a company is to consider whether the company is commercially solvent (as opposed to 'factual' solvency or insolvency). A company is regarded as being commercially insolvent if its finances are in such a state of illiquidity that it is unable to pay its debts (notwithstanding that its assets may exceed its liabilities).

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

There is no mandatory requirement for the commencement of winding-up proceedings, but a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose (prohibition under section 22(1) of the Companies Act 2008).

Directors and officers

17 Directors' liability - failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

If the CIPC has reasonable grounds to believe that the business of the company is being carried on recklessly, with gross negligence or with an intent to defraud any person or is unable to pay its debts as they become due and payable in the normal course of business, it may issue a notice to the company to show just cause why the company may be permitted to continue carrying on its business. If a company fails, within 20 business days thereafter, to satisfy the CIPC that the company is not engaged in such prohibited conduct or that it is able to pay its debts as they become due and payable in the normal course of business, the CIPC may issue a compliance notice requiring the company to cease carrying on its business. If a person to whom a compliance notice has been issued fails to comply with the notice, the CIPC may either apply to a court for the imposition of an administrative fine or refer the matter to the National Prosecuting Authority for prosecution as an offence.

18 Directors' liabilities - other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

In terms of section 76(3) of the Companies Act 2008 (subject to certain safe harbour provisions) a director of a company must exercise the powers and perform the functions of director in good faith and for a proper purpose, in the best interest of the company and with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director, and having the general knowledge, skill and experience of that director. A director may be held liable for any loss, damages or costs sustained by the company as a consequence of any breach by a director of such duty.

A director is liable to the company for any loss, damage or costs arising as a direct or indirect consequence of that director having knowingly acquiesced in the carrying on of the business of the company despite knowing that it was being conducted in a manner prohibited under section 22(1) of the Companies Act 2008.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

The duties of the directors are personal and as such do not transfer to the creditors.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

From the date on which a winding-up order of a company is granted, the directors' powers and duties immediately cease (see Sharrock, R et al, *Hockly's Insolvency Law*, 9th edn, p 254). In reorganisation, the business rescue practitioner has full management control of the company. As such, the directors therefore have no powers.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

If the court has made an order for the winding up of a company, all civil proceedings by or against the company are suspended. Any attachments or executions against the assets of the company after the commencement of the winding-up order are void until the appointment of a provisional liquidator. In the case of legal proceedings instituted against a company, and if those proceedings were suspended by a winding-up application, a person who wishes to continue the proceedings must give the liquidator, within four weeks after the liquidator's appointment, written notice before continuing the proceedings. Similar notice must be given where proceedings are to be commenced in respect of a claim that arose before the commencement of the winding up. In the absence of notice, the proceedings are deemed to be abandoned.

With regard to reorganisation, no legal proceeding, including enforcement action, may either against the company or in relation to any property belonging to the company or lawfully in its possession, be commenced or proceeded with during business rescue proceedings, save with the written consent of the practitioner or with the leave of the court.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

The liquidator may carry on or discontinue any part of the business of the company insofar as may be beneficial for the winding up thereof. The exercise by the liquidator of the powers conferred on him or her in terms of the Companies Act 1973 must be exercised subject to authority granted by meetings of creditors, members, the Master or the court. A liquidator effectively exercises control over the company and can therefore, with the necessary authority granted to him or her, conduct the business of the company for the benefit of the winding up of the company. The court has a broad power to supervise winding-up proceedings.

During business rescue, the company and the management of its affairs, management and property is under the temporary supervision of a business rescue practitioner subject to the business rescue plan.

23 Post-filing credit

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

The court may grant leave to a liquidator of a company to raise money on the security of the assets of the company or to do any other thing that the court may consider necessary for winding up the affairs of the company and distributing its assets. A company in reorganisation may avail of certain permitted sources of 'post-commencement' finance. Claims for repayment of such finance qualify for preferential treatment. The sources of post-commencement finance that may be available include the business rescue practitioner's remuneration and expenses; remuneration and reimbursement of expenses due to an employee that has been deferred (referred to here as 'employee deferred compensation'), and secured and unsecured extraneous financing. The business rescue practitioner's remuneration and expenses rank in priority before the claims of all other secured and unsecured creditors. Employee deferred compensation ranks next in priority and secured and unsecured extraneous financing ranks after that. Such claims rank ahead of all unsecured claims against the company.

24 Sale of assets

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?

During a company's business rescue proceedings, the company may dispose of property only in the ordinary course of its business, in a bona fide transaction at arm's length for fair value approved in advance and in writing by the practitioner, or in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in a vote by all affected parties. See question 25.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The liquidator has wide powers to structure and accept transactions for the benefit of the winding-up procedure. The liquidator has the power to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof, to agree to any reasonable offer of composition made to the company by any debtor, and to accept payment of a debt due to the company in settlement thereof or to grant an extension of time for the payment of any such debt, to compromise or admit any claim or demand against the company including an unliquidated claim. The liquidator must

have regard (subject to the provisions of the Companies Act 1973) to any resolution of the creditors or members or contributories of the company at a general meeting.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

Business contracts are not vulnerable to challenge merely on the basis that they were, or have become, 'unfavourable' and the courts will ordinarily enforce all contracts save for certain consumer contracts for which there is a special consumer protection dispensation. The liquidator in a winding-up is entitled to continue with or discontinue an uncompleted contract. The liquidator may also reject certain impeachable transactions, for example where the company being wound up or in business rescue has disposed of its property without value in return more than two years prior to the winding up and it is proved that after the disposition was made the liabilities of the company exceeded its assets, or within two years of the winding up and the person claiming to have benefited from the disposition is unable to prove that immediately after the disposition was made the assets of the company exceed its liabilities. See generally E Bertelsmann et al, *Mars, The Law of Insolvency in South Africa*, 9th edn, 2008, p222 and p248.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

In a liquidation, the termination of IP rights will be governed by the terms of the IP licencing agreement and will be dealt with in the same manner as agreements in winding-up proceedings. In business rescue proceedings, IP rights will be governed by the terms of the IP licencing agreement and the business rescue plan.

28 Personal data

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

The protection of personal information is governed by the Protection of Personal Information Act 4 of 2013, which deals with matters such as requirements for the lawful processing of personal information, the rights of data subjects and security measures.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Arbitration is not typically used in winding-up and business rescue proceedings, although it may be used prior to such proceedings as a means of crystallising obligations. Matrimonial causes and matters relating to status may not be arbitrated. Certain disputes are subject to specialised arbitration or alternative dispute resolution regimes, for example matters relating to labour issues and consumer protection issues.

Creditor remedies

30 Creditors' enforcement

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?

Processes for seizure of assets of a company are conducted in terms of court proceedings.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Creditors who have neither secured nor preferential claims are referred to as concurrent creditors. These creditors do not enjoy any advantage over other creditors and all such creditors rank equally (see E Bertelsmann et al, *Mars, The Law of Insolvency in South Africa*, 9th edn, 2008, p492). A party who can show a clear right, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy available to that party may apply to the court for an anti-dissipation order. When circumstances warrant, a court may be approached on an urgent basis.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

See questions 6, 10, 17 and 21 with regard to notices that are given to creditors. When a winding-up order has been granted, it must be published in the Government Gazette. The Master must thereafter summon a first meeting of creditors to consider the statement of affairs of the company, the proof of the claims against the company and to nominate a liquidator. After the appointment of the liquidator, he or she must call a general meeting of creditors on formal notice. Claims may be proved at any meeting of creditors and are determined by a presiding officer. The liquidator has a duty to report to creditors and contributories. As soon as practicable and not later than three months after the date of his or her appointment, and except with the consent of the Master, the liquidator must submit to a general meeting of creditors and contributories of the company a report with prescribed information. The liquidator must, within the prescribed time submit a Liquidation and Distribution Account to the Master.

The business rescue practitioner must, within 10 business days after publishing a business rescue plan convene a meeting of voting interest holders. The business rescue plan presented by the practitioner must contain background information (eg, lists of material assets and creditors of the company, holders of the companies' issued securities, and the probable dividend that creditors would receive if the company were placed in liquidation).

33 Creditor representation

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?

For liquidation proceedings, no formal procedures for the formation of committees are set out in the Companies Act 1973. In business rescue proceedings, a person may be a member of a committee of creditors or employees. All creditors are entitled to notice of every court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings, and may participate in any court proceedings arising during the business rescue proceedings. Participation by creditors or their representatives or advisers is not funded.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

It is the function of a liquidator in any winding up to recover and reduce into possession all the assets and property of the company, whether movable or immovable. The liquidator must apply the assets and property of the company in satisfaction of the costs of the winding up and the claims of creditors and distribute the balance among those who are entitled thereto. The creditors do not have any power to pursue remedies.

35 Claims

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

Claims against the company must be proved at a meeting of creditors by submitting the claim in written form and supported by affidavit. The Master may, on application of the liquidator, fix a time within which the creditors of the company are to prove their claims. Claims for contingent or unliquidated amounts can be recognised by means of compromise, admission or judgment. A creditor may prove a claim acquired by cession even if the claim was acquired after institution of liquidation proceedings, although in the latter event the creditor may not vote in respect thereof (see E Bertelsmann et al, *Mars, The Law of Insolvency in South Africa*, 9th edn, 2008, p397). A creditor relying on a ceded claim must disclose the fact that a claim was acquired by cession. A claim can be enforced at its full face value provided that it is otherwise provable. Where a creditor is secured, he or she is entitled to interest on the claim from the date of liquidation to the date of payment (Mars, p465). Interest may be payable as a residual item in non-preferential claims.

36 Set-off and netting

To what extent may creditors 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 estate of one of two persons is liquidated within a period of six months after a set-off has taken place of a debt by one person to the other, the liquidator may either abide by the set-off or, if the set-off was not effected in the ordinary course of business, with the approval of the Master disregard it and call upon the person concerned to pay to the estate the debt that was the subject of the transaction. The liquidator has similar powers if a person who had a claim against another person (ie, the debtor), and that claim has been ceded to a third person against whom the debtor had a claim at the time of the cession, and the estate of the debtor is liquidated within a period of one year after the cession.

37 Modifying creditors' rights

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

The characterisation and priority of creditors' claims is established in the Insolvency Act and not by the court (see *Hockley's Insolvency Law*, 9th edn, p186).

38 Priority claims

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

In liquidation proceedings the secured creditors are ranked first. The preferential creditors follow and the concurrent creditors are last. Claims for salaries and wages enjoy priority, as well as taxes.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

The contracts of service of employees in insolvent companies are suspended with effect from the date of granting of a winding-up order. The liquidator must consult with the employees and the trade unions representing the employees who are likely to be affected by the termination, alternatively with a workplace forum, if there is no registered trade union. The consultation must be aimed at reaching consensus on appropriate measures to save the business. Unless a liquidator and an employee have agreed on continued employment, all suspended contracts of service must terminate 45 days after the appointment of the liquidator. The employee is entitled to claim for his or her loss suffered as a result of the suspension or termination of the employment contract and is further entitled to claim severance benefits due in terms of labour legislation. Subject to the provisions of the Insolvency Act, employee claims are treated on a non-discriminatory basis. In business rescue proceedings, all employees of the company (appointed before the beginning of the proceedings) continue to be employed on the same terms and conditions as before (E Bertelsmann et al, *Mars, The Law of Insolvency in South Africa*, 9th edn, 2008, p240 and p485).

40 Pension claims

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

Pension claims by employees are specifically provided for in the Insolvency Act. After payment of the claims of secured creditors, the balance (ie, the free residue) is utilised to pay the employee-related claims. A pension-related claim ranks last among employee-related claims.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

There is no express provision for dealing with environmental problems in the course of liquidation or business rescue proceedings. The liquidator is not held personally liable for acts of the company committed before his or her appointment.

42 Liabilities that survive insolvency or reorganisation proceedings

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

The company's liabilities are extinguished by a winding-up order. A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it. If a business rescue plan has been approved and implemented in accordance with the Companies Act 2008, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue proceedings, except to the extent provided for in the business rescue plan.

43 Distributions

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

The liquidator is required to distribute the assets in accordance with the Liquidation and Distribution Account or to collect from the creditors

and contributories liable to contribute thereunder the amounts for which they may respectively be liable. The liquidator prepares a liquidation and distribution account which must be confirmed by the Master of the High Court (see A Boraine, J Kunst and D Burdette, *Insolvency Law and its Operation in Winding-up*, LexisNexis, Ch11). A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person: was present at the meeting; voted in favour of adoption of the plan; or in the case of creditors, had proven their claims against the company. Business rescue is not targeted at achieving distributions, but at restoring the viability of the company.

Security**44 Secured lending and credit (immovables)**

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

The most prevalent form of security over immovable property is the registration of a bond in the Deeds Office.

45 Secured lending and credit (movables)

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

The South African legal system is familiar with security in the form of liens, pledges, special mortgages, retention of title and cession securitatem debiti.

Clawback and related-party transactions**46 Transactions that may be annulled**

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

The Insolvency Act provides that if a 'trader' transfers in terms of a contract any business belonging to the 'trader', or its goodwill, any goods or property other than in the ordinary course of that business or for the securing of debt, a notice of the intended transfer must be published in the press and the Government Gazette within a period of not less than 30 days and not more than sixty days before the date of the transfer. If no such notice has been published, the transfer will be void against the trader's creditors for a period of six months after the transfer, and void as against trustees (the liquidator) of the estate if the estate is sequestrated within that period. Further provision is made in terms of the insolvency and companies' legislation for a number of transactions that may be set aside in the event that the company is being wound up and unable to pay its debts. A disposition of property not made for value, or having had the effect of preferring a creditor or being collusive may be set aside if the company was insolvent at the time the disposition was made or prejudiced any creditor.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Transactions that are impeachable in terms of the Insolvency Act will be unenforceable. For business rescue proceedings, see question 7.

Groups of companies**48 Groups of companies**

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

Every company has a separate legal personality. Subject to the provisions of the Companies Act 2008, a company is a juristic person with the legal powers and capacity of an individual. The court may, however, on the application of an interested person or in any proceedings in which a company is involved, if it has made a finding that the incorporation of the company, any use of the company or any act by or on behalf of the

company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of a company or of a shareholder of the company. This power of the court has been used to 'pierce the corporate veil' by declaring that companies of which the group is composed shall not be regarded as separate juristic persons but as if they were a 'single entity'.

49 Combining parent and subsidiary proceedings

In 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?

A group of companies consists of the parent (holding company) and all of its subsidiaries. Each company in the group is regarded as having a separate legal personality. While proceedings relating to a parent and its subsidiaries may be combined for administrative purposes, pooling of assets and liabilities as such is not permissible. Where the business of a group was conducted through its holding company with scant regard for the separate legal personalities of the holding company and its subsidiaries, the court has been prepared to 'pierce the corporate veil' and to permit the treatment of the residual assets of the companies as the assets of the holding company for purposes of settling 'investors' claims' (see *ex parte Gore and others NNO (in their capacities as the liquidators of 41 companies comprising King Financial Holdings Ltd (in liquidation) and its subsidiaries*) [2013] 2 All SA 437 (WCC)).

International cases

50 Recognition of foreign judgments

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?

South Africa is not currently a signatory to a general treaty on the enforcement of foreign judgments. The courts, however, apply requirements of the common law regarding the recognition of foreign judgments and may also have regard to the principles of The Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model was adopted by means of the Cross-Border Insolvency Act 42 of 2000. Implementation of the Act has, however, been delayed.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

In terms of the (as yet) unimplemented Cross-Border Insolvency Act, an appointed representative of a foreign creditor has a right of direct access to the South African courts and may in appropriate circumstances apply to commence proceedings, or participate in proceedings regarding the debtor under the laws of South Africa relating to insolvency and liquidation. In this regard, foreign creditors have the same rights as creditors in the Republic. If any insolvency notification under the laws of the Republic are to be given, notification must be given to the known creditors that do not have addresses in the Republic.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

There is no express provision for such a transfer from a domestic to an overseas administration in terms of the insolvency and liquidation legislation. Exchange control approval may be required.

54 COMI

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 courts have not yet laid down a definitive test for the determination of the COMI of a debtor company or group of companies.

55 Cross-border cooperation

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?

A foreign representative may apply to the court for recognition of the foreign order in terms of which the foreign representative has been appointed. The court may grant an order at the request of the foreign representative that commencement or continuation of individual legal actions or individual legal proceedings concerning the debtor's assets, rights, obligations or liabilities, and execution against the debtor's assets shall be stayed. The courts have generally been positively disposed regarding the recognition of a foreign order.



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56 Cross-border insolvency protocols and joint court hearings

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?

No reports have been ascertained that any of the courts have entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries. The courts may, however, in terms of the common law, communicate directly with foreign representatives appearing before them, regardless of the status of the Cross-Border Insolvency Act.

Spain

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1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

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 Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings. Please refer to the chapter on the European Union for further detail.

2 Excluded entities and excluded assets

What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or 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) that establish specific provisions that affect 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.

3 Public enterprises

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 public legal personality. Therefore, as indicated in question 2, public administrations and

other public entities that have such public legal personality cannot be declared insolvent as 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 or not. 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.

4 Protection for large financial institutions

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 entered 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);
- a 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.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

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.

An appeal can be brought 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 do not relate to the acceptance or rejection of the insolvency petition may be subject to appeal for reversal before the same court that passed the decision being appealed.

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.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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 17 in relation to directors' duties to file for insolvency.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary 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 creditors 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 that 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.

8 Successful reorganisations

How are creditors classified for purposes of a reorganisation 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 up to half the company’s debts (these limits may be exceeded if the settlement agreement is supported by 65 per cent of the ordinary claims);
- alternative proposals to all or some classes of creditors except for public creditors (see question 38 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 24).

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 of 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 to or less than 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. 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 introduced the concept of class for privileged creditors, which is 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 by comparing the proportion that the aggregate value of the security held by all the secured creditors supporting the settlement proposal represents with 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.

The Insolvency Act includes several rules for the calculation of the value of secured assets (which are similar to those 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 38 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 so 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).

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

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 where the directors file for insolvency, as set out in question 16.

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 involuntary reorganisation unsecured creditors to file for insolvency (see question 38 on the ranking of debts).

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Creditors cannot commence an involuntary reorganisation. Creditors can, however, initiate insolvency proceedings (see question 9 for the requirements and effects).

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Procedures do not exist for expedited reorganisations. Nevertheless, the Insolvency Act provides in certain circumstances for summary insolvency proceedings where procedural terms are reduced to 50 per cent.

12 Unsuccessful reorganisations

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 proposed plan. 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.

13 Corporate procedures

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

All commercial entities may be dissolved 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 dissolved 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.

14 Conclusion of case

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.

Insolvency tests and filing requirements**15 Conditions for insolvency**

What is the test to determine if a debtor is insolvent?

Under the Insolvency Act, the only criteria to determine if a debtor is insolvent is a cash-flow test: a debtor is considered insolvent when it is unable to regularly meet its payment obligations when they fall due.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

The company must initiate insolvency proceedings within the two months following the date on which they knew or should have known that it was insolvent. A debtor is considered to be insolvent when it is not able to regularly meet its payment obligations as they fall due (see question 15). 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.

When a company commences negotiations with its creditors to agree a refinancing agreement or an advanced proposal of settlement agreement, the company by means of an article 5-bis filing might communicate this fact to the competent court within the two-month period referred to above to obtain an additional period of three months to negotiate with its creditors. Once that additional three-month period elapses, the company will be required to seek a declaration of insolvency within the following working month, unless the insolvency situation had previously ceased. During that three-month period, the company will be the only one entitled to seek the insolvency, and no other application for insolvency will be accepted.

Directors and officers**17 Directors' liability – failure to commence proceedings and trading while insolvent**

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Breach of the obligation to commence insolvency proceedings may result in the insolvency being classified as a 'guilty insolvency' in the qualification phase of the insolvency proceedings. 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 being held liable for the payment of any deficit to the creditor.

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 this 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.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Directors and de facto directors (which, under Spanish law, includes 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. Creditors who have entered into a refinancing agreement described (see question 7) or a settlement proposal (see question 8) 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.

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.

Additionally, the directors in certain circumstances can be held liable for the payment of any deficit to the creditor (see question 17).

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. This offence is punishable by imprisonment from one to three years and a fine from six to 12 months.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

There are no specific obligations shifted to creditors in these circumstances, nevertheless they can apply to the court to place a debtor into an insolvency process as described in question 9.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation 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.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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, proceedings that seek 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) that is 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. These 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 16) 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.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

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 and enter into new transactions if, among others, this is within the debtor's ordinary commercial activities; or otherwise, provided that the court has authorised such sales or transactions subject to certain exceptions. 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.

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 a specially privileged claim (see question 38).

23 Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be 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 38).

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 will 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 sale of assets the debtor deems necessary to maintain the business activity during the insolvency proceedings). The remaining 50 per cent of the principal amount of the new money will be treated as generally privileged. New money provided by means of a capital increase is excluded.

24 Sale of assets

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?

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.

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; and
- 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 that is 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.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The Insolvency Act allows for 'stalking horse' bids under certain conditions. During the common phase of the insolvency proceedings, the insolvency administrator may dispose of assets that are not necessary for the continuity of the business. The insolvency administrator shall communicate the offer to the insolvency court and it will be approved unless a better bid is filed within 10 days. Additionally, at any time during the insolvency proceedings, the insolvency court may approve the disposal of assets affected by secured claims, subject to a 10-day period for the potential filing of better bids. Therefore, the insolvency administrator is able to continue to seek better bids during such time frames.

The Insolvency Act does not expressly regulate credit bidding. Notwithstanding this, liquidation plans filed by insolvency administrators may include such a possibility and the insolvency court may approve the transfer of an asset in favour of a creditor as a way of payment of such creditor's claim. The ability of a creditor to file a credit bid for the purpose of acquiring an asset would be limited to the amount that such creditor would be entitled to directly receive from the relevant sale proceeds in application of the Insolvency Act including, in particular, the provisions related to claims' priority. An assignee would have the same rights as the original secured creditor unless the priority of the relevant claim has changed as a result of the assignment (eg if the relevant assignee qualifies as a related party of the insolvent debtor).

In assessing any bid, in general, the insolvency court will consider the continuity of the relevant business and employment, and also a better satisfaction of the claims of the creditors.

See question 24 in relation to the sale of specific assets and business units.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 38.

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 46.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

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 or she determines that the termination is beneficial for the debtor.

However, all cases permitting a termination must be approved by the court.

28 Personal data

Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information 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. On 25 May 2018, the General Data Protection Regulation (Regulation (EU) 2016/679) of the European Parliament and of the Council of 27 April 2017 (GDPR) entered into force, and affects the processing of personal data (please refer to the chapter on the European Union for further detail). As a result, Spanish regulations have been superseded by the GDPR. The Spanish parliament is processing a bill to replace the current Data Protection Act in order to adapt Spanish regulations to the GDPR. Meanwhile Royal Decree-law 5/2018, of 27 July, has been published containing some urgent measures (most of them related to the sanction procedure) to align Spanish legislation with the GDPR until the new bill is approved.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

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.

Creditor remedies

30 Creditors' enforcement

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 21).

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Creditors may file an application with the relevant court requesting the grant 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.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

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 8, 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.

33 Creditor representation

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.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

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.

35 Claims

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

Creditors' claims where the amount of the claim is dependent on future events and those that are litigious shall be recognised in the insolvency proceeding as contingent claims without any assigned value and under their relevant classification. Contingent claim creditors are legitimate creditors but with the rights of adhesion, vote and collection suspended until their claim is confirmed.

Generally, creditors that have acquired a debt that is due and payable prior to the insolvency declaration cannot initiate insolvency proceedings until six months have elapsed following the acquisition. Nevertheless, creditors acquiring claims against the insolvent debtor after its formal declaration of insolvency shall 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.

36 Set-off and netting

To what extent may creditors 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.

37 Modifying creditors' rights

May the court change the rank (priority) 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 46.

38 Priority claims

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 43):

- 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), salary claims for the 30 days immediately preceding the declaration of insolvency and 50 per cent of the new money granted pursuant to a collective, individual or judicially sanctioned refinancing agreement, 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 37).

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, although it is worth noting that the value of a guarantee may not exceed the nine-tenths of the reasonable value of the asset minus the amount of the unpaid debts with preferential security in the same asset. The guarantee value cannot be lower than zero or more than the amount of the privileged credit or the maximum agreed liability. If the secured creditor has not been entirely satisfied from the security enforcement proceeds, he or she will be considered an ordinary creditor for the remaining unpaid amount.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

It is very common that, as a result of an insolvency proceeding, a company will start to make redundancies. Termination-related disputes are dealt with 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 dismissals 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.

40 Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation 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 a salary under Spanish law. Any pension-related disputes will be dealt with by the insolvency court.

41 Environmental problems and liabilities

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 personally, 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.

42 Liabilities that survive insolvency or reorganisation proceedings

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, 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 questions 24 and 25.

Additionally, the court may decide, upon the receivers' request, to sell an asset that is subject to security along 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.

43 Distributions

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 or she is considered as an ordinary creditor for the remaining unpaid amount;
- generally, privileged debts will be paid by segregating those assets covering the aggregate amount of such credits from the debtor's estate; 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.

Security**44 Secured lending and credit (immovables)**

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

The main security over immovable 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 must be registered with the appropriate Land Registry. No security that is enforceable against third parties is created until the registration of the mortgage has been completed.

45 Secured lending and credit (movables)

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

The main security over movable 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 movable 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 movable properties.

Clawback and related-party transactions**46 Transactions that may be annulled**

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

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 to rebut this presumption. This is the case for gifts and prepayments of unsecured 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 for the creation of security for pre-existing obligations disposals in favour of related parties (see question 37), or prepayments of unsecured secured debt;
- in the remaining cases, the claimant will have to put forward the arguments and evidence that the alleged act or contract 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 of rescinding those acts and contracts that the debtor had entered into in the four years prior to the creditors' fraud.

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.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

'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 43).

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 jure 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 jure 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.

Groups of companies

48 Groups of companies

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.

49 Combining parent and subsidiary proceedings

In 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?

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.

International cases

50 Recognition of foreign judgments

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?

Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings (the Recast Regulation) applies in Spain (see the chapter on the European Union).

In addition, non-EU insolvency proceedings are recognised 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).

51 **UNCITRAL Model Law**

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

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.

52 **Foreign creditors**

How are foreign creditors dealt with in liquidations and reorganisations?

In general terms, foreign creditors are subject to the same regulations and have the same rights as Spanish creditors.

53 **Cross-border transfers of assets under administration**

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

There is no provision in the Spanish Insolvency Act concerning the transfer of assets from one administration to another.

54 **COMI**

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 the 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 Insolvency Regulation (Regulation (EU) 2015/848) establishes that the presumption that a debtor's COMI is in the place of the registered office will not apply if the registered office has shifted in the preceding three months. For more information on the COMI regulation under 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.

In Spain there is no specific test to determine the COMI of a corporate group of companies. 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 48 and 49 on the insolvency of corporate groups). See the chapter on the European Union for new EU regulations on group insolvencies.

55 **Cross-border cooperation**

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 the Recast Insolvency 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 Recast Insolvency Regulation and the Insolvency Act 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.



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56 Cross-border insolvency protocols and joint court hearings

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.

Switzerland

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

In Switzerland, the Debt Collection and Bankruptcy Act of 1889 (DCBA) governs the enforcement of pecuniary claims and claims for the furnishing of security against private individuals and legal entities of private law. In 1994, this Act was partly revised and the amendments entered into force on 1 January 1997. A further amendment (which also relates to certain sections of the Code of Obligations and other federal acts) was enacted on 21 June 2013, which came into force on 1 January 2014. Finally, the latest amendments were enacted on 16 March 2018 and enter into force on 1 January 2019. The respective amendments are reflected herein. The DCBA is supplemented by other federal statutes, including:

- the Federal Civil Code of 10 December 1907, as amended on 15 December 2017;
- the Federal Code of Obligations of 30 March 1911, as amended on 30 September 2016;
- the Private International Law Act of 18 December 1987 (PILA), as amended on 16 March 2018 (enters into force on 1 January 2019);
- the Federal Act Regarding Merger, Demerger, Conversion and Transfer of Assets and Liabilities of 3 October 2003 (the Merger Act), as amended on 17 December 2010, which only came into force on 1 January 2014;
- the Swiss Federal Banking Act of 8 November 1934 (SFBA), as amended on 19 June 2015, the Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on the Insolvency of Banks and Securities Dealers of 30 August 2012 (BIO-FINMA), as amended on 9 March 2017;
- Swiss Stock Exchange and Securities Trading Acts of 24 March 1995, as amended on 19 June 2015, in particular article 36a;
- the Ordinance of FINMA on the Insolvency of Collective Investment Schemes of 6 December 2012, as amended on 1 March 2013;
- the Ordinance of FINMA on the Insolvency of Insurance Companies of 17 October 2012, as amended on 1 January 2013;
- the Collective Investment Schemes Act of 23 June 2006, as amended on 25 September 2015;
- the Penal Code of 21 December 1937, as amended on 15 December 2017;
- the Federal Insurance Contract Act of 2 April 1908, as amended on 19 December 2008;
- the Federal Act on the Mandatory Unemployment Insurance and the Indemnity for Insolvency of 25 June 1982, as amended on 16 December 2017;
- historic bankruptcy treaties of the nineteenth century, such as the Bankruptcy Treaty of 1825/1826 between all Swiss cantons (except Schwyz and Neuenburg) and the (former) kingdom of Württemberg (currently valid for the district of the Oberlandesgericht Stuttgart) or the Bankruptcy Treaty of 1834 between most of the Swiss cantons and the (former) kingdom of Bavaria on consistent handling of mutual citizens;
- specific rules regarding the foreclosure of aircraft or vessels, which to a large extent follow the provisions of the Ordinance on

Foreclosure of Real Properties of 23 April 1920, as amended on 23 September 2011;

- the Lugano Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 (the Lugano Convention) as revised on 30 October 2007, effective as of 1 January 2011, which is not per se bankruptcy-related but has a substantial impact when it comes to the enforcement of judgments, as amended on 8 April 2016;
- the Swiss Code of Civil Procedure (CPC), which replaced the former 26 cantonal procedure codes, of 19 December 2008, as amended on 17 June 2016 (coming into force on 1 January 2018);
- the Federal Act on Data Protection (DPA) of 19 June 1992, as amended on 30 September 2011;
- the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act, SR 958.1) of 19 June 2015, as amended on 5 July 2017;
- the Federal Act on the supervision of insurance companies of 17 December 2004, as amended on 17 February 2016;
- the Ordinance on the Liquidity of Banks of 30 November 2012 (LiqO), as amended on 22 November 2017;
- the Ordinance on Capital Adequacy and Risk Diversification for Banks and Securities Dealers of 1 June 2012, as amended on 22 November 2017; and
- the Ordinance on Banks and Savings Banks of 30 April 2017, as amended on 5 July 2017.

In the case of a corporate debtor (corporations, corporations with unlimited partners, limited liability companies and cooperatives), over-indebtedness is the most frequent criterion for the beginning of insolvency. Over-indebtedness means the liabilities of the company are not covered whether the assets are appraised at ongoing business value or at liquidation value. Also, a declaration of illiquidity in the sense of article 191 of the DCBA by a debtor (whether corporate or individual) initiates insolvency proceedings.

A debtor in bankruptcy may be any person or entity registered in the commercial register with one of the following capacities:

- an individual owning a business;
- a member of a partnership;
- a member with unlimited liability of a limited partnership;
- a member of the board of a partnership limited by shares;
- a partnership;
- a limited partnership;
- a company or partnership limited by shares;
- a partnership with limited liability;
- a cooperative;
- an association;
- a foundation;
- a trust;
- an investment company with variable or fixed capital (SICAV or SICAF); or
- a limited partnership for collective investments.

2 Excluded entities and excluded assets

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

A debtor who is not registered in the commercial register is subject to individual debt collection, but will also be adjudicated bankrupt if articles 190 to 194 of the DCBA apply.

Debt collection by means of bankruptcy proceeding is in all events excluded for taxes, duties, contributions, emoluments, fines and other obligations based on public law and owed to public treasuries or officials.

In general, all assets belonging to the debtor that have a monetary value form part of the insolvent estate. Assets that qualify as purely personal assets and that do not qualify for seizure are exempt. In the case of an individual debtor, this also applies to benefits under a pension plan that are not yet due. Third-party assets in possession of the debtor may be segregated for the benefit of such third party.

Notably, insolvencies of banks, securities dealers, mortgage bond clearing houses, insurance companies, collective investment scheme companies (SICAFs and SICAVs, and limited partnerships for collective investments) and fund managers will be dealt with by FINMA according to the special insolvency rules, as applicable. The respective rules are not discussed further herein.

Under the SFBA and BIO-FINMA, specific rules apply to protect bank customer deposits and claims.

3 Public enterprises

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

In principle, the insolvency proceedings of fully or partially government-owned enterprises are also governed by the procedure stated by the DCBA (ie, irrespective of whether an enterprise is owned by the government or not, the same rules apply). The insolvency of government-owned banks (eg, the government-owned cantonal banks and PostFinance) is – like other banks and securities dealers – additionally governed by the restructuring and bankruptcy procedure of BIO-FINMA. For shipping and railway companies – whether government-owned or not – the Pledge and Compulsory Liquidation of Railway and Shipping Companies Act of 1917 applies.

Federal and cantonal laws can, however, stipulate exceptions for specific types of government-owned enterprises. One such exception is entities established under public cantonal law whose insolvency is primarily governed by the Debt Collection Against Communities and Other Entities of Public Cantonal Law Act of 1947. The rules of the DCBA may only be applied subsidiarily. Such entities are in particular not subject to the bankruptcy proceeding under the DCBA. Only debt collection by realising pledged property or seizure of assets is possible. However, assets needed for fulfilling public tasks (administrative assets), including tax assets, may not be seized. Seizable are therefore only the financial assets of the public entity. The Swiss Confederation and its public institutions are subject to debt collection under the DCBA, but seizure is also limited to financial assets.

4 Protection for large financial institutions

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

Following the rescue of UBS in 2008, different legislative projects were started in order to avoid further public bailouts of banks. In the meantime, Switzerland has enacted comprehensive legislation. In April 2010, the two major Swiss banks (UBS and Credit Suisse) were identified by a commission of experts as companies ‘too big to fail’ in Switzerland. In 2013 and 2014, two other Swiss banks, the Zürcher Kantonalbank (November 2013) and Raiffeisen (June 2014), were declared systemically important by the Swiss National Bank. In September 2015, PostFinance, a wholly owned subsidiary of the government-owned Swiss Post, was added as number five to the list of systemically important banks.

During the same period, the Swiss banking law was partially revised. Systemically important banks are obliged to increase their equity by 2018 and to ensure essential political economic functions if they go bankrupt. The new banking law provides for contingent convertible bonds (Coco-Bonds). More stringent requirements on capital, liquidity and risk have been imposed to limit the risks of systemically important banks. The respective provisions entered into force on 1 March 2012. Pursuant to the LiqO, effective since 2012, banks are obliged to manage and monitor liquidity risks appropriately. On 25 June 2014, the LiqO was revised and supplemented by quantitative liquidity requirements in accordance with the international liquidity standards. On 22 November 2017, the LiqO was amended again. The new law provides smaller financial institutions with reliefs with respect to their liquidity coverage ratios. The amendments came into force on 1 January 2018.

On 1 November 2012, FINMA replaced the former Bank Bankruptcy Ordinance with the Banking Insolvency Ordinance (BIO-FINMA). BIO-FINMA consolidates the implementing provisions governing the restructuring and bankruptcy procedure for banks and securities dealers into a single decree. It completes Swiss legislation on insolvency and crisis prevention and meets international requirements. BIO-FINMA contains detailed regulations on the restructuring process, while the bankruptcy provisions were adopted practically unchanged from the former Bank Bankruptcy Ordinance. The expectation is that BIO-FINMA will make the restructuring and bankruptcy process both rapid and effective, taking proper account of individual cases, and preserving legal certainty. BIO-FINMA contains detailed regulations on the restructuring powers available to FINMA. In particular, instead of restructuring an entire bank, FINMA has the option, to ensure the continuation of individual core banking services, to convert debt capital into equity capital and to prescribe other corporate actions. The BIO-FINMA was revised on 9 March 2017.

On 1 January 2013, the revised Banking Ordinance and the Capital Adequacy Ordinance entered into force. As a result, banks must comply with the new rules of the Basel Committee on Banking Supervision (Basel III). Moreover, big banks whose failure would considerably harm the Swiss economy must comply with supplementary capital and risk diversification requirements, as well as presenting an effective emergency plan to the supervisory authority. On 30 April 2014, the Banking Ordinance was totally revised. This revision, together with a partial revision of the SFBA and the revised provisions of the Capital Adequacy Ordinance, came into force on 1 January 2015. With the revision of the Banking Ordinance, the new accounting legislation (accounting standards) and the regulations regarding unclaimed assets were implemented. The Banking Ordinance and the Capital Adequacy Ordinance was revised on 22 November 2017. The revised law introduces a leverage ratio and new regulations in the field of risk allocation. With this amendment, two additions to the international standards of the Basel Committee on Banking Supervision (Basel III) have been implemented.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The main decision-makers involved in the enforcement of Swiss insolvency proceedings are the bankruptcy administrator, the creditors’ meeting or its elected administrator or receiver as well as the creditors’ committee, if appointed. In essence, their decisions are subject to a specific complaint before the court. Basically, court decisions in insolvency proceedings are restricted to specific procedural stages. This includes the opening, revocation, suspension and termination of a bankruptcy proceeding. Moreover, in the course of composition with creditors, the composition agreement is subject to approval by the composition court.

In particular, the court’s decision on the opening of a bankruptcy proceeding and the confirmation of a composition agreement are of considerable legal and practical relevance. In both instances an appeal can be filed to challenge the respective court’s decisions.

Against a decision on the opening of a bankruptcy proceeding (granting or rejection of the request to open such proceeding), an objection according to CPC and DCBA can be filed within 10 days of its notification. The parties may plead new facts provided that these had

arisen before the decision of the lower court was rendered. The appellate court will only set aside the lower court's decision on the opening of a bankruptcy proceeding if the appellant can present prima facie evidence that he or she is solvent as well as documentary evidence that, in the meantime, the debt, including interest costs, has been discharged, or that the amount owed has been deposited with the upper court for account of the creditor, or that the creditor has waived the carrying out of bankruptcy proceedings. A further appeal to the Swiss Federal Tribunal is possible.

An objection against the decision of the composition court can also be made. It must be filed within 10 days of notification of the parties about the composition agreement. The creditor's right of appeal against the court's confirmation of the composition agreement requires that he or she did not agree to the composition agreement and that the appellant took part in the hearings before the composition court stating its objection to the composition agreement. Again, a further appeal to the Swiss Federal Tribunal is possible.

Provided that the appellant fulfils the statutory requirements, he or she does not have to obtain a permission to appeal, but has an 'automatic' right of appeal by operation of law.

The requirement to post a security (advance payment) to proceed with an appeal from a court order in an insolvency proceeding is governed by Federal Law (CPC/DCBA). Within such guidelines, the court has certain discretionary authority. The provision to post security has become standard procedure.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Corporate law provides for the dissolution procedures for legal entities leading to a voluntary liquidation of the business with full protection of the creditors' claims.

Upon their own motion, bankruptcy proceedings may be opened against companies limited by shares, partnerships limited by shares, partnerships with limited liability and cooperatives without prior enforcement proceedings in the instances provided for by the Code of Obligations (articles 725a, 764(2), 817 and 903). The application is based on a demonstration of manifest (ie, not just temporary) insolvency and is to be supported by a shareholders' resolution and a recently established balance sheet. As such voluntary liquidation leads to a bankruptcy proceeding, its effects do not differ from those in an involuntary liquidation as described below. Debtors that are not otherwise subject to bankruptcy proceedings may request its application under declaration of insolvency.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

A composition proceeding is a measure to protect the debtor from the consequences of bankruptcy. It allows the debtor to postpone payment of the debts or to satisfy them in total or in part, according to a specific plan. The proposed composition agreement must be ratified by the creditors. According to the newly amended DCBA, the Swiss composition procedure is now designed to rehabilitate the company under the auspices of the court or to reorganise unsecured and unprivileged claims. Over-indebtedness is no longer required.

Any debtor, whether subject to a bankruptcy proceeding or not, seeking to reach an agreement with its creditors, may initiate a debt moratorium proceeding by submitting to the court a reasoned application enclosing recent financial statements and a liquidity plan together with relevant documentation demonstrating the current and future financial status of the debtor, as well as a provisional rehabilitation plan. Usually, the composition court will request additional documentation.

A temporary debt moratorium not exceeding four months may be granted by the court. To protect the debtor's assets, the court will implement the necessary conservatory measures. Should the court conclude that is unlikely that rehabilitation or the conclusion of a composition agreement with creditors will be successful, the court will open bankruptcy proceedings. At the discretion of the court, one or several provisional commissioners for the temporary debt moratorium

may be appointed for the purpose of assessing the viability of the debtor's proposal. Provided all third-party interests remain protected, the court may abstain from making a public notice of the temporary debt moratorium (in which case the appointment of a commissioner is mandatory). In essence, the effects of the temporary debt moratorium are the same as for the definitive debt moratorium. If the temporary debt moratorium shows that a rehabilitation of the debtor or conclusion of a composition agreement with its creditors can be expected, the court, acting ex officio, may grant a definitive debt moratorium for an additional four to six months and will appoint one or more commissioners. The commissioner's primary duties are to supervise the debtor's activities and to perform the tasks set out in articles 298 to 302 and 304 of the DCBA. The actual powers of the commissioner will be determined case by case and can involve actual managerial powers. The commissioner has to present interim reports at the request of the composition court and has to inform the creditor of the progress of the moratorium. The definitive moratorium may be extended from the usual period (four to six months) to 12 months and, in complex cases, 24 months. Depending on the circumstances, the court can establish a creditors' committee, which will act as a supervisory body for the commissioners. The creditors' committee should be composed of representatives of the various classes of creditors. Once established, the creditors' committee will decide on the sale or charges of assets.

The effects of a provisional and temporary debt moratorium are the suspension of pending execution proceedings including bankruptcy and asset-freezing orders (but the prosecution of claims secured by a mortgage remains possible without the realisation of the asset). Emergency provisions, and civil and administrative litigations will be suspended. As one of the centrepieces of the amended DCBA, subject to the express consent of the commissioners and provided the rehabilitation would otherwise be jeopardised, the debtor is entitled to terminate long-term contracts. Resulting (damage) claims will become subject to the composition agreement.

8 Successful reorganisations

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

It is essential to realise that (as opposed to a corporate moratorium pursuant to section 725a CO) the composition agreement under DCBA is designed to affect the non-secured (including the portion of secured claims that remains uncovered) and non-priority creditors only and thus it does not encompass a full reorganisation plan involving all creditors' claims.

Prerequisite for confirmation of the composition agreement by the court is that, pursuant to the findings of the court, the value to be received by the affected creditors must be in sound proportion to the means of the debtor. The terms of the composition agreement are not prescribed by law, which offers a wide variety of features. It is within the discretion of the court to improve insufficient proposals. In case of a composition with dividend payment and continuation of the business, the equity holders must provide adequate contribution. In case of a composition agreement with liquidation of the assets, the result must be more favourable than in a bankruptcy.

Non-debtor parties may be released from liability as part of the terms; article 303 of the DCBA specifically rules on the duties of a creditor in order to maintain its rights against third-party debtors. Swiss law provides that a creditor agreeing to a composition agreement shall inform co-debtors and guarantors about the place and date of the creditors' meeting and shall offer to assign them the creditors' claim against cash payment. If a creditor refrains from doing so, the aforementioned third parties are released of their liabilities.

Furthermore, on a contractual basis a condition may be included in the composition agreement according to which the composition agreement is only concluded if certain third parties are also released from their liabilities. An out-of-court settlement requires the approval of all creditors affected.

In general, the DCBA may allow a financially distressed company to seek rehabilitation under the protection of the court. Special rules apply to public entities, hotels, farms and some of the regulated businesses such as banks. Such a rehabilitation procedure is generally

referred to as a composition proceeding. Its most significant feature is that it is possible for the debtor, with the approval of the court, to force its creditors to conclude a settlement agreement and make it also binding on the dissenting creditors. The proceeding is designed to protect the debtor from enforcement proceedings (except the realisation of collateral for claims secured by a mortgage of real property) and to work out a suitable offer for a composition. During the proceeding, the business of the debtor is generally operated under the supervision of a court-appointed commissioner. The amended DCBA provides for the possibility of a debt moratorium to give the debtor time under protection of the court to rehabilitate without a composition agreement involving a haircut of the claims being intended. Upon order of the court, such debt moratorium, which may not exceed four months, will require no public notification. In such an event, a commissioner needs to be appointed to protect third-party interests.

Any composition agreement can only be confirmed by the court upon approval of either the majority of the admitted (ie, non-secured and non-priority claims) creditors representing two-thirds of the qualifying claims, or of one-quarter of the creditors with at least three-quarters of the total amount of the qualifying claims.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

To place a debtor in an involuntary proceeding, the creditor must have complied with the preliminary debt collection procedure that involves the issuing and notification of a payment order by the debt collection and bankruptcy office at the request of the creditor, a successful setting aside of a possible objection raised by the debtor in a summary procedure and the petition to continue the execution. If the creditor has complied with the above, a bankruptcy warning is issued by the debt collection and bankruptcy office. At this point in time, the bankruptcy court, at the creditor's request, may order as a protective device the drawing up of an inventory of all the debtor's assets. If the claim is not satisfied 20 days after the service of the bankruptcy warning, the creditor can apply to the bankruptcy court to declare the opening of the bankruptcy. The bankruptcy order marks the start of the bankruptcy proceeding to be conducted by the bankruptcy office and results in a general execution with all its civil and procedural legal effects. A creditor may request the court to declare a debtor bankrupt without prior enforcement proceedings if the whereabouts of the debtor are unknown, or if the debtor evades its liabilities, engages in fraudulent conduct, has concealed assets in a preceding debt collection, or has ceased to make payments. The declaration of bankruptcy can be suspended by the court if a petition for a debt moratorium, emergency moratorium or, alternatively (but only for stock corporations, limited liability companies and cooperatives), for a corporate moratorium pursuant to article 725a of the Code of Obligations is submitted. The start of a bankruptcy liquidation has the following effects:

- one single bankrupt estate is formed consisting of all assets to which the debtor is entitled (irrespective of where they are located or whether they serve as security). The right to dispose of the assets is automatically transferred to the bankruptcy administration. The administration office establishes an inventory of all assets and takes protective measures;
- other enforcement proceedings directed against the debtor are automatically suspended and, in general, pending litigations will be suspended as well;
- all obligations of the debtor become due against the bankrupt estate with the exception of those secured by mortgages on real estate;
- except for claims secured by pledge, interest ceases to accrue against the debtor;
- claims subject to a suspensive condition are admitted in their full amount in the bankruptcy;
- claims that are not for a sum of money have to be converted into a monetary claim of corresponding value;
- a creditor may set off its claim against a claim that the debtor has against him or her, provided that obligation was contracted bona fide prior to the opening of the bankruptcy; and

- the creditors' claims are ascertained and listed in the schedule of claims by order of ranking and secured rights.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

The possibility for creditors to commence involuntary reorganisation in Switzerland was introduced by the DCBA revision in 1994. In practice, the demand for reorganisation by creditors is not very frequent. The main prerequisite for creditors to commence an involuntary reorganisation is the creditor's right to request the opening of bankruptcy proceedings according to article 166 or 190 of the DCBA. In addition, the court may also stay judgment on the opening of bankruptcy proceedings of its own motion if it appears that an agreement will be reached with the creditor. In this case, the file will be transferred to the composition court.

Apart from that, the effects of involuntary reorganisations do not differ from those for voluntary reorganisation.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Under Swiss law, no specific procedures exist for expedited reorganisations. The moratorium period and the proceeding can be considerably reduced on the basis of a prior consensus with the creditors. In more substantial cases, it is not unusual that advisers discuss pre-petition with the court. The amended DCBA now favours a pure debt moratorium for a period of up to four months to rehabilitate financially distressed companies.

12 Unsuccessful reorganisations

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?

The following can cause failure of a reorganisation plan:

- a strong minority of creditors disapproves the reorganisation and is in a position to preclude the twofold majority requirement from being met;
- the assets are insufficient to fully cover the privileged creditors and the claims incurred by the commissioner or administrator;
- the corporation is unable to do business during the moratorium period because of loss of reputation and lack of business;
- it becomes obvious to the court that the intended rehabilitation will not be achieved; or
- the debtor acts against the instructions of the commissioner.

An insolvent corporation that is no longer capable of reorganisation becomes bankrupt. If the plan is rejected, the court will declare bankruptcy. If the composition agreement is not fulfilled with regard to a specific creditor, the latter may apply to the composition court to have the agreement revoked as far as its claim is concerned, without prejudice to its rights.

In a dividend (or percentage) composition, a creditor who has not received its dividend may request the revocation of the composition for its claim only and may demand full payment.

Finally, each creditor may apply to the composition court to revoke an agreement obtained by dishonest means.

13 Corporate procedures

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

According to articles 736 to 751 of the Code of Obligations, a corporation is capable of being subject to an ordinary dissolution or liquidation procedure that involves no intervention by the judge or creditors. In that event, the board of directors or the liquidator is in charge of the liquidation.

Liquidators are appointed by the shareholders or by the court where the dissolution of the corporation is judicially ordered. The duties of the liquidators include the establishment of a balance sheet and of the information regarding the creditors of the dissolution. The liquidators terminate all current business before distributing the corporate assets, or the proceeds thereof, among the shareholders and give notice to the commercial register that the corporation has been dissolved.

All creditors' claims must be satisfied in full before this. A blocking period of at least one year must be observed prior to the payment of the liquidation dividend. An early distribution after three months is possible upon certification by a qualified auditor that no creditor or possible third-party interests are jeopardised.

As opposed to bankruptcy proceedings, corporate liquidation is not subject to verification by the court.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In the event of bankruptcy, closing judgment is given as soon as the liquidation is finished.

In the event of reorganisation, a report is submitted to the judge after the composition has been implemented.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

Under Swiss law, the relevant test is over-indebtedness, meaning that the liabilities exceed the assets at going concern values and at liquidation value. Going concern values may be maintained if it is demonstrated that the business operation can be continued for twelve months (see question 16).

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Over-indebtedness forms a special cause of bankruptcy for corporations, corporations with unlimited partners, limited liability companies and cooperatives.

Over-indebtedness means the liabilities of the company are not covered whether the assets are appraised at ongoing business values or at liquidation values. To maintain going-concern value, a sound cash-flow plan securing the operation for a reasonable period (typically 12 months) will be requested.

As long as at least half of the equity capital still exists, an adverse balance sheet remains unremarkable. But if the previous annual balance sheet shows that half of the share capital and the legal reserves are no longer covered, the board of directors must without delay call a general meeting of shareholders and propose a financial reorganisation.

If there is substantiated concern of over-indebtedness, an interim balance sheet must be prepared and submitted to the auditors for examination. If the concern is approved, the company bodies (board of directors, liquidators, auditors) are obliged, in the interest of the creditors, to notify the judge (Code of Obligations, article 725(2)). This notification of over-indebtedness is generally referred to as 'dumping of the balance sheet'. The timeline of the filing is decided on a case-by-case basis; in light of recent court cases, the breathing period tends to be restricted to a couple of weeks.

Notification of over-indebtedness may only be avoided if the balance sheet can be reorganised within a short time, in particular because creditors of the company subordinate their claims to those of all other company creditors to the extent of such insufficient coverage.

After a summary examination of over-indebtedness, the judge adjudicates the bankruptcy *ex officio*. Despite over-indebtedness, the judge may refrain from or postpone adjudicating the bankruptcy in two cases:

- if there is a possibility of a financial reorganisation, in which case he or she will take appropriate measures to preserve the value of the assets; or
- if there are indications of accomplishing a composition with creditors.

A bank that no longer fulfils the licensing requirements or violates its legal obligations risks the withdrawal of its banking licence, which inevitably results in the liquidation of the bank. In these situations, or if the bank is threatened by insolvency, FINMA has authority under the SFBA, which was revised in several steps to order far-reaching protective measures or the restructuring of the bank. The appointment of an independent expert investigator by FINMA so as to examine certain matters within the bank or to monitor the implementation of measures imposed by FINMA are among those protective measures. Also, a restructuring administrator can be appointed by FINMA to establish a restructuring plan. In the case of liquidation, FINMA appoints a liquidator.

Directors and officers

17 Directors' liability - failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

The members of the board of directors and all persons engaged in the management or liquidation of the company, as well as all persons engaged in the audit of the annual account, are liable not only to the company, but also to the shareholders and to the company's creditors for the damage caused by an intentional or negligent violation of their duties, for which a disregard of the provisions set out in article 725 of the Code of Obligations is being considered (see question 16). The provisions regarding liability (Code of Obligations, articles 752 to 760) also apply to the founders, organs or supervisors of banks.

As a further consequence, certain transactions carried out by the company while insolvent may be the subject of avoidance actions (DCBA, article 287) in order to refer the assets in question to the estate (see question 39).

Criminal liability could eventually occur in the event of acts that are carried out in the knowledge that the company will not be able to pay its debts.

18 Directors' liabilities - other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

For legal entities in general, their liabilities have to be satisfied by their own assets. The personal liability of corporate officers and directors arises in the context of a violation of their duties of responsibilities. This also applies to government claims, in particular personal exposure can result in the context of non-payment of social security or withholding tax.

Article 754 of the Code of Obligations provides that any member of the board of directors or any person entrusted with management or liquidation is liable for any damage caused to the corporation, its shareholders or creditors where they have intentionally or negligently acted in breach of their duties. This responsibility does not apply only to the formally appointed representatives, but also to what are termed 'factual corporate bodies' (all those persons who in reality decisively influence the corporate decision-making process). The principles of fiduciary duties are specified in a number of statutory provisions that aim at the protection of the shareholders as well as of the creditors' interests. Further specifications are laid down in the company's by-laws and organisational rules.

Of particular interest is the provision of article 725 of the Code of Obligations (see question 16). Lastly, the Swiss Penal Code sanctions reckless bankruptcy or mismanagement.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

If the duties as described in question 16 are not observed by the directors or if they support actions that are subject to challenge, personal liability to the creditors can ensue. It is noteworthy that the duties of the board relate to the specific company on a stand-alone basis only. The company's interests have to be defined accordingly to the prevailing circumstances (in essence following business judgement). Swiss corporate law is based on the notion that each legal entity has to protect and pursue its own interests. Cash management is of particular interest.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Under the supervision of the commissioner and at the direction of the composition court, the debtor may continue its business operations. However, certain transactions will require approval from the court or the creditors' committee, if appointed. The debtor is prohibited to divest, encumber or pledge fixed assets, to give guarantees or to donate assets without the authorisation of the composition court or the creditors' committee, respectively. Moreover, if the debtor contravenes the commissioner's instructions, the court can revoke the debtor's capacity to dispose of its assets or declare itself bankrupt. At the discretion of the court, the authority to operate the business can be given to the commissioner. The court may deprive management of its power of disposal or make its resolutions conditional on the consent of the commissioner. Contracts entered into during the moratorium with the approval of the commissioner enjoy priority over pre-petition rights. Unless a creditors' committee is appointed, which is one of the new features of the revised DCBA, the role of the creditors during the entire proceeding is fairly passive. They have to file their claims, can attend the creditors' meeting, can approve or reject the proposed composition agreement and have the right to be heard in court.

Matters arising in a liquidation or reorganisation**21 Stays of proceedings and moratoria**

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?

Liquidation

Regarding liquidation, there are two effects of the adjudication of bankruptcy with respect to enforcement and legal proceedings. As long as enforcement proceedings against the debtor are affected, all those proceedings cease and new enforcement proceedings relating to claims that arose before the opening of bankruptcy proceedings are not possible (except the enforcement of pledges given by third parties). Those enforcement proceedings for claims that arose after the declaration of bankruptcy can be continued during the bankruptcy proceedings by seizure or by realisation of pledges.

Civil court actions to which the debtor is a party and that affect the composition of the bankrupt estate are stayed, with the exception of urgent matters. In ordinary bankruptcy proceedings they can be resumed, at the earliest, 10 days after the second creditors' meeting. In summary bankruptcy proceedings, they can be resumed, at the earliest, 20 days after the schedule of claims is made available for inspection. Under the same conditions, administrative proceedings are stayed.

Reorganisation

As a general effect of composition, all pending execution proceedings, including petitions for bankruptcy and asset freezing, are stayed. Secured creditors may, regarding charges on immovable property, initiate the procedure for the realisation of security, but the charge will not actually be realised. Except for urgent cases, pending civil and administrative proceedings are stayed.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

Under the supervision of the commissioner and at the direction of the composition court, the debtor may continue its business operations. However, certain transactions will require approval from the court or the creditors' committee, if appointed. The debtor is prohibited to divest, encumber or pledge fixed assets, to give guarantees or to donate assets without the authorisation of the composition court or the creditors' committee, respectively. Moreover, if the debtor contravenes the commissioner's instructions, the court can revoke the debtor's capacity to dispose of its assets or declare itself bankrupt. At the discretion of the court, the authority to operate the business can exclusively be given to the commissioner. The court may deprive management of its power of disposal or make its resolutions conditional on the consent of the commissioner. Contracts entered into during the moratorium with the approval of the commissioner enjoy priority over pre-petition rights. Unless a creditors' committee is appointed, which is one of the new features of the revised DCBA, the role of the creditors during the entire proceeding is fairly passive. They have to file their claims, can attend the creditors' meeting, can approve or reject the proposed composition agreement and have the right to be heard in court.

23 Post-filing credit

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

In accordance with article 204 of the DCBA, one of the main effects of bankruptcy is that the debtor is deprived of all rights of disposal over its assets. The administrator, however, is able to contract new obligations, such as a loan or a credit, which may touch the free assets of the bankrupt estate.

Any debt contracted during the debt moratorium with the approval of the commissioner constitutes a debt against the assets in a composition with assignment of assets or in a subsequent bankruptcy proceeding and is, therefore, privileged.

24 Sale of assets

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?

Sale of assets in a reorganisation

The right of the debtor to dispose of its assets is generally preserved but restricted by the way in which the business activities are supervised by a commissioner. The debtor is prohibited to divest, encumber or pledge fixed assets, to give guarantees or to donate assets without the authorisation of the composition court or the creditors' committee, respectively. Any such transactions, if entered into, are null and void against creditors. In some cases, the judge may authorise the commissioner to pursue business instead of the debtor, which effectively puts the debtor under guardianship. These statutory restrictions will not affect the validity of transactions concluded with bona fide third parties. If the debtor refuses to follow the commissioner's instructions, the court can revoke the debtor's capacity to dispose of its assets or declare bankruptcy. The amended DCBA now refers to the possibility of establishing a rescue company the shares of which can be used, with approval of the court, to satisfy the creditors.

Sale of assets in a liquidation

In liquidation, the debtor loses its right of disposal over its assets as soon as the judge opens bankruptcy proceedings. Although the debtor remains the legal owner of its assets, the right of disposal is transferred to the administration for purposes of their liquidation. As soon as the bankruptcy judgment is published, any unilateral or bilateral transactions concerning assets belonging to the bankrupt estate entered

into by the debtor, and not the estate, are void as against its creditors. However, the payment of a promissory note to a bona fide creditor will not be regarded as void, as well as the sale or encumbrance of real estate when the restriction on the debtor's right of disposal is not yet registered in the land register.

Liabilities

In an acquisition of immovable property, the charges and liabilities registered for that property will generally pass on to the acquirer. To ascertain such charges, a special procedure will be conducted. The acquirer will also inherit existing environmental liabilities subject to possibility of recourse against the former owner. Movables, instead, will be transferred free and clear of claims. The amended DCBA makes clear that a transfer of a business or part thereof in the course of a debt moratorium, a bankruptcy or a composition agreement with assignment of assets will not automatically result in an assumption of the employees' related liability by the acquirer, but rather such liabilities will be assumed only upon explicit consent by the acquirer.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Stalking horse procedure

Swiss bankruptcy law does not provide for a specific stalking horse procedure. In a bankruptcy or insolvency liquidation, the assets are sold by public auction or free sale, as the liquidator may determine. Generally, in the case of real property and other substantial assets, the creditors will be granted a right to participate in the sale process and to make higher bids. While the liquidator has substantial discretion in organising a free sale process, the procedure should be fair in terms of time, should grant equal treatment and should disclose specific conditions of the interim sale agreement.

Credit bidding in sales

The sale of assets under any enforcement procedure of the DCBA requires cash payment by the bidder and the sale proceeds will be allocated to the creditors in line with their rankings. Exceptionally, money claims may be transferred at par value to a creditor in satisfaction of the equivalent amount. The courts have also accepted a set-off in specific circumstances for secured claims but only when it was obvious and uncontested that the sales proceeds would have to be handed out to the acquiring creditor. To the extent a transaction is governed by Swiss law, there is no difference whether the original secured creditor or an assignee of the original creditor request a set-off. Private sales, which are typically stipulated in security contracts and which may also provide for a right of the creditor to step in as acquirer, are not enforceable in bankruptcy situations.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 debtor is now allowed to cancel onerous long-term contracts, if their continuation would frustrate the intended rehabilitation. Such early termination requires the consent of the commissioner. Compensation for early termination may be granted, but respective claims will be treated as ordinary creditor claim. The special provisions for employment contracts remain reserved. Otherwise, contracts entered into by the debtor prior to the commencement of the respective proceeding remain in force. By operation of law, some specific contracts such as a mandate will terminate with the bankruptcy or involuntary liquidation.

While pecuniary claims become due, obligations that are not of pecuniary nature will be translated into a pecuniary claim. Special rules apply for 'synallagmatic contracts' (meaning contracts that involve contractual performances by both parties) that had not or only partially been fulfilled at the time of the opening of the insolvency proceeding. Pursuant to article 211 of the DCBA, the administrator in a bankruptcy

can decide whether he or she (in lieu of the debtor who has lost its rights to dispose over assets and contractual rights) wants to fulfil such a contract. The law does not set forth within what time such decision should be made. As a consequence, this discretion to 'cherry pick' can create legal uncertainty for the involved party. Contractual clauses to avoid the uncertainty may be considered. As a matter of law, such discretion is not warranted in cases of contracts that need to be performed at a specific date as well as for financial future, swap and option transactions if the value of the contractual performance can be determined by a market price. If the administrator chooses to continue with the contract, the adversary party may request security for its performance, and decline the performance if no sufficient security is provided.

Claims resulting from contracts or breach of contracts, respectively, that are fulfilled with the approval of the administrator enjoy privileged treatment. In contrast to that, claims resulting from contracts that were entered into or fulfilled without the approval of the administrator are treated as ordinary creditor claims.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Bankruptcy does not result per se in a termination of ongoing agreements, and respective claims that are incurred up to the date of first ordinary termination of the expiry of the contract term can be submitted, whereby benefits accruing to the creditor must be accounted for. The bankruptcy administrator is entitled to step into a contract that is not or is only partly fulfilled. So, if considered beneficial for the estate, the bankruptcy administrator will elect a continued performance of the licence agreement, which will result in a privileged treatment of the accepted claims. If the administrator opts not to step in, the contract party can request appropriate security for the continued performance, and if not provided, terminate the agreement.

It is controversial how the monetary and the non-monetary claims resulting from the licence agreement (which will have to be converted into monetary claims) will actually be treated in the proceeding. It is generally (but not universally) accepted that article 211(2) of the DCBA is a procedural rule only so that contractual clauses addressing termination should be overriding. Such clauses, however, will be tested against avoidance rules. Under the amended DCBA – during the debt moratorium – the debtor is entitled to terminate long-term contracts with the consent of the commissioner if the continuation of the contractual relationship would impede the rehabilitation of the debtor. Compensation for such early termination must be granted but the respective damages claim will be treated as an ordinary creditor's claim.

28 Personal data

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

The sale of personal information or customer data collected by an insolvent company in the course of an insolvency proceeding is not restricted by Swiss insolvency provisions but has to be in compliance with the general rules of the DPA. The DPA allows, under certain conditions, the sale of personal information or customer data to a third party.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Given the extensive international exposure of the Swiss economy, arbitration issues often arise in collective enforcement proceedings with a Swiss context. The availability of and the limitations to arbitration in connection with insolvency proceedings are the subject of continued legal discussion. The admissibility of arbitration is largely dependent on the nature of the specific dispute and on whether the bankruptcy

trustee or receiver is bound by a given pre-existing arbitration clause. Whereas for Swiss international arbitration (where the seat of the arbitration is in Switzerland but at least one party is domiciled abroad) a matter is arbitrable if the dispute involves 'an economic interest' (PILA, article 177(1)), in Swiss domestic arbitration the test is whether the parties are free to dispose of the rights of the dispute (CPC, article 354). In the first case, the concept is of a liberal nature but is restricted by public policy, while in cases of domestic arbitration the limitations are posed by the mandatory rules of collective enforcement. Despite the liberal concept of arbitrability in Swiss international and domestic arbitration law, certain types of insolvency proceedings cannot be argued before an arbitral tribunal. This especially relates to the actions that exclusively aim at enforcing debts, such as the creditor's application to the court to (definitively or provisionally) set aside the debtor's objection in summary proceedings (DCBA, articles 80 to 84). Because an arbitration process can only replace the ordinary judicial proceedings, but not (administrative) enforcement proceedings, in relation to the DCBA only actions of substantive nature (such as the action for contested claims in composition proceedings pursuant to article 315 of the DCBA) and, according to the dominant Swiss doctrine, actions with a reflexive effect on substantive law (such as clawback claims pursuant to the articles 285 to 292 of the DCBA), respectively, are considered as arbitrable.

In practice, the possibility to arbitrate is often decided by the circumstances whether the trustee or receiver in a bankruptcy takes the role of a defendant or rather acts as plaintiff. It is still questioned whether parties may validly agree to resolve a dispute regarding a voidance action by arbitration.

Although still a matter of debate, it seems widely established meanwhile that an arbitration clause entered into by the debtor before the start of the insolvency proceeding remains binding on the trustee or receiver absent specific limitations in the arbitration agreement. Likewise, the trustee or receiver may enter into new agreements for arbitration during the course of the insolvency proceeding.

In domestic arbitration, article 207 of the DCBA is to be observed, which requires the stay of all pending actions until the second meeting of the creditors (except for urgent matters). In Swiss international arbitration, the relevant procedural rules adopted for the proceeding will be guiding. It is suggested that arbitration proceedings in any event should allow for sufficient time for the trustee (or the respective creditors) to familiarise itself with the claim.

Creditor remedies

30 Creditors' enforcement

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?

Apart from the ordinary liquidation procedure that may be requested by shareholders, it is possible to liquidate a business outside the bankruptcy process by merger, demerger and transfer of assets and liabilities. This is specifically provided for by the Merger Act, which came into force on 1 July 2004. Full creditor protection is required in such a process.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

A simple statement of the creditor to the debt collection office at the debtor's domicile or at the debtor's registered office is sufficient to commence the enforcement proceedings of a money claim. Upon receipt of the enforcement request, the enforcement office issues the summons to pay. The debtor can file an objection within 10 days of notification without giving reasons. This forces the creditor to set aside the objection and, depending on the evidence at hand on the claim, to:

- institute an ordinary legal action (in the event of liquid cases in a summary proceeding) to prove the claim;
- request, in a summary proceeding:
 - the enforcement of an enforceable judgment rendered by a Swiss court, or an equivalent order of a recognised foreign court, in which case the court will definitively set aside the objection; or

- reach a provisional setting aside of the objection if the claim is evidenced by a written debt acknowledgement duly signed by the debtor.

Considerable case law has been developed to establish what qualifies as such debt acknowledgement. In this instance, the debtor can resort to ordinary legal action to quash the summary decision. Pursuant to the CPC, the setting aside of the objection can become definitive, as in the case of an enforceable decision, provided the debt acknowledgment is established by way of a notarial deed.

A fast-track proceeding is available to creditors who hold on to a bill of exchange or a cheque.

If the debtor neither pays nor objects in a timely manner, or if the creditor has successfully set aside the objection raised by the debtor, the creditor is entitled to apply for the continuation of the enforcement proceeding after 20 days, at the earliest, since the summons to pay has been served. If successful, the creditor may then continue the debt collection proceeding by filing a bankruptcy petition, or, if the debtor is not subject to bankruptcy proceedings, to have the debt collection office seize enough of its assets to cover the claim (other creditors who file their own request of continuation within 30 days of a seizure will participate in the proceeds realised from the seized assets). A new debt collection proceeding must be started if the proceeding is not continued within one year from service of the payment order, not counting the period used for the setting aside of the objection.

Whereas the purpose of the bankruptcy proceedings is to realise all of the assets of the debtor to satisfy out of the proceeds the claims of all of the creditors in accordance with their secured rights and priorities, the seizure procedure is for individual creditors and aims at realising only certain assets of the debtor.

Pre-judgment attachment proceeding

A special asset freeze proceeding is provided for under articles 271 et seq of the DCBA. In connection with the revised Lugano Convention, effective as of 1 January 2011, the regime for freezing orders has been modified and its scope has been extended. Freezing orders are available for both local as well as foreign creditors; they are subject to specific prerequisites. Such a freezing order has to be applied for by the court of the place where a debt collection against a debtor can be initiated or at the place the asset is located. It will be granted upon demonstrating prima facie evidence of a liquid and due but unsecured money claim. The creditor has to plausibly demonstrate to the court in a summary ex parte proceeding where the assets to be attached are located; 'fishing expeditions' are unlikely to be heard. However, pursuant to the revised law, the court can now issue freezing orders for the entire territory of Switzerland. This is a substantial improvement, as before, several orders needed to be obtained if the assets were kept in different local districts.

Freezing orders can be applied against assets located in Switzerland belonging to debtors resident abroad. Unless other grounds of attachments apply, respective claims must be based on an enforceable court decision or arbitral award or a debt acknowledgment or must at least be sufficiently connected with Switzerland. This sufficient connection test was introduced by the more recent partial revision of the DCBA and is subject to qualification by case law. With the revised Lugano Convention and related revision of the DCBA, any creditor holding an enforceable judgment, be it from a Swiss court or from a court of a member state of the European Union (or of the Lugano Convention, such as Norway or Iceland), or having a notarised debt acknowledgment at hand, will have the right to request a freezing order against a Swiss debtor. The freezing order is now recognised as the protection measure to be provided for under article 47, paragraph 2 of the Lugano Convention. The revised law has also introduced the possibility for the debtor to file a pre-petition protection letter to challenge an application for a freezing order.

The effects of a freezing order are to provisionally secure assets for the specific creditor. The freezing order is subject to challenge by the debtor. The creditor is liable for damages resulting from an unjustified attachment and must, to maintain the attachment, pursue a validation proceeding in a timely manner. During a legally determined period, creditors who likewise qualify may join in the proceeding and, thus, frustrate the result of the first attachment.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

The opening of the bankruptcy is publicly announced by the bankruptcy office as soon as it has been determined whether ordinary or summary proceedings will be adopted. The announcement contains:

- personal information on the debtor and the time of the declaration of bankruptcy;
- the enjoinder to creditors of the debtor and all persons having claims to assets in the debtor's possession to file such claims with the bankruptcy office within one month of the announcement (including means of evidence);
- the enjoinder to debtors of the bankrupt to report to the bankruptcy office within the same period, subject to penal law consequences in case of non-compliance;
- the enjoinder to persons in possession of items belonging to the debtor, as holders of security rights or for other reasons, to deliver such items to the bankruptcy office; and
- the invitation to attend the first creditors' meeting, which takes place 20 days, at the latest, after the publication.

The first creditors' meeting makes the first decisions relating to the liquidation and the option of appointing a creditors' committee that will supervise the administration of the bankruptcy.

In the first creditors' meeting, the bankruptcy officer has to provide a report on the inventory and on the bankrupt estate.

A second creditors' meeting is held after the claims are established in the creditors' schedule. Upon presentation of the administrator's report, it decides the further course of the proceedings. The report includes a comprehensive presentation of the assets, the creditors' claims and the status of the proceedings. Additional creditors' meetings will be called upon motion of one-quarter of the creditors, or of the creditors' committee or at the discretion of the bankruptcy officer. A final comprehensive report has to be submitted to the court by the bankruptcy officer upon close of the proceeding.

The reporting obligations of the insolvency administrator include a comprehensive report on the financial situation of the debtor on the occasion of the creditors' meeting and a report to the court as to the approval of the proposed composition agreement. In addition, annual status reports have to be submitted to the court by the liquidator in cases where the liquidation exceeds one year. Such report has to be pre-approved by the creditors' committee. In addition, a conclusive final report must be prepared and be approved by the court.

During the liquidation, additional reports will often be provided by the insolvency administrator to the creditors.

For a liquidation proceeding pursuant to a composition agreement with assignment of assets, in essence, similar rules apply. For the role of a creditors' committee usually appointed in such proceeding, see question 33.

A creditor may pursue a remedy of the estate against third parties if the insolvency administrator with the support of the majority of the admitted creditors decided not to pursue the claim and the creditor has requested the assignment of the rights of the bankrupt estate (see also question 34).

33 Creditor representation

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?

With the amended DCBA, the legislator has now introduced the opportunity of appointing a creditors' committee by the court during the definitive debt moratorium. The commissioner must then report to the creditors' committee, which has supervisory authority. In particular, the creditors' committee will authorise transactions during the

debt moratorium involving the sale or charge of fixed assets, the provision of security or transactions without receiving consideration. In the event of bankruptcy, the creditors' committee is appointed at the first creditors' meeting. In the case of a composition agreement with liquidation, the appointment takes place at the creditors' meeting approving the composition agreement. The election is done with a head count of the claims, each creditor having one vote only, irrespective of the magnitude of the claim and whether the claim is prioritised or not. One-quarter of the known creditors must be present to qualify. In the case of a composition agreement, the head count applies as well, but it is disputed whether the same qualifications apply as for the approval of the composition agreement or the requirements as they apply in a bankruptcy. In a bankruptcy situation, the creditors' committee is composed of three to five creditors or their (legal) representatives and ensures the interests of all creditors are preserved. The committee has no executive power, but its decisions have to be implemented by the bankruptcy administration. The creditors' committee regularly has the following tasks:

- to supervise the activities of the bankruptcy administration, to address questions submitted and to object to any measures that contravene the creditors' interest;
- to authorise that the debtor may continue to run its business or trade, and under what conditions;
- to approve bills and to authorise the continuation of court proceedings and the conclusion of settlements and arbitration agreements; and
- to object to claims in the bankruptcy that the administration has admitted.

In a composition agreement with liquidation of assets, the liquidator acts under the control and supervision of the creditors' committee. It deals with the tasks set forth under the bankruptcy regime (above) and is assigned additional responsibilities:

- complaints by creditors regarding the liquidation of assets can be brought before this supervisory authority;
- approval of the creditors' claims schedule;
- decisions on the timing and procedure of asset liquidation;
- renouncement to pursue contested or otherwise difficult claims;
- approval of the reports presented by the liquidator; and
- decision on payments of interim dividends.

Additional authority and tasks may be stipulated in the composition agreement.

Compensation of the members of the creditors' committee is made in accordance with the specific tariff and is subject to court approval. Advisers may be retained but it is uncertain whether the (modest) rates of the tariff apply.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

If the bankrupt estate lacks sufficient free assets to conduct the bankruptcy proceeding, the proceeding will be terminated unless the necessary funds are provided by the creditors (DCBA, article 230). If the insolvency administrator with the support of the majority of the admitted creditors decides not to pursue a claim, each creditor is entitled to request the assignment of rights of the bankrupt estate to pursue. After deduction of the costs, the proceeds are used to satisfy the claims of those creditors who have pursued the claim relative to their amounts and ranking.

35 Claims

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

Creditors must submit their claims to the debt collection and bankruptcy office within a month after the public announcement of the opening of the bankruptcy. If filed late, the claim will nonetheless be admitted prior to the closing of the bankruptcy proceedings. Once the deadline for filing has elapsed, the bankruptcy authority examines each claim filed and undertakes the necessary inquiries for their verification. It invites the debtor to comment on each claim. Within 60 days, the bankruptcy authority is expected to draw up the plan for the order of the creditors (creditors' schedule), a time limit that, in practice, is extended regularly. This creditors' schedule contains all claims retained, including a statement of charges where the assets comprise real property. The creditors' schedule also indicates which claims have been disallowed and why. As long as the creditors have constituted a creditors' committee, the creditors' schedule and the statement of charges are submitted to it for approval.

An appeal by a creditor is possible against the disallowance of its claim by instituting legal proceedings. This has to happen within 20 days of the announcement of the claims schedule. If the creditors have agreed not to pursue a claim against the debtor, the bankruptcy authority may authorise the transfer of the claim to any creditor who requests it. The assignee will act in its own name and at its own risk to recover the claim. Should a balance subsist after realisation, it will be proportionally distributed among the creditors according to the claims schedule.

With some minor exceptions stated in the DCBA that prohibit the transfer of specific claims, creditors are generally entitled to transfer claims. A partial assignment, however, may not be misused to change the original voting power allocated to a specific claim. In addition, contractual agreements may stipulate restrictions regarding assignment. The relevant creditor for the proceedings, including for distribution, is the duly registered creditor. Hence, any claim transfer should be notified to the bankruptcy officer or liquidator. As a consequence of the (notified) transfer, the transferee assumes the legal status of the creditor. Regardless of whether the transferee acquired a claim at a discount, the transferee may register the claim for its full face value.

Contingent claims (ie, those that have not materialised but are subject to a post-petition or bankruptcy opening event) will be fully recognised in a liquidation but the liquidation proceeds allocated to those claims may not be received by the creditor until the event has materialised. In the case of a composition agreement, the court decides if and to what extent contingent liabilities shall be admitted. Claims for unliquidated amounts are admitted in the liquidation proceedings provided the cause of the claim is established prior to bankruptcy or the beginning of the composition proceeding. The amount of the claim to be admitted is subject to the verification process described above. In the case of a composition agreement, the court decides if and to what extent contingent liabilities or unliquidated amounts shall be admitted for the purposes of voting on the composition agreement.

For a composition agreement with assignment of assets, similar rules apply as for bankruptcy. Claims already submitted for the preceding debt moratorium do not have to be refiled.

With regard to the interest, a creditor may, in principle, only claim for the interest that had accrued by the date of the opening of the bankruptcy proceedings. As an effect of the opening of bankruptcy proceedings, interest ceases to accrue against the debtor. However, an exception is made for claims secured by pledge. For these types of claims, interest continues to accrue until the realisation of the respective collateral, provided the proceeds exceed the amount of the claim and the interest that had accrued by the date of the opening of bankruptcy proceedings.

36 Set-off and netting

To what extent may creditors 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?

With respect to any claim a bankrupt debtor has against a creditor, the latter can exercise a right of set-off. The right of set-off is, however, excluded in the following situations:

- if a debtor of the bankrupt became a creditor only after the opening of the bankruptcy proceeding (except if such a debtor only fulfils an obligation that was pre-existing at the time of the opening of the bankruptcy or if debts of the bankrupt are satisfied by using collateral made available by such a third-party debtor);
- if a creditor of the bankrupt became a debtor of the bankrupt debtor or the bankrupt estate only after the declaration of bankruptcy; or
- if the claim to be set off results from unpaid capital contributions.

Set-off against claims generally arises where the creditor establishes that the rights were acquired bona fide prior to the adjudication of bankruptcy. The set-off is voidable where the debtor of a bankrupt debtor has acquired, prior to the opening of bankruptcy but knowing its creditor is insolvent, a claim against him or her, with a view to procure for itself or a third person, by way of set-off, an advantage to the prejudice of the assets in bankruptcy (DCBA, article 214). Regarding composition, the same provisions apply.

While there is some room for cherry-picking by the administration regarding the performance of unfulfilled contracts in general concerning netting, the administrator's right to decide whether to perform contracts concluded by the bankrupt party is excluded under Swiss law (DCBA, article 211) in respect of contracts to be performed at a fixed date as well as in respect of forward, swap and option contracts, provided the value of the obligations yet to be performed can be determined on the basis of a market or stock exchange price. Swiss law further provides that both the administration and the solvent counterparty have the right to claim the difference between the agreed value of the contractual obligations and their market or stock exchange value on the date of the opening of bankruptcy proceedings, which will enable the set-off of the claim arising from such a liquidation procedure against any debt of the other party (as Swiss law allows the set-off of claims that came into existence prior to the bankruptcy judgment).

37 Modifying creditors' rights

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

The DCBA (and the CO in case of an absolute subordination) clearly defines the ranking of claims. In bankruptcy or liquidation proceedings, the decision on the ranking of a claim is part of the adjudication process. Any creditor whose claim has been rejected in part or totally or was not allocated the rank requested can bring legal action against the bankrupt estate. Similarly, a creditor may challenge in court the admission of another creditor's claim (DCBA, article 250).

38 Priority claims

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

All creditors that dispose of claims against the bankrupt debtor are able to participate in the bankruptcy proceedings. No restrictions exist as to nationality, jurisdiction or territory, but secured creditors always enjoy priority over unsecured creditors. Article 219 of the DCBA sets up three different classes of unsecured creditors for the distribution out of the proceeds of the entire remainder of the bankrupt estate:

- first class – unpaid claims of employees that arose or became due not more than the six months prior to the opening of bankruptcy proceedings, but not exceeding (currently) 148,200 Swiss francs, and claims arising from premature dissolution of the employment relationship because of the opening of bankruptcy proceedings against the employer and the restitution of deposited securities; insurance policyholders may avail themselves of their

rights granted by the federal legislation and may enforce claims in connection with professional welfare institutions; outstanding pension plan contributions to be paid by the employer; claims for maintenance and assistance derived from family law that arose during the six months prior to the opening of bankruptcy proceedings and that are to be performed by payments of money;

- second class – unpaid social security contributions; certain claims of persons whose assets were entrusted to the debtor as holder of parental power; deposits with banks kept in the name of the depositor (or short-term bonds) up to 100,000 Swiss francs; and
- third class – all other claims.

Taxes are not prioritised; the privilege for VAT claims was abolished as of 1 January 2014.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Employment contracts are not terminated for reason of opening a bankruptcy, liquidation or composition agreement, but essentially in accordance with the contractual termination terms. However, the employee can request early termination unless the payment of compensation for future services is adequately secured. In the case of a transfer of business (or part) the buyer can now decide whether it wants to continue the employment. Also, joint and several liability with the seller for employment claims is no longer enforced. The rules relating to mass dismissals no longer have to be observed in the case of a bankruptcy or composition proceeding. Generally, pensions plan schemes in Switzerland are operated independently of the employer's business. The pension fund enjoys first-class privilege for unpaid contributions.

40 Pension claims

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

The Swiss pension and social security system is operated by entities that are legally independent of employers. Claims under occupational pension schemes (second pillar) enjoy first-class priority, and claims of all the other social insurance institutions are satisfied in the second class. The status of the occupational pension scheme does not only apply to outstanding premiums but to all claims by the scheme against the insolvent employer (eg, loan claims).

If an occupational pension scheme suffers a cover shortage and the employer becomes insolvent, the contract between occupational pension scheme and employer will be terminated. A cover shortage is given when the pension benefits of a pension scheme are no longer covered in full (100 per cent) by the pension scheme assets. In this case, the occupational pension scheme is obliged to conduct a partial liquidation and the cover shortage is proportionally passed on to the insured persons. However, such reductions are only permitted in non-mandatory occupational pension provision (pillar 2b).

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Swiss legislation on insolvency does not provide for specific environmental-related provisions. Pursuant to the Federal Environmental Protection Act of 7 October 1983 (EPA), which applies, in principle, also to insolvency proceedings, the operator of an establishment or an installation that represents a special risk to the environment is liable for the loss or damage arising from effects that occur when this risk

is materialised (EPA, article 59a). This applies to parties who acquire the establishment or operation from an insolvent estate. A director, officer, liquidator or other person entrusted with the debtor company's management or liquidation may (indirectly) be held liable for damages caused to the debtor company or its creditors if he or she has intentionally or negligently acted in breach of his or her duties defined by environmental law. Subject to specific situations (eg, factual corporate bodies; see question 41), there is no mechanism that directly shifts liability to a secured or unsecured creditor or any other third party.

42 Liabilities that survive insolvency or reorganisation proceedings

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

The claims that form part of a reorganisation proceeding will be consummated by the payment plan and the composition agreement becomes binding on all creditors whose claims either arose before the granting of the moratorium or have arisen without the receiver's consent and all respective enforcement proceedings are terminated (DCBA, article 310).

If the composition agreement is not fulfilled, respective creditors may apply to the court to have the agreement revoked (DCBA, article 316).

Liabilities secured by mortgages on real estate and similar registered assets will be passed on to the purchaser.

43 Distributions

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

Upon receipt of the proceeds of the entire bankrupt estate and after the schedule of claims has become definitive, the bankruptcy administration prepares the distribution plan and the final account. All costs for the opening and carrying out of the bankruptcy proceedings and for the drawing up of the inventory are paid first, directly out of the proceeds. The distribution list and the final account are made available for inspection at the enforcement office for 10 days. Interim dividend payments can be made.

Secured creditors have a preferential right to be paid out of the proceeds of the realisation of their collateral. They participate as unsecured creditors to the extent of a shortfall of the collateral.

Each creditor receives a certificate of loss in respect of the unsatisfied amount of its claim. This is an official certification of the loss incurred by the creditor, which allows the creditor to initiate new proceedings against the debtor subsequently.

Security

44 Secured lending and credit (immovables)

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

A debtor may provide its creditors with a variety of forms of security and quasi-security interests. With regard to charges on immovable property, the subject matter of the security is real estate within the meaning of article 655(2) of the Civil Code. A real estate security interest can be established in only two ways: as a mortgage or real estate bond. Detailed provisions regulate these different types of security interests. Such 'real estate security interest' has to be recorded in the land register.

Real estate interest may only be established for a specified amount of the claim denominated in Swiss currency. If the amount of the claim is not or cannot yet be determined, the parties can fix a maximum amount. Likewise, interest charges need to be fixed by the parties and are subject to the permissible maximum interest rate fixed by cantonal legislation.

Pursuant to a partial revision of the Federal Civil Code, which became effective on 1 January 2012 as an alternative to the present real estate bond, a paperless register bond has been established. The paperless register bond comes into existence with an entry in the land register.

45 Secured lending and credit (movables)

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

As regards movable property, various means are on hand to secure a claim:

- right of retention (security interest) – a right to satisfy a claim by enabling a creditor (with the consent of the debtor) to retain and sell movable property or securities that are in his or her possession, and that the creditor would otherwise be obliged to surrender. The creation and continuation of the right of retention is dependent upon possession of the movables. If the debtor fails to fulfil his or her obligation, the creditor may, if he or she is not sufficiently secured, realise the retained asset, following prior notification of the debtor, in the same manner as a pledge; and
- pledges – to secure a present or future claim, movable goods can also be pledged. Delivery of possession of the specific movables to the creditor or to a third person holding the pledge for the creditor is a prerequisite.

The two security rights differ primarily in that the right of pledge is usually based on a contract, whereas the right of retention is also of statutory nature and can therefore be applied without a specific contract:

- retention of title – frequently, general business terms and conditions will provide for a retention of title by the seller of goods until the purchase price is fully paid. It is necessary for the parties to explicitly agree upon such a retention of title and the goods concerned have to be registered item by item in the Public Retention Title Register (Civil Code, article 715). Swiss law presumes that the possessor of goods is the legal owner. The registration does not prevent a transfer of the property title to a third party that acts in good faith. The entitled creditor is, however, protected in the case of seizure of the goods or bankruptcy of the debtor; the monitoring of the register of title retention is cumbersome, with the consequence that this security instrument is not widely used. If movable property arrives in Switzerland and is subject to a reservation of title validly established abroad but for which the requirements of Swiss law are not yet satisfied, the retention of title will remain effective in Switzerland for a period of three months (PILA, article 102(2));
- fiduciary transfer of property title – in practice, full property title of an asset is often vested in the creditor (or a third party) with the understanding that the asset serves as security only. A fiduciary relationship is thereby created, by which the holder of the property enjoys the legal position of a proprietor but the transfer is connected with the (implied or explicit) contractual obligation to act in the best interest of the principal and to return the property once the contractual obligations are met; and
- person-related securities – the creditor may seek an undertaking from a third party to pay the debt (or secure the specific performance) of the primary debtor. Types of such undertakings are:
 - undertaking of a guarantee (Code of Obligations, article 111); and
 - undertaking as a suretyship (Code of Obligations, articles 492 et seq). Because of the strict formalities to be observed in the case of a suretyship and its similarity to a guarantee, the parties have to be attentive when employing these security instruments. The suretyship must in all cases specify the maximum amount of liability and must be recorded in a notarised deed if issued by a natural person.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

It is explicitly provided that the bankrupt estate includes everything that can be the subject of an avoidance action (similar rules exist for individual enforcement proceedings). Certain transactions that were concluded pre-bankruptcy can be challenged and set aside by the court with the effect that specific assets of the debtor will be referred to the estate and the creditor is left with the claim he or she had prior to receiving the consideration now restituted.

Three different types of transactions are voidable:

- gifts and equivalent transactions;
- transactions concluded in an over-indebted situation such as the provision of security for an unsecured debt without prior respective obligations, the satisfaction of a money claim other than by usual methods of payment, and the payment of claims that are not yet due. The transaction will not be set aside if the beneficiary can demonstrate that it did not know about the critical financial status of the debtor and was not bound to know; and
- transactions concluded that are knowingly disadvantageous to creditors in general, or for the benefit of individual creditors (fraudulent conveyance).

A considerable number of court decisions have been delivered supporting clawback claims. As a result, lenders' risks have substantially increased for pre-petition transactions. The same rules apply for a composition agreement in liquidation proceedings. In the case of a reorganisation, the court may consider the impact and remedy of illicit transactions when asked to approve the composition agreement (see question 47 for special procedural rules that apply to transactions with closely related persons). Transactions that occurred during the debt moratorium may no longer be challenged if approved by the creditors' committee or the court.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

See question 46 for the general rules on clawback claims. The amended DCBA, in sections 286, paragraph 3 and 288, paragraph 2 have changed the burden of proof for closely related persons, such as directors of the board, controlling shareholders and other closely related persons, including, in particular, group companies. They (and not the claimant) must prove that the respective transaction was at arm's length or that there was no intent to harm other creditors.

Groups of companies

48 Groups of companies

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

Neither Swiss corporate or insolvency law provides for a formal legal framework for groups of companies. Swiss law assumes that each legal entity acts on its own. Basically, each company is obliged to protect and pursue its own interests independently of the interest of the controlling party and, in principle, the shareholder's duty is limited to paying the share capital that has been subscribed. A parent or affiliated corporation or natural person may, however, become responsible for the liabilities of a subsidiary if undue influence on the decision-making process of the subsidiary is exerted and the position of the material or factual corporate body is assumed. Often, contractual undertakings are entered into such as primary or accessory guarantees, undertakings as direct co-obligor or letters of responsibility. Case law has developed for parental liability on the basis of justified reliance by third parties on the business conduct of the parent company supporting the subsidiary. On fairly rare occasions the piercing of the corporate veil doctrine is applied, when it is considered abusive to claim the legal independence of a company. In such abusive, rare cases a court may decide to order a distribution of group company assets without regard to the assets of the individual corporate entities involved. A court may not intervene in the allocation of assets for the benefit of another group company.

49 Combining parent and subsidiary proceedings

In 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?

Except for accounting rules applied in a group context, Swiss statutory law does not provide a formal legal framework for groups of companies. Swiss law assumes each legal entity acts on its own. Basically,

each company is obliged to protect and pursue its own interests independently from the interest of the controlling party. So, insolvency proceedings are conducted separately. There is no pooling of assets and liabilities for a corporate group. Consequently, assets may not be transferred from an administration in Switzerland to another administration. Occasionally, for the purpose of coordination, the same administrator is appointed in a group situation. Assets located in Switzerland can, however, be marshalled by the foreign administrator pursuant to the Swiss mini-bankruptcy proceeding (see question 50).

International cases

50 Recognition of foreign judgments

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?

Switzerland is a signatory to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988. In proceedings concerned with the enforcement of judgments, the courts of the contracting state in which the judgment has been or is to be enforced according to the Lugano Convention shall have exclusive jurisdiction. The revised Lugano Convention entered into force on 1 January 2011. The revised Lugano Convention aligns Switzerland with the EU system of jurisdiction and enforcement of judgments throughout Europe. With the revision, the territorial application of the convention has been enlarged to include the new states of the European Union; significant changes relating to jurisdictional issues, exequatur proceedings and new provisions for provisional and protective measures are adopted. In line with this, significant amendments were made to DCBA, for example, regarding freezing orders ('arrest').

If the debtor is domiciled in Switzerland and there are assets abroad, article 197(1) of the DCBA provides that all seizable assets owned by the debtor at the time of the opening of the bankruptcy proceedings, irrespective of where they are located, form one sole estate (the bankrupt estate). However, the extraterritorial effect of the Swiss bankrupt estate depends on whether and to what extent the foreign state where the assets are located recognises the Swiss bankruptcy decree. Therefore, the inclusion of foreign assets in the Swiss bankrupt estate is only possible if the foreign authorities are obliged to recognise the Swiss bankruptcy decree (as is the case in Germany, for example).

If the debtor is domiciled abroad and part of his or her assets are located in Switzerland, the PILA has established basic rules for the recognition in Switzerland of foreign bankruptcy decrees or orders for a composition with creditors or similar proceedings. The revised PILA enters into force on 1 January 2019. The revised PILA increases international cooperation and simplifies enforcement of foreign bankruptcy orders in Switzerland (see also 'Update and trends'). Based on the amended law, the foreign main proceeding can be recognised, provided that the following prerequisites are met:

- proper jurisdiction of the foreign court (debtor's country of residence or domicile or, for non-Swiss residents, centre of debtor's main interest (COMI));
- enforceability;
- observation of minimal due process standards; and
- no violation of Swiss public policy.

With the latest revision of the PILA, the former requirement of reciprocal recognition of bankruptcy orders has been relinquished. To receive recognition, the request must be brought before the court at the location of the assets in Switzerland. If successful, the recognition of the foreign decree subjects the debtor's assets in Switzerland to the consequences of Swiss law (the DCBA) in what is referred to as a 'mini-bankruptcy' proceeding. Such proceeding neither provides for a creditors' meeting nor a supervisory committee. The (Swiss) schedule of claims only includes secured creditors and unsecured privileged creditors domiciled in Switzerland. After distribution of the proceeds according to the (Swiss) schedule of claims, any balance must be remitted to the foreign bankruptcy estate or to those creditors who are entitled to it. However, such balance will only be remitted after recognition of the foreign schedule of claims by the Swiss court. The Swiss court will examine whether the ordinary (ie, unsecured and not privileged) claims of Swiss creditors have been properly admitted in the foreign

Update and trends

Amendment of PILA

In the past, the restrictive recognition requirements of the revised law, in particular the evidence of reciprocal recognition and the mandatory secondary bankruptcy proceeding (mini-bankruptcy proceeding), have delayed the recognition of foreign bankruptcy orders and in some cases even made them impossible to pursue in Switzerland. The amendments in the revised PILA aim to simplify the recognition procedure. The main terms of the amendments made have already been introduced in Swiss bank insolvency law back in 2011 and have proved their effectiveness there.

With the revised provisions, evidence of reciprocal recognition will no longer be required. In addition, proceedings opened in the state in whose territory the debtor has the centre of its main interests (COMI) may in future also be recognised. Furthermore, the Swiss secondary bankruptcy proceedings (mini-bankruptcy proceeding) only need to be conducted if there are creditors in need of protection in Switzerland. The amendments enter into force on 1 January 2019.

Old cantonal treaties on bankruptcy law

Switzerland's international bankruptcy law contains old international treaties on bankruptcy that were concluded in the first half of the nineteenth century by various Swiss cantons with individual German principalities. The Swiss Federal Council plans to abolish these treaties. The negotiations with the German authorities have started.

Protection against unjustified debt enforcement proceedings

Anyone against whom debt enforcement proceedings have been initiated unjustifiably can ensure that third parties are not informed about such proceedings. The amendment on the DCBA enters into force on 1 January 2019.

(main) proceeding. With certain restrictions, Swiss assets can thus be marshalled for the main foreign proceeding. No 'mini-bankruptcy' proceeding is required, if there are no secured creditors or unsecured privileged creditors domiciled in Switzerland involved and the Swiss domiciled creditors will be treated appropriately in the foreign bankruptcy proceeding. In such case, foreign bankruptcy administration may, in compliance with Swiss law, exercise all powers to which it is entitled under the law of the state in which the bankruptcy is opened; in particular, it may transfer assets abroad and conduct proceedings. These powers do not include the performance of sovereign acts, the use of coercive measures or the right to decide disputes.

Alternatively, if the debtor is domiciled abroad but runs a business operation in Switzerland, the 'branch bankruptcy' according to article 166(2) of the PILA and article 50 of the DCBA must be followed. The local and foreign creditors of the Swiss business operation (but only to the extent that such claims derive from operations of such branch office) can enforce their respective claims against the debtor's assets located in Switzerland, which can lead to a specific branch bankruptcy proceeding. However, the initiation of such branch proceeding is only feasible until the recognition of the foreign bankruptcy order against the foreign debtor in Switzerland.

Also, debtors domiciled abroad may elect special domicile in Switzerland for the performance of an obligation with the consequence that they become subject to Swiss enforcement for that obligation (DCBA, article 50(2)).

Another possibility is a freezing order according to article 271 of the DCBA. Such a freezing order, however, would cease to apply once the foreign bankruptcy administration or another bankruptcy creditor successfully requests the opening of a mini-bankruptcy proceeding.

In the case of an insolvency of a foreign bank with assets in Switzerland, FINMA has far-reaching authority to recognise the foreign decree and to possibly cooperate with the foreign administrator.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model Law is not adopted by Switzerland but its development is closely observed by the Swiss legislator.

The latest revision of the PILA focuses on increased international cooperation and simplified enforcement of foreign bankruptcy orders

in Switzerland. In particular, the former requirement of reciprocal recognition of bankruptcy orders has been relinquished and the concept of COMI (with certain limitations) has been introduced with regard to the recognition of foreign bankruptcy orders (see question 50).

In the case of an insolvency of a foreign bank with assets in Switzerland, FINMA has far-reaching authority to recognise the foreign decree and to possibly cooperate with the foreign administrator.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

In Swiss main proceedings, foreign creditors enjoy the same recognition as domestic creditors. Regarding Swiss secondary proceedings, see question 50 ('mini-bankruptcy').

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Swiss statutory law does not provide a formal legal framework for groups of companies. Swiss law assumes each legal entity acts on its own. Basically, each company is obliged to protect and pursue its own interests independently from the interest of the controlling party. So, insolvency proceedings are conducted separately. There is no pooling of assets and liabilities for a corporate group. Consequently, assets may not be transferred from an administration in Switzerland to an administration abroad. Assets located in Switzerland can, however, be marshalled by the foreign administrator, normally, pursuant to the Swiss mini-bankruptcy proceeding (see question 50).

54 COMI

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 Switzerland at this point in time, debt enforcement and bankruptcy proceedings can exclusively be initiated and take place at the registered seat of a debtor company as reflected in the commercial register. In contrast to the European Regulation on insolvency proceedings, which is based on the principle of COMI (EC 1346/2000, article 3), Swiss law focuses on the formal criterion of the registered seat according to the theory of incorporation. However, with the latest revision of the PILA, the concept of COMI (with certain limitations) has been introduced with regard to the recognition of foreign bankruptcy orders (see question 50).

55 Cross-border cooperation

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 Swiss legal system provides for recognition of foreign insolvency proceedings, in particular pursuant to the rules of the 'mini-bankruptcy' proceeding (PILA, articles 166 to 175; see question 50). The latest revision of the PILA focused on increasing international cooperation and simplified enforcement of foreign bankruptcy orders in Switzerland. The new law explicitly states that the authorities and official bodies may coordinate their actions with each other and with foreign authorities, if the proceedings have a certain connection. It remains to be seen how the international coordination will be interpreted by the authorities and how far such coordination will go. In the course of a Swiss mini-bankruptcy (a secondary proceeding), so far, coordination is to a certain degree formalised. On an informal basis, certain exchange of information court-to-court may be arranged on a case-by-case basis. Once the insolvency proceeding is opened, the insolvency administrator will handle the proceeding. A Swiss administrator has to marshal the assets worldwide; his or her authority abroad will be determined by the law of the country concerned. On that level, pragmatic solutions are often sought. As to the revised law, see question 50.

FINMA acts in court capacity with regard to institutions regulated under the SFBA. FINMA may recognise an insolvency order issued by the court of actual (instead of registered) domicile of the debtor FINMA. BIO-FINMA requires that actions taken shall be coordinated with foreign authorities.

Some historic international bankruptcy treaties that were entered into by certain (but not all) Swiss cantons also need to be consulted to see whether different rules of cross-border cooperation apply:

- Bankruptcy Treaty of 12 December 1825 and 13 May 1826 with the (former) Kingdom of Württemberg;
- Treaty with the (former) Kingdom of Bavaria of 11 May and 27 June 1834; and
- Treaty with the (former) Kingdom of Saxony of 4 and 18 February 1837 (see 'Update and trends').

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56 Cross-border insolvency protocols and joint court hearings

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?

Cross-border protocols are increasingly used in international insolvency cases but are dealt with at the administrator's level. Sweden was one of the first countries to adopt a cross-border protocol. A Swedish administrator was the first to conclude a cross-border protocol with a Swiss administrator.

Thailand

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

In Thailand, the Bankruptcy Act BE 2483 (AD 1940) as amended (the BA) is the law governing bankruptcy matters. In the BA, there are also sections that directly deal with reorganisation matters. Bankruptcy and reorganisation procedural matters are stipulated in the BA, the Establishment of and Procedures for Bankruptcy Court Act BE 2542 (AD 1999) (the EPB), and the Regulations for Bankruptcy Cases BE 2549 (AD 2006).

2 Excluded entities and excluded assets

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

According to section 7 of the BA, the Thai court of jurisdiction may order that an insolvent debtor be declared bankrupt if such debtor is domiciled in Thailand or operates its business in Thailand within one year prior to the date that a bankruptcy case was filed. In addition, section 9 of the BA specifies that a creditor can file a bankruptcy case against a debtor if certain conditions are met. In order for a bankruptcy case to be filed, a juristic person is required to have indebtedness with one or more creditors of not less than 2 million baht in total. Therefore, an entity, including a foreign entity, who meets the above requirements, may be declared bankrupt by the Thai court.

Currently in reorganisation proceedings, only a debtor who is a limited company or public limited company can file for or be subject to involuntary reorganisation under the BA in accordance with the definition of debtor under section 90/1 of the BA. However, section 90/1 also opens the process to other juristic persons included in ministerial regulations. An interesting example is the Credit Union Cooperative, which is included in the definition of 'debtor' in the Ministerial Regulation of the Ministry of Justice dated 5 August 2014 (published in the government gazette on 7 August 2014). Consequently, the Credit Union Cooperative entered into reorganisation proceedings and is now in the process of administration of business pursuant to the reorganisation plan.

Excluded assets from bankruptcy proceedings are personal and necessary effects that the debtor, his or her spouse and his or her minor children reasonably require in accordance with their condition in life; and livestock, seeds, instruments and items for use in the debtor's occupation, of a total value not exceeding 100,000 baht.

3 Public enterprises

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

There is no specific procedure in respect of insolvency of a government-owned enterprise. If a government-owned enterprise enters into insolvency proceedings, they shall follow the same procedure as that of a private enterprise.

There is no special remedy for creditors of an insolvent public enterprise. Such creditor shall enjoy the same remedies as those of a private enterprise.

4 Protection for large financial institutions

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

Currently, there is no legislation enacted specifically to deal with the financial difficulties of institutions that are considered 'too big to fail'. However, under the Financial Institution Business Act, prior to entering into reorganisation proceedings in respect of a debtor that is a commercial bank, a finance company or a credit foncier company, the Bank of Thailand may take control over said financial institutions. As such, the directors, officers and employees of the financial institutions will be prohibited from conducting further business of such financial institutions unless authorised by the control committee. The control committee has the duty to undertake all business of the financial institution placed under control, including having the financial institution merged with or its business transferred to another financial institution when deemed appropriate. A similar control mechanism is applicable to insurance companies and securities companies under the Life Insurance Act, the Non-Life Insurance Act and the Securities and Exchange Act.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The Central Bankruptcy Court, Regional Bankruptcy Court, the Court of Appeal for Specialised Cases and Supreme Court, Bankruptcy Division, are the specialised courts that have jurisdiction to adjudicate bankruptcy and reorganisation matters.

In bankruptcy and reorganisation proceedings, there are three levels of court. On the first level, the (Central or Regional) Bankruptcy Court are the courts of first instance. Any appeal of either the judgment or order (or both) thereof can be made to the Court of Appeal for Specialised Cases, subject to restrictions as prescribed by law. If a party is dissatisfied with the judgment or order of the Court of Appeal for Specialised Cases, he or she may further appeal such judgment or order to the Supreme Court, subject to restrictions as prescribed by law, by submitting a request to appeal to the Supreme Court.

Pursuant to the Act on the Establishment of and Procedures for Bankruptcy Court, a judgment or order of the (Central or Regional) Bankruptcy Court in respect of bankruptcy or business rehabilitation cannot be appealed except if the judgment or order is for:

- dismissal of the plaint or dismissal of the petition or a petition asking for adjudication of bankruptcy;
- dismissal of the petition for business reorganisation;
- approval or disapproval of the repayment of debt, either in whole or in part;
- absolute receivership; or
- civil cases relating to bankruptcy proceedings.

Therefore, if the petitioner wants to appeal a judgment or order that is restricted to appeal, a petition must be filed to the Court of Appeal for Specialised Cases, within one month of the date of judgment or order, asking for an approval to appeal, together with the statement of appeal. Where the (Central or Regional) Bankruptcy Court considers that the appeal is restricted, it shall refer the statement of appeal and the request for approval to appeal to the Court of Appeal for Specialised Cases for further consideration and approval. The party who submitted the appeal may submit a request for an approval to appeal to the Court of Appeal for Specialised Cases within 15 days of the date of rejection by the (Central or Regional) Bankruptcy Court. However, if the (Central or Regional) Bankruptcy Court finds the appeal is not restricted, it shall allow the appeal. The Court of Appeal for Specialised Cases will allow the appeal if it finds the appeal for such case is not restricted or the request for appeal is in the interest of justice.

In addition, the judgment or order of the Court of Appeal for Specialised Cases may be further appealed to the Supreme Court, within one month of the date of judgment or order, by requesting for an approval of the Supreme Court, subject to the conditions and requirements as prescribed by the Civil Procedure Code (as amended). The grounds for appeal to the Supreme Court includes important legal issues decided by the Court of Appeal for Specialised Cases that conflict with precedents of the Supreme Court or have never been decided by the Supreme Court.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Thai laws do not allow voluntary bankruptcy to be commenced by the debtor, except in the case that a liquidator of a dissolved debtor files a bankruptcy case where such dissolved debtor has insufficient assets to settle all debts.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

An insolvent debtor owing a definite amount not less than 10 million baht to one or more creditors is entitled to file a reorganisation petition in accordance with sections 90/3 and 90/4 of the BA. Once the reorganisation petition is accepted by the court, certain activities involving the assets of the debtor will be subject to section 90/12 of the BA (see further details in question 21).

8 Successful reorganisations

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

A reorganisation plan must be approved by resolution of the creditors' meeting. The BA provides a voting system whereby creditors are, according to section 90/42 bis, divided into the following groups or classes:

- each secured creditor having a secured debt of not less than 15 per cent of the total debt for which a claim for repayment may be filed will be classed as one group, while other remaining secured creditors shall be classified in the same group;
- unsecured creditors may be classified in different groups, but unsecured creditors who hold the same or similar rights or benefits will be classified in the same group; and
- creditors that, under the law or contract, are entitled to receive payment only after other creditors have received payments in full will be classed as one group.

The reorganisation plan must be approved by:

- in the case of a meeting of every group of creditors, a majority of each group of creditors with an amount of debts of not less than two-thirds of the total debts of each group of creditors being present at the meeting, in person or by proxy, and casting their votes; or

- in the case of a meeting of at least one group of creditors, a majority of the group of creditors with an amount of debts of not less than two-thirds of that group of creditors being present at the meeting, in person or by proxy, and casting their votes, and, when counting the total amount of debts owed to all creditors who approved the reorganisation plan, such amount must not be less than 50 per cent of the total debts owed to all creditors being present at the meeting, in person or by proxy, and casting their votes.

In addition, the creditors' approval of the reorganisation plan must be confirmed by the relevant court. The reorganisation plan confirmed by the court will bind both creditors that are not required to submit proofs of claims and those that must submit proofs of claims.

Practically, the reorganisation plan may contain the clause to release non-debtor parties from any liability arising out of the implementation of the plan. Nevertheless, any specification to limit the liability of non-debtor parties will not relieve them from the liability arising out of a wrongful act or gross negligence. Meanwhile, the reorganisation plan cannot release non-debtor parties from any liability arising prior to the reorganisation.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Under section 9 of the BA, a creditor is eligible to file for bankruptcy against a debtor.

To do so, the insolvent debtor must be proved to be indebted to one or more creditors in the amount of at least 1 million baht in total (in the case of an individual debtor) or indebted to one or more creditors in the amount of at least 2 million baht in total (in the case of a corporate debtor).

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

A single creditor or a group of creditors may file a reorganisation petition against the insolvent debtor if such insolvent debtor has a definite amount of debt of not less than 10 million baht. A state agency authorised to supervise the business of the debtor as prescribed by the BA (eg, the Bank of Thailand, the Securities and Exchange Commission, etc) may also file such a reorganisation petition. Once the reorganisation petition is accepted by the court, certain activities involving the assets of the debtor will be subject to section 90/12 of the BA (see further details in question 21).

Under the BA, there are no material differences between proceedings opened voluntarily and involuntarily.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

There is no expedited reorganisation under Thai laws but, in practice, the debtor can reduce the time-consuming nature of certain stages of the reorganisation by having major creditors agree on the principles of the reorganisation plan prior to the application for reorganisation.

12 Unsuccessful reorganisations

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?

If the reorganisation plan is not approved by the creditors or is approved by the creditors but not confirmed by the court, the court will then cancel the reorganisation order. Upon an order for cancellation of the reorganisation order, the automatic stay will end and the powers and duties in managing the debtor's business and assets will devolve to the debtor's executives, but any acts done by the official receiver, interim

executive or the plan preparer before such order will not be affected. The debtor's shareholders will also again enjoy their normal legal rights. Moreover, the receiver, interim executive, or the plan preparer, as the case may be, must hand over the assets, seals, accounting ledgers and documents relating to the assets and business operation to the debtor's executives promptly.

If the reorganisation is not successfully implemented in accordance with the reorganisation plan and the maximum period prescribed under the BA has elapsed, the court will either render an absolute receivership order if the court deems that the debtor should be declared bankrupt, or render an order to terminate the debtor's reorganisation.

13 Corporate procedures

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

The liquidation of the company is governed by the Civil and Commercial Code (the CCC) and the BA. If the company wishes to enter the liquidation in a normal situation, the company must call a shareholders' meeting and appoint a liquidator to settle the affairs of the company, to pay its debts and distribute its assets.

In addition, under section 1266 of the CCC and section 88 of the BA, if the liquidator of the company finds that after the whole of the contributions or shares has been paid up its assets are insufficient to meet the company's liabilities, the liquidator must apply at once to the court to have the company declared bankrupt.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Bankruptcy proceedings are concluded according to section 133 of the BA. Once the official receiver has made the final distribution of the assets of the debtor, or has ceased to take action under a composition, or when the debtor has no distributable asset, the receiver can prepare a report of the business and accounts for receipts and expenditures and submit the same to the court and request a court order for closure of the case.

Reorganisation proceedings are concluded according to section 90/70 of the BA if the debtor's executives, plan administrator, interim plan administrator, or the official receiver, as the case may be, finds the reorganisation of the business has been successfully completed pursuant to the plan. He or she must promptly report to the court and request the court to issue an order for termination of the reorganisation. If the court views that the company has successfully implemented the plan, the court will render the order to terminate the reorganisation.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

The test of insolvency is mainly whether a debtor has debt greater than his or her assets. In addition, under the BA, there are presumption of facts as to whether a debtor is insolvent as prescribed in section 8 of the BA. For example: a debtor transfers his or her assets or creates any right over such assets that, if the debtor were a bankrupt, would be deemed as an act of preference, whether such act is carried out within or outside Thailand, or the debtor transfers his or her asset to other persons for the benefit of all creditors, whether such act is done within or outside Thailand. These examples are only presumptions that the debtor is entitled to rebut by proving that he or she is solvent. In practice debtors would have to prove that they have assets of value that exceeds their liabilities by referring to their audited accounts.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

There is no Thai law that requires directors to commence bankruptcy and reorganisation proceedings. Nevertheless, the board of directors has a duty to call for an extraordinary general meeting of shareholders

when the company is significantly at loss (ie, loss equal to a half of the company's capital).

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

There are no liabilities incurred for directors and officers resulting from the failure to commence proceedings as it is not required under Thai laws. However, should a company's board of directors fail to call for an extraordinary general meeting of the shareholders to assess the company's loss as detailed in question 16, each director may be held criminally liable with a penalty of up to 20,000 baht under the Act on Offences Concerning Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations BE 2499 (AD 1956).

Companies are not prohibited from carrying on business while being insolvent. However, in a case where an unsecured creditor has known that the company (debtor) is insolvent at the time and yet still allows it to create debt, such debt (excluding debts that the creditor allowed to be created so that the debtor's business can continue its operations) may not be claimed for repayment if insolvency proceedings are subsequently commenced.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Under Thai laws, the liability of the directors and officers is separated from the liability of the company.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Commencement of insolvency or reorganisation proceedings will not cause duties of the debtor's executives to be transferred to its creditors.

In insolvency proceedings, once the court has ordered the debtor to be under receivership, the powers of the directors in connection with their corporation's assets or business will cease and are, by virtue of law, transferred to the official receivers.

In reorganisation proceedings, after the court orders for a business reorganisation, the power and duties of the debtor's executives in managing the business and assets of the debtor will cease and will be transferred to the interim executive, the receiver or the plan preparer. Nevertheless, the debtor's business will not cease to operate during this procedure and, ultimately, once the court has issued an order approving the plan, the plan administrator will carry on the debtor's business to disburse the debtor's debts within the scope set out by the business reorganisation plan.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

After the insolvency proceedings are commenced by or against the debtor, the directors and officers are not prohibited from exercising the powers in connection with the management of assets or business of the debtor. However, as prescribed by section 24 of the BA, once the court has ordered the debtor to be under receivership, the powers of the directors in connection with their corporation's asset or business will cease and are, by virtue of law, transferred to the official receivers. Pursuant to section 826 of the CCC, the powers of the officers empowered by the directors to act as an agent of the debtor shall also

terminate once the debtor becomes bankrupt. Nonetheless, the officers (agents) are obligated to take all necessary steps to protect the interests entrusted to them until the representatives of the principal can protect such interests.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

There are proceedings similar to a stay (automatic stay) as stipulated in section 90/12 of the BA. An automatic stay permits the debtor to continue to conduct business during the implementation of reorganisation proceedings by suspending existing lawsuits brought by creditors and prohibiting civil claims or actions to be filed against the debtor. Creditors may seek permission from the bankruptcy court to file such claims.

The BA does not specifically provide for the application of an automatic stay in a bankruptcy case. If the court has not yet issued for an absolute receivership of the debtor's assets, its creditors may still file civil complaints in relation to debts that could be applied for repayment under the BA to the court. In addition, pending cases involving assets of the debtor under bankruptcy proceedings may be suspended at the court's discretion.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

If the debtor is being liquidated because of bankruptcy under the BA, the official receiver on behalf of the debtor can only continue the debtor's business strictly for the purpose of finishing up its remaining businesses.

The debtor is allowed to continue operating its normal business operation during a reorganisation pursuant to section 90/12(9) of the BA. However, the powers and duties of the debtor's executive in managing the business and assets shall cease once the court has ordered for business reorganisation and the court may appoint any persons or the debtor's former executive to be an interim executive until the plan preparer is appointed. The debtor's assets cannot be sold except in the normal course of business unless such sale of assets is approved by the court. The debtor is allowed to make payments to creditors who supply goods or services according to normal and current terms and conditions of agreements. Any claims arising after the court's reorganisation order will not be subject to reorganisation proceedings, and if the debtor has incurred such obligations in the normal course of business and as required for the continuation of its operation, the debtor can pay such claims.

Creditors of debts created by the receiver or interim executive with a debt confirmation letter from a plan preparer and creditors of debts created by the plan preparer, plan administrator, interim plan administrator and receiver have the right to be repaid without having to file an application for repayment of debts for business reorganisation.

Under the BA, if the business reorganisation plan is successfully implemented and the court orders for the termination of the reorganisation process, the debts of the creditors who supply goods and services after filing (created by the plan preparer, plan administrator, interim plan administrator and receiver) will be treated as a first-rank privileged debt. In the event that the business reorganisation plan fails and the court orders the absolute receivership of the debtor, the debts of the creditors who supply goods and services after filing (created by the plan preparer, plan administrator, interim plan administrator and receiver), will be treated at the rank of the expenses incurred by the receiver in the management of the assets of the debtor.

The creditors and the court have roles in supervising the debtor's business activities as the creditors are entitled to file a petition requesting the court to revoke any transaction in breach of section 90/12(9).

If the creditors approve the business reorganisation plan, they can be represented by a creditor committee to be selected at a creditors' meeting. The creditor committee will supervise the implementation of the plan by the plan administrator.

23 Post-filing credit

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

In bankruptcy proceedings, when the court has ordered the debtor to go into receivership, the debtor is prohibited from carrying out any act relating to its assets or business, except those performed under the order or approval of the court, the official receiver, the administrator of the asset or of a creditors' meeting (as the case may be), as prescribed in the BA. Accordingly, the debtor is prohibited from incurring any additional debt, otherwise the transaction in breach will be void.

In reorganisation proceedings, the debtor is prohibited from undertaking certain activities during the term of automatic stay, such as incurring additional debt that is not done during the normal course of business, whether secured or unsecured. An automatic stay becomes effective on the date the court issues an order accepting the reorganisation petition.

24 Sale of assets

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 bankruptcy proceedings, under section 24 of the BA, after the rendering of the court's receivership order, the debtor is prohibited from engaging in any activity involving his or her assets, including sale of the assets, unless such engagement is approved by the court, the official receiver, the administrator of the asset or of a creditors' meeting. The official receiver is generally the only person permitted under the BA to sell the assets of the debtor. The sale of assets will be conducted through auction or other selling methods proved to be the most convenient and for the best interests of all creditors as stipulated in section 123 of the BA.

The claims and liabilities can be passed with assets depending on the terms and conditions of the sale.

In reorganisation proceedings, under section 90/12(9) of the BA, the debtor is also prohibited from selling the assets out of the ordinary course of business throughout the process, unless it is provided otherwise in the plan or approved by the court.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

'Stalking horse' bids and credit bidding are not specifically prescribed under Thai laws.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 case of bankruptcy, section 122 of the BA specifies that the official receiver has the power to reject an unfavourable contract. Such power shall be exercised within three months from the date such contract has been realised by the official receiver. A party affected by such rejection is entitled to file an application for debt repayment under the bankruptcy proceedings. Any claim for damages occurred as a result of breach of such contract can be made against the debtor only if the court has not yet issued an order for absolute receivership of the debtor.

Under section 90/41 bis of the BA, only the plan administrator shall have the power to reject an unfavourable contract as specified in the reorganisation plan. The rejection right must be exercised within two months of the date on which the court approves the plan. Whoever suffers damages therefrom will have the right to file an objection with the court within 14 days of becoming aware of such rejection. If the court reaffirms the rejection, whoever suffers damages therefrom shall be entitled to apply for the repayment of debt for such damages under reorganisation proceedings.

Once the court issues an order accepting the petition for business reorganisation, section 90/12 of the BA prohibits the creditors from commencing a civil case in respect of the assets against the debtor if the obligation arises before the day on which the court approves the plan. If a breach of contract occurs, the creditors can choose to take action as follows:

- if the breach occurs before the court issued the order to reorganise the business, creditors can file an application for debt repayment with the official receiver;
- if the breach occurs after the day on which the court orders the reorganisation of business but before the day on which the court approves the rehabilitation plan, the creditors can ask the court for permission to take action against the debtor in a civil case; or
- if the breach occurs after the day on which the court approves the rehabilitation plan, the creditors can take action against the debtor in a civil case without having to seek permission from the court.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

There is no specific provision under the BA for the termination of IP usage or the extent of IP usage during the bankruptcy and reorganisation proceedings. Accordingly, the termination of IP usage or the extent of IP usage is governed by the terms of the agreement between the licensor and the licensee.

There is no provision under the BA prescribing the right to use the IP after the termination of the IP agreement.

28 Personal data

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

There is no specific provision under the BA to restrict the use of personal information or the collection of customer data of an insolvent company. Therefore, if such information is not recognised as a trade secret, it can be transferred.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Bankruptcy and reorganisation proceedings under Thai laws will be initiated and proceed only in the courts, not in arbitration proceedings. No insolvency disputes are resolved by arbitration.

Under the BA, no creditors, including the creditors who initiate the bankruptcy of the debtor, can initiate a new bankruptcy case against the debtor in court after the court renders the absolute receivership order. In civil cases and arbitration proceedings, the BA does not specifically prohibit creditors from initiating these cases or proceedings. In practice, however, after the court renders the absolute receivership order on the debtor, the official receiver may ask the court or tribunal to dispose of the pending civil cases or arbitration proceedings.

In reorganisation proceedings, all actions against the debtor are put on stay and the creditors are prohibited from initiating arbitration or court proceedings against the debtor unless such prohibition is not necessary for the reorganisation proceedings.

Creditor remedies

30 Creditors' enforcement

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?

No, there is no process by which some or all of the assets of a business are seized outside of court proceedings. However, secured creditors naturally have rights over the assets for which security is afforded to them by the debtor prior to the order of receivership of such debtor's assets, and need not file a claim for a repayment of debt provided that the secured creditors allow the official receiver to inspect such asset.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

In bankruptcy and reorganisation proceedings, as unsecured creditors do not have any right over the assets to be enforced for their sole benefits, the only means therefore available for unsecured creditors to obtain repayment of debts lies with their rights to file an application for repayment of such debts. Subject to section 90/27 and section 91 of the BA, unsecured creditors are entitled to file an application for repayment of debt in both bankruptcy and reorganisation proceedings.

The procedure to prove the validity of such an application for the repayment of debt is not complicated. Still, the duration of these proceedings may vary depending on the case's complications and the availability of the court's docket. Practically, it would take up to three months for the official receiver to consider and make an order on the application for the repayment of debt.

There are measures provided under Thai laws that prevent the debtor's transfer of assets. In bankruptcy proceedings, temporary receivership is available under section 17 of the BA and an interim injunction under section 254 of the Civil Procedure Code is applicable *mutatis mutandis* by virtue of section 14 of the EPB prior to the rendering of the court's absolute receivership order.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

In bankruptcy proceedings, certain notices are to be given to creditors:

- notice of the deadline for submission of debt repayment application;
- notice to convene the first creditors' meeting;
- notice to convene the creditors' meeting for the composition prior to or after being declared bankrupt; and
- notice of the court's hearing for the consideration of the composition.

While in business reorganisation proceedings, the following notices will be given to creditors:

- notice of filing of business reorganisation petition;
- notice of the deadline for submission of debt repayment application;
- notice to convene the first creditors' meeting for consideration of the proposed business reorganisation plan; and
- notice of the court's hearing for consideration of the business reorganisation plan.

Certain information will be available to creditors or creditors' committees, for example, details of the composition and details of the debtor's estate and business. The official receiver has the duty to report to the court on the administration of the debtor's assets and the conduct of the bankrupt person. On the other hand, the plan administrator shall report the progress of implementation of the plan to the official receiver every three months.

33 Creditor representation

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 bankruptcy proceedings, under section 37 of the BA, the creditors' meeting may pass a resolution to appoint a committee of creditors in the matter relating to the management of the debtor's assets as prescribed in the BA.

In reorganisation proceedings, under section 90/55 of the BA, the creditors' meeting may pass a resolution to appoint a committee of creditors to act on behalf of all creditors in monitoring the implementation of the plan. In practice, the plan may specify that proper expenses be paid to the advisers of the creditors. There are cases where the court approved reorganisation plans that contained the payment of proper expenses to the advisers of the creditors.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

In bankruptcy proceedings, the official receiver is empowered by the BA to pursue the estate's remedies (rights to claim repayment or demand the delivery of an asset) against third parties. The fruits of such remedies will add to the debtor's pool of assets and distributed among the creditors.

In reorganisation proceedings, under section 90/38 of the BA, the planner, the plan administrator or the official receiver is entitled to submit a petition requesting the court to compel those persons who admit that they are indebted to the debtor or have assets of the debtor in their possession, to pay the debt or turn over those assets. On the contrary, if such persons do not admit that they are indebted to the debtor or they have assets of the debtor in their possession, the planner or the plan administrator must notify the official receiver to proceed with any further actions in accordance with section 90/39 of the BA. Any amount obtained in this way belongs to the debtor.

35 Claims

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

In bankruptcy proceedings, in general, all creditors must file an application for repayment of debt with the official receiver within two months of the date on which the court's order appointing the official receiver is published in the Government Gazette (the period may be extended at the official receiver's discretion, in the event such creditor is domiciled outside Thailand, for a period not exceeding two months). If a creditor fails to file an application for repayment of debt, except for limited exceptions (ie, tax claims), such creditor will not be entitled to receive its share of the bankruptcy proceeds.

The official receiver shall submit the applications for debt repayment of all creditors along with his or her opinion for the consideration of the court and whether the creditors will be granted repayment of the debt is at the court's discretion. If the creditors wish to object to the court's order, they may appeal to the Court of Appeal for Specialised Cases.

There is no specific provision under the BA that prescribes the transfer of claims. The transfer of claims is possible but subject to the discretion of the official receiver. The transfer of claims must be disclosed to the official receiver.

In reorganisation, all creditors must file an application for repayment of debt within one month of the publication of the order for appointment of the planner in the Government Gazette. If a creditor fails to file an application for repayment of debt, it will not be entitled to receive payment under the plan and has no further recourse against the

debtor, unless the reorganisation plan provides otherwise, or the court cancels the reorganisation order.

In reorganisation proceedings, the official receiver has a duty to approve applications for repayment of debt, including the contingent or unliquidated amounts. Such contingent or unliquidated amounts will be determined by the official receiver based on evidence and the creditors' proof of claim. An interested person may appeal against the decision of the official receiver for the consideration of the relevant court within 14 days.

In general, the transfer of claims in reorganisation proceedings is subject to the discretion of the official receiver or the court, depending on the stage of the consideration of the application for repayment of debt.

Under Thai laws, a claim acquired at a discount can be enforced for its full face value.

In regard to interest calculation, in bankruptcy proceedings, interest incurred after the date on which the court orders receivership cannot be claimed pursuant to section 100 of the BA. In reorganisation proceedings, on the other hand, creditors are not prohibited from claiming interest incurred after the court orders for reorganisation of the debtor's business.

36 Set-off and netting

To what extent may creditors 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 bankruptcy proceedings, under section 102 of the BA, if a creditor who is entitled to claim for repayment of his or her debt is indebted to the debtor when the court issues the order placing the asset under receivership, even if the grounds for the indebtedness of the two parties are not the same, or are subject to conditions or terms, such debts may be set off against each other, unless the creditor's right of claim against the debtor accrued after the order of receivership of the asset.

In reorganisation proceedings, under section 90/33, if the creditor who is entitled to apply for repayment of debt for reorganisation is indebted to the debtor at the time of issuance of the reorganisation order, such creditor may exercise the right of set-off, unless the creditor acquires the claim against the debtor after the court issues a reorganisation order.

37 Modifying creditors' rights

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

Under the BA, the court is unable to change the rank (priority) of a creditor's claim prescribed in the BA.

38 Priority claims

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

Under Thai laws, secured debts has priority over unsecured debts. For unsecured debts, repayments will be distributed in the following order:

- expenses of administering the debtor's estate;
- expenses incurred by the receiver in managing the debtor's assets;
- funeral expenses of the deceased debtor appropriate to his or her status;
- fees incurred in collecting assets;
- fees of the petitioning creditor and counsel's fee, as the court or the receiver may prescribe;
- taxes that have become due for payment within the six months prior to the order for receivership; and
- other debts.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Normal employee claims (eg, severance pay) will arise if an employment is terminated during the reorganisation proceeding. The procedure for termination during the reorganisation proceeding is then in accordance with Thai labour laws. Also, employees' pension plans or schemes do not have any priority in the bankruptcy or reorganisation proceedings in Thailand.

40 Pension claims

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

Under Thai laws, there is no specific remedy for pension-related claims against employers in insolvency proceedings. Employees, along with other creditors, are required to file applications for repayment of debt with the official receiver within two months of the date on which the court's order appointing the official receiver is published in the government gazette. This period of two months may be extended at the official receiver's discretion in the event that any creditors are domiciled outside Thailand for a period of up to two months. No priorities are attached to such claims.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Before the court orders the debtor to be under receivership, the directors are responsible for controlling the environmental problem and for remediating the damage.

When the court has ordered the debtor to be under receivership, on the other hand, section 24 of the BA prohibits the debtor from taking action in relation to his or her assets or his or her business. Rather, pursuant to section 22 of the BA, the official receiver is entitled to do any necessary act to complete any pending business of the debtor. As such, if environmental problems, or any other circumstances in which the debtor is obligated by law to perform certain actions, occur, the official receiver has the authority to control the problem and to remediate the damage caused. The liabilities to compensate for the damages incurred will be imposed on the debtor.

42 Liabilities that survive insolvency or reorganisation proceedings

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

In bankruptcy proceedings, the liabilities of the debtor will survive the proceedings in two cases: discharge from and termination of the bankruptcy.

In the case of discharge from the bankruptcy, there are two types of discharge: discharge from bankruptcy according to a court's order; and discharge from bankruptcy after the lapse of a three-year period as prescribed in the BA. An order of discharge from bankruptcy will not relieve the debtor from debts related to tax or land tax and debts that have arisen through the dishonesty or fraud thereof, or debts for which creditors have not filed claims owing to dishonesty or fraud to which the debtor is a party.

If the bankruptcy is terminated by the court because of the creditors' failure to cooperate with the official receiver, the debtor will not be adjudicated bankrupt and will not be relieved from its liabilities.

In reorganisation proceedings, the debts incurred prior to the rendering of the court's reorganisation order, which had been applied for repayment, will be released after the implementation of the plan. After the rendering of the order to terminate the reorganisation, the debtor will be freed from all debts that could be applied for repayments in reorganisation proceedings. However, if the court revokes the reorganisation proceedings, all remaining debts that have not yet been repaid will remain.

43 Distributions

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

In bankruptcy proceedings, once the assets of the debtor are sold, the distribution will be made to the creditors who have been granted the court's final order to receive repayment of debts.

In reorganisation proceedings, distributions will be made according to the reorganisation plan that has been approved by the court.

Security

44 Secured lending and credit (immovables)

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

Under Thai laws, an immovable (real) property can be taken as security by way of mortgage under the CCC, and security under the Business Security Act BE 2015 (the BSA). The BSA makes significant changes to the regime for creating security in Thailand by, among other things, expanding the types of assets that Thai entities can use as security for their financing, and establishes a new method of creating security: the business security agreement.

Depending on the type of mortgage, security can be in the form of:

- immovable property such as lands and buildings;
- certain movable assets (ie, ships of five tonnes and over, floating houses, beasts of burden); and
- any other movable properties with regard to which the law may provide registration for that purpose such as machinery that is registered with the Central Office for Machinery Registration, the Department of Industrial Works in Thailand under the Machine Registration Act BE 2530, or any movable assets that can be mortgaged under a specific law.

For example, ships of sixty tonnes gross or over for the purpose of a sea voyage can be mortgaged under the Mortgage of Ships and Maritime Lien Act BE 2537.

Under the CCC, a mortgage must be made in writing and registered with the competent authority. The CCC also prescribes certain details that must be specified in the mortgage agreement; for example, mortgaged amount is required to be in Thai baht (except for ships mortgaged pursuant to the Mortgage of Ships and Maritime Lien Act BE 2537 where the mortgaged amount can be in foreign currency) and details of the secured obligations. A title document in respect of mortgaged property is not required to be delivered to the mortgagee in order to perfect a mortgage. However, in practice, original land title deeds of mortgaged properties are usually required to be in the possession of the mortgagee throughout the term of the mortgage agreement.

The same asset may be subject to several mortgages in favour of several mortgagees (which have different rankings depending on the time of registration of the mortgage); the first registration of the mortgage is considered as the first in priority, and the first mortgagee will be entitled to first receiving repayment in priority over the second or other mortgagee. The creditor who accepts the mortgage is regarded as a secured creditor under the Thai bankruptcy proceedings under the BA.

Apart from mortgage, immovable property can be taken as security by way of security under the BSA; see further details in question 45. It is worth noting that lands that can be used as security by way of a business security agreement under the BSA are only lands on which the security provider operates the business of immovable property directly and the security receiver must be a financial institution or any other person prescribed in a ministerial regulation.

45 Secured lending and credit (movables)

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

Under section 6 of the BA, a secured creditor means 'a creditor holding rights over an asset of the debtor in a mortgage, pledge or right of retention, or a creditor possessing preferential rights in the same nature as that of a pledgee'. Practically, pledge and right of retention are currently the principal types of security taken on movable (personal) property. It is vital to note that a creditor holding rights over the asset of the third person or holding any other kind of security of a third person is not recognised as a secured creditor under the bankruptcy proceedings. However, such creditor still has the right to enforce such security under the civil procedure.

In general practice, a pledge under the CCC can be taken as security over the following movable properties and the following perfection requirements are required to be carried out.

Movable property

Perfection of a pledge over movable property or rights with respect to a movable property requires delivery of the pledged property to the pledgee or to a third person acting on behalf of the pledgee. As Thai laws require possession of the pledged property by the pledgee throughout the term of the pledge in order to maintain a valid pledge, the pledge over movable property that is still used in the business of the pledgor is not practical.

Right represented by a written instrument (eg, a bill of exchange)

Perfection of a pledge over rights represented by a written instrument requires delivery of such instrument to the pledgee and the pledge being notified in writing to the relevant obligor. The pledge cannot be set up against third parties unless its creation is endorsed upon the instrument.

Shares in script or certificate form

Perfection of a pledge over shares (in script form) requires delivery of the share certificate to the pledgee or to a third person acting on behalf of the pledgee and the pledge to be recorded in the register of shares of the issuing company.

In the case of a listed company, the registrar of shares is the Thailand Securities Depository Co, Ltd (the TSD). The parties must notify and register the pledge with the TSD by submitting an application together with required documents to the TSD.

Under Thai laws, pledge over the above assets is not required to be made in writing or in any special form. However, it is common to have a pledge agreement in writing signed by the parties.

Security under the BSA

Under the BSA, a security may be created over certain assets under a business security agreement, such assets are:

- a business;
- a right of claim (which includes a right to receive performance of obligations and any other rights, but excludes a right represented by a written instrument);
- movable property used in a business such as machinery or inventory;
- immovable property used directly in a business;
- intellectual property; and
- other assets as prescribed by a ministerial regulation.

A business security agreement must be made in writing and registered online with the Business Security Registration Office. The BSA also prescribes certain details that must be specified for the registration of a business security agreement; for example, enforcement events and the debt secured. In the case of a business security agreement over a business, the security receiver must file the consent of the security enforcer when registering the agreement.

It is important to note that the security receiver must be a financial institution or any other person to be prescribed in a ministerial regulation. A creditor that accepts a business security agreement is regarded as a secured creditor under Thai bankruptcy proceedings.

In relation to the priority established, this is similar to a mortgage. That is to say, the same asset may be subject to several business

security agreements in favour of several security receivers (that have different rankings depending on the time of registration of the business security agreement); the security receiver who is registered first shall be entitled to receive debts payment before the security receiver who is registered thereafter.

If any asset that is already used as security under the BSA has also been mortgaged as a security to secure the debts, the rank of the security receiver and mortgagee shall be in the respective order of the day and time of registration, whereby the security receiver or mortgagee who is first registered shall be entitled to receive debt repayment before the security receiver or mortgagee who is registered thereafter.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Under the BA, transfers involving assets of a reorganised company can be voided by court order.

Upon the written petition of the planner, a plan administrator or the official receiver, the court may order the cancellation and void the following transfers:

- a transfer of assets or transactions (or both) involving assets of the debtor carried out with the debtor's knowledge that it will prejudice creditors (except in the event the relevant beneficiary is not aware that such act or transaction would prejudice the debtor's creditors) (fraudulent transfer); or
- a transfer of the debtor's assets that intentionally provides preference to one or more of its creditors over other creditors, which is made in the three-month period prior to the commencement of proceedings under the BA or, in the event the creditors granted such preference are linked in some way to the debtor, within one year prior to the commencement of such proceedings (preferential transfer).

The BA provides that the following events, both in bankruptcy and reorganisation, invoke the presumption that the debtor and the beneficiary are aware that such a transfer or act would prejudice the debtor's creditors, and thus is a fraudulent transfer: the relevant transfer or act was made in the year before the filing of a bankruptcy petition or reorganisation petition, as the case may be; or the transfer was gratuitous or a transfer from which the debtor received an unreasonably small amount.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Under the BA, an 'insider' is defined as, inter alia, a director, a shareholder holding more than 5 per cent of the total number of the issued shares of the debtor's business, and their spouses and minor children. 'Non-arm's length creditors' are not defined in the BA.

Under Thai laws, there is no specific restriction barring insiders or non-arm's length creditors from initiating insolvency claims.

Groups of companies

48 Groups of companies

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

Currently, under Thai laws, there are two types of company: private limited companies and public limited companies. The liability of shareholders in both legal entities is limited only to the amount, if any, unpaid on the shares that are subscribed by them. Under Thai jurisdiction, the doctrine of separate legal entity is strictly upheld. Hence, a parent or affiliated corporation can be held responsible for the liabilities of subsidiaries or affiliates only in the event that such parent or affiliated corporation has personally guaranteed the entity's debts or where it has made itself a co-debtor with its subsidiaries or affiliates.

49 Combining parent and subsidiary proceedings

In 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?

Under Thai laws, there is no procedure for combining the parent company and its subsidiaries, thus, none of the assets and liabilities can be pooled for distribution purposes. The assets are not allowed under Thai laws to be transferred from an administration in Thailand to an administration in a foreign country.

International cases**50 Recognition of foreign judgments**

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?

With respect to insolvency proceedings, Thailand follows the territoriality principle (as opposed to the universality principle). Foreign judgments or orders with respect to insolvency proceedings in other countries are not recognised under Thai laws. Thailand is not a signatory to any treaties on international insolvency or on the recognition of foreign judgments.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Thailand has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Under section 178 of the BA, foreign creditors who are domiciled outside the kingdom can claim for repayment of debts in a bankruptcy action upon compliance with certain conditions.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

A foreign bankruptcy or order for control of a debtor's estate has no effect on the debtor's assets in Thailand. Thai laws do not provide for cross-border transfers of assets under administration.

54 COMI

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?

Thai courts do not recognise the COMI but rather regard each debtor company as a separate entity from its group of companies. To determine jurisdiction, Thai courts consider whether the debtor is domiciled in Thailand, or operates business therein, whether by him or herself or by representative, at the time an application is made to adjudicate such debtor bankrupt, or within a period of one year prior to that, as prescribed by section 7 of the BA. If this appears to be the case, the debtor can be adjudged bankrupt by Thai courts, which will only have jurisdiction over assets of the debtor that are situated within Thailand, pursuant to section 177 of the BA.

55 Cross-border cooperation

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?

Under Thai laws, there is no legislation providing cross-border cooperation. Therefore, according to section 177 of the BA, a foreign bankruptcy or order for control of a debtor's estate has no effect on the debtor's assets in Thailand. In addition, Thai laws do not provide for the recognition of foreign judgments. However, a foreign judgment may form part of the evidence in a case brought in Thailand on the same subject matter, and be considered as 'best evidence', provided the judgment is:

- final and conclusive;
- not contrary to Thai public policy; and
- given by a court of competent jurisdiction.

Thailand is not a signatory to any international treaties on insolvency or the recognition of foreign judgments.



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56 Cross-border insolvency protocols and joint court hearings

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?

While Thailand is not a party to any international treaty on insolvency or recognition of foreign judgments, it is generally accepted that a foreign judgment may form part of the evidence in a case brought in Thailand on the same subject matter, and shall be considered as the 'best evidence' for consideration of the court. It should be noted that foreign judgments should be final and conclusive, not contrary to Thai public policy, and given by a court of competent jurisdiction.

The Legal Execution Department under the Ministry of Justice has, however, recently amended the BA by adding new provisions that are in line with the UNCITRAL'S Model Law on Cross-Border Insolvency, including access for foreign creditors and foreign representatives, recognition of foreign proceedings and relief, cooperation and communication, and concurrent proceedings. This new legislation will enhance the enforcement of debtors' assets in cross-border matters.

United Arab Emirates

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The new UAE Federal Bankruptcy Law No. 9 of 2016 (the UAE Bankruptcy Law) contains the main legislation applicable to insolvencies and reorganisations in the UAE. It was published in the Federal Official Gazette on 29 September 2016 and came into force on 29 December 2016. The UAE Bankruptcy Law repeals and replaces Book 5 of Federal Law No. 18 of 1993 (the Commercial Code). Certain aspects of Federal Law No. 5 of 1985 (the Civil Code) and Federal Law No. 11 of 1992 (the Civil Procedures Code) also apply. Provisions relating to corporate liquidation of companies can be found in Federal Law No. 2 of 2015 (the Companies Law). Certain provisions of Federal Law No. 10 of 1980 concerning the Central Bank, the Monetary System and the Organisation of Banking apply on the bankruptcy or liquidation of banks and financial institutions.

In some circumstances specific decrees have been issued to manage specific restructuring situations. An example of one such special regime is the Dubai Decree No. 57 of 2009 (the DWG Decree) which applies to matters relating to the Dubai World Group (DWG). The DWG Decree was issued by the ruler of Dubai to facilitate the restructuring of the DWG. The DWG Decree is a customised version of the Insolvency Law DIFC No. 3 of 2009 (DIFC Insolvency Law) and the Insolvency Regulations of the Dubai International Financial Centre (DIFC), a financial free zone created by the Emirate of Dubai. The DWG Decree disapplies many of the provisions of the DIFC Insolvency Law, with the apparent intention of ensuring that the restructuring of DWG will be carried out in a particular manner. DWG has a unique status as a decree corporation (established by decree by the ruler of Dubai) and as such was unable to restructure its debts under existing legislation. The DWG Decree was therefore issued to provide for a formal framework that did not otherwise exist. The DWG Decree does not have wider application and it is yet to be seen how or if the framework will be utilised elsewhere in future.

The federal laws mentioned above apply at a federal level. However, there are a number of free zones within the UAE, which have created an independent legal framework, including the DIFC. The DIFC has created its own legal and regulatory framework for all civil and commercial matters. UAE federal criminal laws however, continue to apply within the DIFC. The DIFC Authority and the Dubai Financial Services Authority develop laws and regulations applicable to the operation of the DIFC and these laws are generally based on common, rather than civil, law. The Emirate of Abu Dhabi has created a similar financial free zone in the Abu Dhabi Global Market (ADGM), which also has its own legal and regulatory framework.

2 Excluded entities and excluded assets

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

The UAE Bankruptcy Law applies to companies that are governed by the Companies Law, free zone companies (other than free zone companies incorporated in free zones that have their own insolvency laws that provide for preventive composition, restructuring or bankruptcy procedures (eg, DIFC and ADGM)), licensed civil companies conducting professional activities and individual traders. The UAE Bankruptcy Law does not apply to companies wholly or partially owned by the federal or local government unless they have opted into the UAE Bankruptcy Law in their constitutional documents.

The Civil Procedures Code prevents seizure of 'public or private assets owned by the State or any of the Emirates' and this may be interpreted to prevent bankruptcy proceedings against state entities. In addition, state entities may be incorporated by decrees and these decrees may contain restrictions that prevent insolvency proceedings from being instituted.

As noted in question 1, specific legislation has been enacted in Dubai to facilitate the restructuring of the DWG.

3 Public enterprises

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

There are no special rules for the insolvency of government-owned enterprises. If a government-owned enterprise has opted for the application of the UAE Bankruptcy Law in its constitutional documents, the procedures of the UAE Bankruptcy Law shall apply. Note also the experience in relation to the DWG restructuring highlighted above.

4 Protection for large financial institutions

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

The UAE has not enacted general legislation to deal with financial difficulties of institutions that are considered 'too big to fail'; however, the UAE Bankruptcy Law introduced a Financial Restructuring Committee (the Committee). The Cabinet Resolution No. 4 of 2018 (the Cabinet Resolution) came into force on 1 March 2018 and sets out further detail surrounding formation of the Committee. The role of the Committee will include, among other things, overseeing the management of out-of-court restructuring procedures for licensed financial institutions. These restructurings will take place outside of a formal insolvency process but with the support of an insolvency expert. The scope of what could constitute a financial institution is likely to include retail and investment banks and possibly insurance companies. Other duties of the Committee include maintaining registers of disqualified directors and bankrupt companies. It is unclear from the Cabinet Resolution whether the various registers will be searchable by the public.

It is worth noting that some companies in financial difficulty have been considered for assistance on a specific case-by-case basis. As

discussed previously, the Dubai government issued the DWG Decree in relation to the DWG restructuring. This decree adopted the DIFC Insolvency Law as its basic legal framework but made a number of amendments to the DIFC Insolvency Laws that were only applicable to DWG. A similar decree – Decree No. 61 of 2009 (Decree No. 61) – was also passed to establish a special judicial committee to consider and settle any petition or claim raised against Amlak Finance PJSC or Tamweel PJSC. Decree No. 61 effectively removes the jurisdiction of the Dubai Courts (the Court of First Instance, the Court of Appeal and the Court of Cassation), preventing them from hearing any claims in connection with Amlak Finance PJSC or Tamweel PJSC and further imposing the referral of all such cases to the special committee.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The UAE does not have a specialised bankruptcy court system. Bankruptcy processes are dealt with by the competent court according to the jurisdiction rules provided in the Civil Procedures Code. The UAE Bankruptcy Law provides that no decisions or judgments of the court may be appealed unless there is a specific provision to this effect in the UAE Bankruptcy Law. The debtor or the creditor may appeal a judgment of the court in respect of the approval or rejection of initiating procedures according to section 3 (preventive composition) and section 4 (bankruptcy) of the UAE Bankruptcy Law. The Court of Appeal, at the request of the appellant, may decide to stay the appealed decision until the appeal is decided. In that case the court may request the appellant to provide security to mitigate against any adverse effects should the application for appeal not be upheld. A debtor who is a natural person or any dependants may appeal a court decision regarding the sale, pledge or disposition of any property allocated for their support.

Appeals related to bankruptcy proceedings should follow the procedures and periods stipulated under the Civil Procedures Code. In summary, the Civil Procedures Code stipulates that, in relation to the three levels of courts (Court of First Instance, Court of Appeal and Court of Cassation):

- appeals are dealt with in articles 150 to 188 of the Civil Procedures Code. The time for appealing against a judgment runs from the date following the date of the passing of the judgment (unless the UAE Bankruptcy Law provides otherwise), and there is a time limit for making appeals of 30 days (or 10 days in expedited matters); permission to make an appeal is not required – it is an automatic right, but it is dependent on the sum in dispute (over 20,000 dirhams for court of appeal, and over 200,000 dirhams for court of cassation, except for where the sum claimed hasn't been evaluated); and
- appeals against a decision of the Court of First Instance can be made in relation to issues of fact or law, whereas appeals against a decision of the Court of Appeal or Cassation can only be made in relation to matters of law.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

The UAE distinguishes between liquidation, which provides for the termination of the corporate existence of a company and the realisation and distribution of its assets of the company to satisfy any liabilities (where possible), known as voluntary liquidation, and liquidation within bankruptcy procedures. Voluntary liquidation to terminate the corporate existence of a company is provided for in the Companies Law. The initiation of liquidation proceedings is at the court's discretion within the bankruptcy proceedings as provided in the UAE Bankruptcy Law.

As to liquidation of companies pursuant to the Companies Law, a company enters into 'liquidation' if it is dissolved. Joint liability, simple commandite (a company established by limited and unlimited partners) and joint-stock companies may be dissolved at the request of a shareholder where it appears to the court that there are serious grounds warranting the dissolution, or on the grounds of a shareholder's failure to meet its obligations. Events triggering dissolution include:

- expiry of the term set out in the constitutional documents;
- completion of the company's objectives;
- loss of all or most of the company's assets;
- merger; or
- a unanimous decision of the shareholders (subject to the terms of the company's constitutional documents).

Until the company is officially dissolved, the company retains its corporate existence to the extent necessary for the acts of liquidation. While the Companies Law sets out general guidelines in relation to the process of liquidation, a company is permitted to set out in its constitutional documents the manner in which it should be liquidated, or alternatively, the shareholders may agree on these details at the time of liquidation. The liquidator, upon appointment, assesses the company's liabilities and assets. In addition, upon liquidation, all debts owed by the company become immediately due and payable. The liquidator is required to notify all creditors and to invite them to present their claims in the liquidation within a time period of not less than 45 days. If the liquidated estate does not have sufficient assets to discharge all outstanding debts, the debts are discharged between the creditors (and note the potential for bankruptcy liquidation proceedings to commence in that instance – see question 9). Any value that remains after all debts have been discharged is returned to the shareholders in proportion to each shareholder's equity in the company. Once the liquidation has been completed and recorded on the commercial register, the liquidation may be admissible as a defence against other parties, and the liquidator is required to request the deletion of the company from the Commercial Register.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

The UAE Bankruptcy Law provides a debtor who is in financial difficulty with the opportunity to agree a compromise with its creditors (a preventive composition). The preventive composition is only available for a debtor who is not insolvent (ie, who has not ceased making payments on due debts for more than 30 consecutive business days because of its financial instability or its assets being insufficient to cover its due liabilities at any time). Preventive composition cannot be applied for if the debtor has already entered bankruptcy proceedings. An application for preventive composition can only be made by the debtor or ordered by the court and it cannot be made by creditors. As part of the application, the debtor must submit, among other things, a brief description of its economic and financial position, details of its properties, employees and creditors; and cash flow and profit and loss projections. A shareholders' resolution approving the application must also be submitted to the court.

Once the debtor has applied for a preventive composition and submitted the necessary documents, a court-appointed expert will prepare a report on the debtor's financial condition, determining if the conditions for a preventive composition have been met and if the debtor has sufficient funds to cover the costs of the preventive composition process. Grounds to reject an application include the court deciding that the debtor's position is not suitable for preventive composition and that it should instead be placed into bankruptcy. It should therefore be noted that there is a risk with an application for preventive composition that the court may order bankruptcy proceedings instead.

If the court accepts the application, it will appoint a trustee designated by the debtor in the application for preventive composition. Once appointed, the trustee will assess the debtor's assets and liabilities. Control of the company remains with the debtor who continues to manage its business, albeit under the supervision of the trustee who has wide powers on the preservation of assets and the continuation (or otherwise) of the debtor's business. A moratorium on creditor action comes into effect until the preventive composition scheme in relation to the debtor has been approved. Secured creditors, however, are still able to enforce their security with the court's permission.

8 Successful reorganisations

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

The trustee is obliged to advertise a summary of the preventive composition application in two newspapers (one in Arabic and one in English) within five business days of his appointment with an invitation to creditors to submit proofs of claim within 20 business days from the date of publication. The trustee will then lodge the list of creditors with the court for approval including the trustee's opinion as to whether to accept, amend or reject the debt and any propositions as to the way of repayment (if possible). Within three consecutive business days from the day of lodging the creditors list with the court, the trustee must also publish a list of the breakdown of debt in two widely circulated daily newspapers. The debtor and any creditor will then have the opportunity to object to the debt breakdown list within seven business days from the date of publication. The court shall consider any objection and its decision may be appealed to the Court of Appeal. Pending final judgment from the Court of Appeal, the relevant claim may be admitted on a temporary basis and such creditor will be included in the voting process as further discussed below.

The debtor and the trustee will then work together on the restructuring plan. Within 45 business days from the date on which the court accepts the application for preventive composition, the trustee must submit a draft preventive composition scheme to the court (subject to extensions not exceeding in aggregate 20 business days). The court has 10 business days to review the preventive composition scheme and ensure that it observes all parties' interests. The court may make amendments and the trustee must implement these within 10 business days (subject to one extension not exceeding 10 business days). Once the court approves the draft preventive composition scheme, the trustee must advertise the scheme to creditors within five business days of approval by the court and call for a meeting of creditors within 15 business days of publication (timing subject to the court's discretion to postpone or hold further meetings).

Creditors are generally classified as secured or unsecured creditors. At the creditors' meeting, the preventive composition scheme is presented to the creditors by the debtor and the trustee and the creditors may propose amendments to the scheme. The court may order further meetings to consider the amendments and may approve or reject any of the amendments. The creditors will then vote on the preventive composition scheme. Only unsecured creditors may vote on the preventive composition scheme. In order for the scheme to be approved, unsecured creditors (whose debts are finally or temporarily admitted) must vote in favour of the scheme both by a majority in number and two-thirds in value of total ordinary admitted debts. The vote will be binding on non-consenting unsecured creditors. Failure to obtain approval in the two majorities results in the creditors' meeting being postponed for seven business days. Failure to obtain approval at the second creditors' meeting is deemed to be a rejection of the preventive composition scheme. Any creditor, whose debt is admitted and rejects the scheme in the vote, may object to the scheme within a further three business days of the trustee's submission of the scheme to the court and the court must decide on any such objection within five business days.

After creditor approval, the court must approve the preventive composition scheme. The trustee must present the approved preventive composition scheme to the court within three business days. The approval by the court of the preventive composition scheme binds all unsecured creditors. The trustee must advertise the court's approval within seven business days of approval. If the court does not approve the preventive composition scheme, the court must return it to the trustee for amendment within 10 business days, after which the trustee must resubmit the amended scheme to the court. Creditors have a right to object to the court's rejection or amendment (to be decided upon by the court within 10 business days of objection).

The deadline for implementation of a preventive composition is three years, which may be extended for another three years with majority creditor approval.

UAE law does not provide guidance on the release of non-debtor parties from liability through a reorganisation plan.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

As noted, the liquidation procedure provides for the voluntary termination of a company's corporate existence while the principal method for involuntarily winding up a debtor is through the bankruptcy liquidation proceedings as set out in the UAE Bankruptcy Law. Bankruptcy proceedings are split into two procedures: a bankruptcy restructuring process, which is a rescue process within formal bankruptcy proceedings; and a formal liquidation procedure for the winding up of insolvent companies.

Although creditors may apply for the commencement of bankruptcy proceedings against a debtor, the initiation of bankruptcy liquidation procedures remains at the discretion of the court if it decides that a bankruptcy restructuring procedure is not appropriate.

A liquidation is undertaken by one or more court-appointed trustees. Once the trustee is appointed, all the powers and authorities of the company's board of directors vest in the trustee. The trustee is also required to notify all creditors and to invite them to present any final claims (which have not already been notified in accordance with the bankruptcy application) within 10 business days from the date of notice. The trustee is required to liquidate all the debtor's assets and distribute the proceeds among the creditors according to the order of priority under the UAE Bankruptcy Law (see question 37).

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Bankruptcy proceedings can be applied for by a creditor or a number of creditors who hold an unpaid debt of not less than 100,000 dirhams, have served a statutory demand on the debtor, and such demand has remained unpaid for at least 30 consecutive business days. In order to meet any expenses and costs of the initial proceedings and the consideration of the application by the court, the creditors must also pay an amount to be determined by the courts (not to exceed 20,000 dirhams) or submit a bank guarantee in that amount. The court will then appoint an expert to prepare a report on the debtor's financial position including the expert's opinion on whether a bankruptcy restructuring is a viable option and whether the debtor's assets are sufficient to cover the cost of a restructuring. The court will then decide whether to approve the application and start bankruptcy proceedings.

If the court decides to initiate proceedings, the debtor will be placed under the supervision of a court-appointed trustee who will take control of the management of the company and is granted wide-ranging powers in relation to preservation of assets, dealing with claims and any other actions required to achieve the purpose of the procedure. Similar to the preventive composition, a moratorium comes into effect and all enforcement action relating to the debtor is automatically stayed. Secured creditors are required to obtain court approval in order to enforce their security over any secured assets. Once appointed, the trustee must, within five business days from the date of being notified of its appointment, publish a summary of the court's decision to initiate bankruptcy proceedings against the debtor in two daily newspapers (one issued in Arabic and one issued in English) including an invitation to the creditors to submit their claims within 20 business days from the date of publication. The trustee must then lodge a list of creditors with the court (see question 34 for more detail on the procedure for claims submission by the creditors).

The trustee is then given time to prepare and submit to the court a report on the debtor's business including his assessment of either restructuring or selling the debtor's business in case of liquidation. If the trustee believes there is a reasonable prospect of restructuring the debtor's business, a restructuring plan should also be prepared for submission to the creditors. The creditors are then given an opportunity to comment on the report ahead of a court hearing to be attended by the trustee, the debtor and creditors. At this hearing the court will examine the report and decide whether to initiate either restructuring or

liquidation proceedings. The court will only initiate restructuring proceedings if the debtor expresses a willingness to continue the business and the court believes there is a possibility for the debtor's business to be profitable again within a reasonable period.

If restructuring proceedings are initiated, a final restructuring scheme must be prepared and voted on by creditors. For the restructuring to be approved, a majority of unsecured creditors must vote in favour of the arrangement, provided that such majority represents at least two-thirds of the total debt by value. The procedural aspects described above in respect of preventive composition process are also applicable to restructuring proceedings; however, the deadline for implementation of a restructuring is longer (five years, which may be extended for another three years with majority creditor approval).

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

The UAE does not provide for 'pre-packaged' reorganisations in any formal manner, although it is possible that expedited reorganisations take place informally outside of the legislative framework.

12 Unsuccessful reorganisations

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?

The proposed preventive composition or bankruptcy restructuring is defeated if the majority of the unsecured creditors, in number and who hold two-thirds of the ordinary debt, do not approve the preventive composition or restructuring scheme.

The court has an ongoing power to terminate the preventive composition procedure and convert it into bankruptcy proceedings if at any time it finds (either of its own discretion or on application of an interested party) that either: the debtor was in payment default for more than 30 consecutive business days or was insolvent on the date of commencement of the preventive composition proceedings, or if this becomes clear to the court during the implementation of the preventive composition scheme; or it becomes impossible to apply the preventive composition and ending the same would result in payment default for more than 30 consecutive business days or result in the debtor's insolvency. There is no further guidance in the law as to what would constitute 'impossible'.

The court may order bankruptcy liquidation if the debtor applies for preventive composition or bankruptcy restructuring in bad faith.

Failure to comply with the terms of the preventive composition or bankruptcy restructuring scheme may lead to nullification and an order by the court to convert the proceedings to bankruptcy liquidation. Further, the preventive composition or bankruptcy restructuring may be annulled for any fraud or criminal action by the debtor.

13 Corporate procedures

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

As noted in question 6, the Companies Law sets out the procedures for liquidating a company while the UAE Bankruptcy Law regulates the bankruptcy liquidation of the entities subject to it. The aim of the two proceedings is somewhat different, as a liquidation involves the dissolution and termination of the corporate existence of a company (irrespective of its solvency position), while the preventive composition and bankruptcy restructuring proceedings aim to rehabilitate debtors in financial difficulties and liquidate the debtor's estate if no rehabilitation is possible.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

A preventive composition or bankruptcy restructuring is formally concluded once the scheme has been implemented and all the debtor's obligations have been discharged in accordance with the scheme. The court

shall then, at the request of the trustee, the debtor or an interested party, issue a judgment of completion of the preventive composition or bankruptcy restructuring scheme, which shall be published in two widely circulated daily newspapers (one in English and one in Arabic).

In a bankruptcy liquidation procedure, once the trustee has made the final distribution, the court will issue a decision to close the proceedings. The trustee is then required to publish a notice including a list of creditors whose debts were accepted, the amounts of those debts and any unsettled amounts in two newspapers.

In a voluntary liquidation, the liquidator is required to pay all the debts owed by the company in liquidation. Once this has been completed, the liquidator must present a final account to the company's shareholders or the general assembly. Following presentation of the final account, the liquidator registers the completion of the liquidation on the commercial register. Registration on the commercial register is deemed notification to the public. The final step in a liquidation is the formal removal of the company's registration from the commercial register that follows on from the registration of the liquidation.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

Under the UAE Bankruptcy Law, a debtor is considered to be insolvent if it has ceased making payments on due debts for more than 30 consecutive business days because of the debtor's financial instability or the debtor's assets being insufficient to cover its due liabilities at any time.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

If a debtor fails to make payments on its debts as they fall due for a period of over 30 consecutive business days because of its financial instability or its assets being insufficient to cover its due liabilities at any time, it is mandatory for the debtor to apply to the court to commence bankruptcy proceedings. A debtor cannot apply for preventive composition in these circumstances.

Directors and officers

17 Directors' liability - failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

In the UAE Bankruptcy Law, failure to file for bankruptcy is no longer a criminal offence. Although there appear to be no sanctions or penalties that apply to directors who do not file for bankruptcy, it is not clear if directors of the business will be subject to specific sanctions if they fail to file for bankruptcy prior to submission of a bankruptcy application on the part of the creditors. However, if the debtor's failure to act led to the debtor's eventual bankruptcy, the debtor may be penalised for failing to complete a mandatory filing as it will be prohibited from taking part in the management of any company or transacting any business up until the time that the debtor becomes rehabilitated pursuant to the UAE Bankruptcy Law.

The Companies Law provides that corporate officers and directors are liable towards the company shareholders and third parties for acts of fraud, abuse of power, violation of the Companies Law or of the company's constitution and mismanagement of the company. Corporate officers may be liable to pay amounts owed by their corporations where the liabilities arise from any of the above circumstances. This provision applies regardless of whether the company is in an insolvency situation.

The UAE Bankruptcy Law provides that if, following the declaration of bankruptcy liquidation, it is found by the court that the assets of the debtor are not sufficient to pay at least 20 per cent of its debts, the court may order all or part of the directors, jointly or severally, to pay all or part of the debt of the debtor in the event that they are held liable for the loss of the company in accordance with the Companies Law.

After the declaration of bankruptcy, the directors or managers of the debtor may be held liable to repay the debts of the company if they have undertaken certain actions in the management of the company within two years following the commencement of the bankruptcy proceedings. These actions include sales of assets at an undervalue, entering into new commitments at less than market value or that are unaffordable in the context of the company's resources, and creating preferences in favour of certain creditors. However, if the directors are able to prove that the acts were taken with a view to minimising the loss incurred by the debtor and its creditors, they may not be held liable. Furthermore, any director who objected to the acts, or was not involved in any of the relevant actions, will also not be held liable for them.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

The UAE Bankruptcy Law provides that directors and general managers can be sentenced to prison for a period not exceeding two years if the following circumstances arise:

- failing to keep adequate commercial books to reflect the real financial position of the company;
- not providing information as requested by the trustee or deliberately providing the trustee with false information;
- illegally disposing of assets to hide them from the debtor's estate;
- repaying the debt of a creditor to harm the remaining creditors;
- granting security to a creditor in preference over the remaining creditors;
- disposing of assets at an undervalue or other means that are detrimental to the interest of the creditors to procure funding or delay a payment default or the declaration of bankruptcy or rescission of preventive composition or bankruptcy restructuring procedures;
- expending considerable funds in non-core speculative business not required by the business of the company; or
- entering into undertakings for the benefit of a third party that are beyond the financial means of the debtor when made.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Under the Companies Law, a director must preserve the rights of the company and extend such care as a prudent person would do in a similar position and the director must not do any acts that are incompatible with the objects of the company and the powers granted to him to this effect. A director of a company in financial difficulties may find that his acts and decisions in the period leading up to a preventive composition or bankruptcy restructuring are scrutinised closely against this standard; however, there are no provisions of the Companies Law or the UAE Bankruptcy Law that state that the duty of the directors owed to the company shifts to the creditors in these circumstances.

As mentioned above, officers and directors are liable towards the shareholders and third parties for acts of fraud, abuse of power, violation of the Companies Law or of the company's constitution and mismanagement of the company. As such, even if there is no express shift in duties, directors of companies in financial difficulty will have to consider the interest of all the company's counterparties and stakeholders, including creditors.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Once bankruptcy proceedings are commenced, the debtor will be placed under the control and supervision of one or more liquidation trustees and the directors will lose their power to manage the debtor's business. The UAE Bankruptcy Law expressly provides that, as of the

date of commencement of the bankruptcy procedures, the debtor shall not be allowed to perform, among others, the following acts:

- manage assets or pay any claims created before the commencement of the bankruptcy procedures, except for any set-off payments made in accordance with the UAE Bankruptcy Law;
- dispose of any assets or pay or borrow any amounts, unless such disposal or payment is permitted by the UAE Bankruptcy Law; and
- dispose of stock or shares of, or change the ownership or legal form of the company, if the debtor is a legal person.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

Once the court accepts the application for preventive composition or bankruptcy proceedings and until the approval of the preventive composition or bankruptcy restructuring scheme, a statutory moratorium comes into effect to prevent creditor action and enforcement proceedings against the assets of the debtor. The statutory moratorium does not apply to secured creditors who continue to have the right to enforce secured claims with permission of the court.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

During the preventive composition, the debtor continues to manage its business under the supervision of the court-appointed trustee. The trustee has wide powers in relation to the preservation of assets and the continuation of the debtor's business. Following the commencement of the bankruptcy procedures, the trustee takes over the management and the debtor will no longer have control over its business.

No special treatment is given to creditors who supply goods or services. Counterparties must perform their obligations under any contracts unless they had obtained a judgment of stay of execution because of the failure of the debtor to perform its obligations under the contract before the start of the preventive composition or bankruptcy proceedings.

Other than the appointment of a supervisory creditor committee (see question 32), the UAE Bankruptcy Law does not give the creditors much scope to supervise the debtor's business. The power to supervise the debtor's business (in a preventive composition scenario) and manage the debtor's business (in a bankruptcy scenario) is vested in the trustee under the control of the court.

23 Post-filing credit

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

The court may, at the request of the debtor or the trustee, in a preventive composition or bankruptcy restructuring procedure, allow the debtor to obtain new finance that will have priority over any existing ordinary debts of the debtor. The new credit may be secured either on unsecured assets of the debtor or on assets that are already subject to security (ranking behind existing security unless the relevant secured creditor agrees otherwise).

24 Sale of assets

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?

Once the preventive composition or bankruptcy proceedings have commenced, the trustee is entitled to sell the debtor’s assets. The debtor is not allowed to dispose of any assets except in the ordinary course of business without the prior consent of the trustee and the court. Assets of the debtor that are considered critical to the debtor’s business may not be disposed of for a period not exceeding the period of the preventive composition or restructuring scheme without the permission of the court.

In a liquidation, at the request and under supervision of the trustee, the court may permit the debtor to sell all or part of his business at ‘the best possible price’, which is taken to be market value. The court permission for the sale is time barred and shall not exceed six months from the date of granting the permission by the court and may be extended for not more than two months if the extension is in the interest of the creditors or in the public interest. All assets of the debtor must be sold by the trustee in public auction, with the consent and under the supervision of the court. Any alternative means of sale must be expressly approved and on conditions set by the court.

25 Negotiating sale of assets

Does your system allow for ‘stalking horse’ bids in sale procedures and does your system permit credit bidding in sales?

Given the requirement for judicial involvement in asset and business sales in bankruptcy liquidations, there is limited scope for a system of ‘stalking horse’ bids. The UAE system does not specifically provide for credit bidding in sales, however one cannot discount using such a mechanism where to do so would be in the best interests of creditors.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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 UAE Bankruptcy Law provides that the commencement of preventive composition or bankruptcy procedures does not entail the rescission or termination of contracts. The counterparty must perform its obligations under the contract unless it obtains a judgment of stay of execution because of the failure of the debtor to perform its obligations under the contract before the start of the preventive composition or bankruptcy proceedings. The trustee may request the court to order the termination of an unfavourable contract if this is in the interest of the debtor or the creditors and such termination does not substantially prejudice the interest of the counterparty.

If the trustee fails to perform or continue to perform contractual obligations in a bankruptcy restructuring or bankruptcy liquidation procedure, the counterparty may apply to the court to terminate the contract. The counterparty may submit a claim as an unsecured creditor for any amounts owed to it pursuant to the termination of the contract.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor’s right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The UAE Bankruptcy Law does not specifically address this issue, although the general provisions of the UAE Bankruptcy Law on termination of contracts would apply (see question 26).

28 Personal data

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

The UAE Bankruptcy Law does not contain any specific provisions on collection of customer data in a liquidation or reorganisation scenario. The UAE generally does not have any specific data protection laws comparable to those applicable in Europe outside of certain free zone areas such as the DIFC and ADGM. However, certain provisions in a number of different UAE laws may provide some protections in respect of privacy and the transfer of data. For example, article 378 of Federal Law No. 3 of 1987 (the Penal Code) provides that the publication of any personal data that relates to an individual’s private or family life is an offence. In addition, certain sector-based laws and policies, such as the Cybercrime Law and Privacy of Consumer Information Policy, require service providers to take measures to prevent the unauthorised use or disclosure of personal data. Further, there are no specific provisions under UAE federal law that impose any obligations on data controllers to ensure data is processed properly. Notification or registration is not required before processing data provided that consent has been obtained from the data subject in relation to the collection and processing of any personal data relating to the individual’s private or family life. There are no specific provisions under UAE law regulating the transfer of data. However, under article 378 of the Penal Code, data subjects should provide consent to the transfer of personal data to third parties inside or outside the UAE if that data relates to an individual’s private or family life.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

The statutory procedures set out in the UAE Bankruptcy Law can be applied for at the competent court in accordance with the applicable jurisdiction rules of the Civil Procedures Code and are not subject to arbitration proceedings. The Commercial Code provided that trustees in insolvency procedures could accept arbitration in any proceedings connected with the bankruptcy, subject to obtaining the consent of the judge where the arbitration relates to an indefinite amount or an amount above 10,000 dirhams. A similar provision is not included in the UAE Bankruptcy Law. It remains to be seen how the courts will implement the new regulation in this regard, particularly in view of the statutory moratoria that now apply to debtors who are in preventive composition or bankruptcy restructuring procedures and in relation to whom legal proceedings cannot be initiated or continued (other than enforcement of security with permission of the court).

Creditor remedies**30 Creditors’ enforcement**

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?

We are not aware of any such processes that would permit creditors to seize assets outside of court proceedings.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

In general, remedies are not available to creditors (secured or unsecured) outside of the formal bankruptcy proceedings. Pre-judgment attachments are not generally available, although creditors may have limited rights in situations where the creditor retains some right over a specific asset, for example where a creditor has actually retained physical possession of the ‘thing’ contracted for. The creditor is limited as to the actions it may take; it may not sell the asset in question unless it is

of a type that would suffer loss or deterioration and the creditor must obtain court permission before proceeding to sell the asset. Retention does, however, provide the person retaining the goods a priority right over competing creditors.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

The predominant way of communication with creditors is by way of publications by the trustee in two widely circulated daily newspapers (one in English and one in Arabic) subject to statutory timelines. This is the case for the notification of the creditors regarding the start of the preventive composition or bankruptcy proceedings, the publication of the list of debt breakdown and the convening of creditors' meetings (including the place and time of the meeting) to discuss and vote on the draft preventive composition scheme or the bankruptcy restructuring scheme. Ahead of the meeting, the trustee must provide the creditors with a copy of the draft preventive composition scheme or the draft restructuring scheme, as relevant.

The preventive composition scheme or restructuring scheme will include the following information that will become available to the creditors or creditors' committees:

- information around the possibility of the debtor's business to regenerate profit;
- activities or business of the debtor that must be suspended or terminated;
- the terms and conditions of settlement of any liabilities;
- any performance bonds (contingent liabilities) that may be requested from the debtor;
- any proposals to purchase all or part of the business of the debtor;
- applicable grace periods and discounts in relation to any due payments;
- the possibility of debt to equity conversion;
- the possibility to consolidate, create, release or replace any credit support, if necessary to implement the draft scheme;
- any proposals around the extension of the maturity dates for repayment of principal (specifically included for bankruptcy restructuring); and
- the scheme implementation period (specifically included for preventive composition).

The reporting obligations of the trustee in preventive composition, bankruptcy restructuring and bankruptcy liquidation proceedings are owed to and under the supervision of the court.

33 Creditor representation

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 court, after consulting with the trustee, may issue a decision to form one or more creditor committees (eg, a committee of unsecured creditors, a committee of secured creditors or a committee of bondholders) for the purpose of discussing and proposing amendments to the preventive composition scheme. Every committee may choose a representative from the creditors or from the legal or financial advisers. All correspondence relating to the creditors' meeting shall be communicated to the representative of each committee and they shall be responsible for notifying the creditors to which their committee relates. At the request of the trustee, the court may limit the powers of the representative or relieve him of his task if the court is of the opinion that the powers conferred upon such representatives are too broad and detrimental to the interest of the creditors. The court may 'reform' any of the committees in its discretion. Although it seems that secured creditors are allowed to discuss the scheme and propose amendments, only

the unsecured creditors have a right to vote on the protective composition or bankruptcy restructuring scheme. The UAE Bankruptcy Law assumes that the creditors will retain legal and financial advisers and provides that the committee may choose an adviser as a representative. The UAE Bankruptcy Law does not provide any detail on how the creditor committees are funded.

In relation to preventive composition procedures, the UAE Bankruptcy Law allows the creditors to nominate a supervisory committee to supervise the execution of the preventive composition procedures. If there are several nominations, the court will decide on the appointment. If there are secured and unsecured creditors, the supervisory committee shall include a representative of each group. The supervisory committee shall assist the trustee and the court and serve the general interest of the creditors. The supervisory committee must notify any breaches of the scheme conditions to the court. No fees shall be charged by the supervisory committee. Although this is not entirely clear, it is likely that a supervisory committee can also be nominated in the context of bankruptcy restructuring procedures.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

The bankruptcy laws do not provide for creditors to pursue the estate's remedies while the bankruptcy proceedings are continuing. However, if the bankruptcy and liquidation is closed because of insufficiency of assets in the estate, the UAE Bankruptcy Law provides that 'every creditor whose debt is admitted and not fully paid, may enforce on the properties of the debtor to receive the remainder of his debt'. Given that the UAE Bankruptcy Law has not been tested and the limited experience in the UAE of insolvent liquidations, it is not clear how the courts will approach this provision and how it will be applied in practice.

35 Claims

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

All creditors, including secured creditors, must submit their claims and supporting documents within 20 business days from the date of publication of the initiation of preventive composition or bankruptcy proceedings (the Claims Deadline). The trustee may request further clarification from any creditor who submits his claim, including from the auditor or the accountant of the creditor.

After expiry of the Claims Deadline, the trustee must put together a list of names of creditors who submitted their claims including a statement regarding each debt, supporting documents, credit support and whether in the opinion of the trustee the debt should be accepted, amended or rejected and a proposition as to repayment of the debt (if possible). The trustee must lodge the list of creditors with the court within 10 business days from the Claims Deadline. If necessary, the court may extend this period once by 10 business days, at the discretion of the court. The trustee shall within three consecutive business days from submitting the list to the court, publish a list with a breakdown of the debt in two widely circulated local daily newspapers (one in Arabic and one in English).

The debtor and every creditor (whether included in the debt breakdown or not), may object to the list within seven business days from the date of its publication. The court shall decide on the objection within 10 business days from the day of lodging such objection. Any debt may be admitted on a temporary basis by the court. The court's decision may be appealed before the competent Court of Appeal within five business days from the day of the court's decision on the objection. The decision of the Court of Appeal will be final. The courts will approve the list of creditors whose claims will be admitted on a final or temporary basis.

Unless expressly consented to by the trustee and approved by the court, a creditor who fails to submit proof of claim before the Claims Deadline shall be excluded from the preventive composition or

bankruptcy procedure. If the trustee rejects or fails to respond within three business days, the creditor may apply to the court to accept its claim. The court may, after consulting with the trustee, consider the application and issue a decision within seven business days from the date of application.

Claims for contingent or unliquidated amounts can be submitted to the trustee. The court may, prior to making a final ruling with regard to a debt, provisionally accept a debt in an amount specified by the court. However, as noted above, the trustee, debtor and court may challenge a debt. The law does not provide any further guidance on how claims for contingent or unliquidated claims would be valued or on the nature of the proof required to be submitted by a creditor. The law does not provide further guidance on the enforcement of a claim acquired at a discount nor claims relating interest accrued after the opening of an insolvency case and the area relating to claims remains largely untested.

36 Set-off and netting

To what extent may creditors 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 UAE Bankruptcy Law permits set-off between a debtor and a creditor if it had been contractually agreed before insolvency, but not in relation to debts that arise after the commencement of a preventive composition or bankruptcy restructuring procedure. The set-off provision also allows for a creditor to claim for any debt that remains after the set-off, and, conversely, if following the set-off the creditor owes an amount, then this must be paid to the debtor's estate. In the absence of clarity on the sums that can be used as part of the insolvency set-off, it is the expectation that the provisions of the Civil Code relating to mandatory set-off will still apply to any analysis of insolvency set-off; in particular that the creditor and debtor will owe each other an obligation of the same type and description and it must be 'equally due' and of 'equal strength and weakness'. Although a set-off provision has been included, the UAE Bankruptcy Law does not provide specific provisions for post-insolvency close-out netting. However, the court will have discretion to incorporate any agreement on set-off or netting arrangements into a preventive composition scheme or restructuring plan approved in accordance with the procedures outlined above.

37 Modifying creditors' rights

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

The UAE Bankruptcy Law provides that a secured creditor who wishes to vote on a preventive composition scheme or bankruptcy restructuring may only do so after having 'assigned' his security interest (the law is not clear on what this assignment entails, in whose favour it should be made and the terms of this assignment) as voting on such schemes is only available to unsecured creditors. This, however, is at the discretion of the secured creditor and not the courts. The law is untested and it is therefore unclear how the courts would approach this matter. Other than the obligation to 'assign' security for voting purposes and the inclusion of a list of statutory priorities (see question 38), the UAE Bankruptcy Law does not provide grounds for changing the ranking of a creditor's claim.

38 Priority claims

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

In addition to certain employee claims (see question 39), the UAE Bankruptcy Law provides for the following priority claims in liquidations:

- judicial fees and charges incurred in respect of the liquidation process, such as court fees and the fees of the trustee and experts;
- judgment debts;
- amounts due to governmental bodies; and
- fees, costs and expenses that arise in connection with the provision of goods and services to continue the business of the debtor after proceedings have been initiated.

The UAE Bankruptcy Law mentions that secured creditors are 'ranked higher than other ordinary creditors'. The law is not clear on whether the courts would grant priority to the secured creditors or the priority claimants listed above or whether the priority claimants will only be paid from funds available to unsecured creditors.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

The Commercial Code permitted the bankruptcy trustee to terminate contracts, provided this was done in accordance with the provisions of Federal Law No. 8 of 1980 (the Labour Law). This has changed in the UAE Bankruptcy Law as it provides that:

without prejudice to the rights legally established to the worker, the court may terminate the effective employment contracts between the debtor whose properties are subject to restructuring or whose bankruptcy is declared and any of his employees, if required, irrespective of the provisions contained in such contracts.

The UAE Bankruptcy Law further provides that unpaid end of service gratuity, wages and salaries of employees of the debtor (not including allowances, bonuses etc.), in total not exceeding a maximum of three months' salary, are preferential debts on liquidation of the debtor. The court may also permit the payment of salaries for a period of not more than 30 days.

Further guidance is needed, but we would assume that the court would terminate any employment contract in accordance with the provisions of the Labour Law. The Labour Law provides for two principal types of employment contract: definite or limited-term and indefinite or unlimited term contracts. The termination provisions differ between the two types of employment contracts and consequently the claims that may arise differ. Where a limited-term contract is terminated for reasons other than fault on the part of the employee, the employee is entitled to an amount equal to three months' salary or payment of the remainder of the term of the contract, whichever period is shorter. In the case of unlimited-term contracts, such contracts can be terminated for a valid reason (which would include restructuring or insolvency) at any time, by giving the employee at least 30 days' notice in writing. If such a notice is not given, and the employee is terminated, the employee is entitled to compensation in lieu of notice.

40 Pension claims

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

The majority of employees in the UAE do not benefit from pension plans but are entitled to an end-of-service benefit, the amount of which depends on the employee's base salary and length of service. The UAE Bankruptcy Law provides that unpaid end-of-service benefit is a preferential debt and ranks in the list of priorities after judicial fees and charges incurred in respect of the liquidation process, such as court fees and the fees of the trustee and experts.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The UAE Bankruptcy Law does not address environmental liabilities in an insolvency scenario. The Companies Law provides that corporate officers and directors are liable towards the company shareholders and third parties for acts of fraud, abuse of power, violation of the company's constitution and mismanagement of the company. Corporate officers may be liable to pay amounts owed by their corporations where

the liabilities arise from any of the above acts. This provision applies regardless of whether the company is in an insolvency situation. The Commercial Code does not specifically address environmental issues and liabilities. The UAE has specific environmental legislation both at a federal level and in each emirate. The main federal law is Federal Law No. 24 of 1999 Concerning the Protection and Development of the Environment; however, this is of general application and does not cover liability on insolvency.

42 Liabilities that survive insolvency or reorganisation proceedings

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

There are no provisions in the UAE Bankruptcy Law that seem to suggest that liabilities will survive the liquidation of the debtor. In relation to reorganisations, in the normal course of events, liabilities may survive only if the preventive composition or bankruptcy restructuring is unsuccessful.

43 Distributions

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

The UAE Bankruptcy Law provides that the trustee shall apply the proceeds of liquidation of the debtor's assets towards any claims owed by the debtor under supervision of the court in line with the applicable waterfall of priority of claims and the treatment of preferential creditors. In respect of a reorganisation, if a preventive composition or bankruptcy restructuring has been finalised, distributions shall be made pursuant to the terms of the preventive composition or the restructuring.

Security

44 Secured lending and credit (immovables)

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

Security over real property is usually taken in the form of a mortgage. Mortgages over real property may consist of:

- mortgages over freehold land and buildings constructed on such land;
- mortgages over leasehold interests in real property; and
- mortgages over buildings constructed on leased land.

The mortgage gives the mortgagee a security interest over the real property in question for the mortgagor's debt. As a result of the mortgage, the mortgagee obtains a priority right over unsecured creditors in general, although it is unclear whether certain preferred unsecured claims, including employee wage and tax claims, would be preferred over secured creditor claims. It should be noted that, other than in certain designated areas, restrictions on foreign ownership of real property exist throughout the UAE. In brief, each emirate is free to enact its own legislation in relation to foreign ownership of real property. In Dubai, the local population and nationals from Gulf Cooperation Council (GCC) countries can hold the title to freehold property without distinction, though foreign owners may only hold the freehold title within specifically designated areas. There are also restrictions on the length of leaseholds. For certain practical reasons, and, indeed, for registrable security (eg, mortgages over immovable property) it is a requirement for a local bank registered with the Central Bank to hold the security.

45 Secured lending and credit (movables)

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

The principal types of security taken on movable property are pledges, business mortgages and assignments.

Pledges over movables are effective if:

- possession of the pledged asset is transferred from the pledgor to the pledgee, or to a third party; and
- throughout the term of the pledge, the pledged asset continues to be held in a manner that prevents the pledgor from disposing of the assets without the consent of the pledgee.

It should be noted in this context that a new federal law No. 20/2016 (Movables Law) has been passed that has removed the requirement to take physical possession of most types of movable assets. The implementing regulations and necessary infrastructure has now been established by the Emirates Development Bank and is known as the Emirates Movable Collateral Registry. The Emirates Movable Collateral Registry allows for: (i) free public searches of registered security; (ii) certified searches of registered security, (iii) registration of notices of security interests; and (iv) registration of notices of termination of security interest.

A business mortgage (a pledge over a commercial business) can be taken over a commercial business (usually interpreted to cover all the tangible and intangible property of a commercial trader); however, it may only be granted to banks and financial institutions. The items that are secured pursuant to a business mortgage should be in existence and identifiable and cannot be changed after perfection without additional formalities, as the concept of a floating charge is not recognised. Business mortgages automatically expire after five years unless renewed. Because of the uncertainty of the UAE insolvency regime, it is unclear whether a company's inventory or tradable assets would fall within the definition of a business mortgage. It should also be noted that, while there may be some similarities between the business mortgage and an English law floating charge, the concept of a floating charge is not recognised under UAE law.

Pledges can be created over shares issued by some UAE incorporated companies, although difficulties may arise for foreign creditors taking or enforcing such pledges because of laws restricting foreign ownership in UAE companies. In general, UAE companies must be 51 per cent owned by UAE or GCC nationals so the exercise of a pledge that results in non-UAE or non-GCC nationals owning more than 49 per cent of a company would be invalid. Account pledges can also be created provided that the monies in the account are ascertainable and identifiable at the date of execution. There is a degree of uncertainty as to the consequence of a change in the initial balance as to the effectiveness of the security, but the conservative view is that every time the account balance fluctuates, the pledge needs to be taken again over the new balance and in practice the frequency of such retake becomes a negotiated point.

Assignment agreements are usually taken as a form of security over contracts, contractual rights, account receivables and insurances. The Civil Code is silent as to whether it applies solely to the assignment of obligations or to the assignment of both rights and obligations. There is also uncertainty as to whether the consent of the obligor is required or an acknowledgment of the assignment in addition to a notice of the assignment. Under UAE law an assignment of future assets, which are not identifiable at the time the assignment is granted, is not permitted. The perfection requirements for each type of security vary depending on the circumstances, such as the location of the secured assets and the asset that is the subject of the relevant security interest. We note that separate perfection requirements are also applicable with respect to mortgages over certain property such as vessels and aircraft.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

The following transactions may be annulled or set aside by the court, and are not binding on the general body of creditors, if they take place during the two years prior to the initiation of the bankruptcy proceedings and it is found that the relevant transaction occurred at a time when the creditor knew, or ought to have known, that the debtor was insolvent and where it can be shown that the transaction has a detrimental effect on the general body of creditors:

- donations, gifts or transactions without consideration with the exception of small gifts that are customary;
- any transaction in which the liabilities of the debtor remarkably exceed the liabilities of the counterparty;
- payment of debts before the maturity date;
- payment of debts with something other than that agreed; and
- providing security or guarantees for a pre-existing debt.

To the extent that the court finds that the transaction was entered into in good faith and for the purpose of the continuation of the debtor's business and that there were grounds for the debtor to believe that the transaction would be of the benefit of the business, the court may not reverse such transaction.

In relation to debtors that have been declared bankrupt, personal, financial and criminal liability may accrue to directors and managers for, among others, preferential treatment of creditors and transactions at an undervalue (see question 16). In this context, the UAE Bankruptcy Law provides that certain transactions (eg, preference, security for pre-existing debts and disposals at an undervalue) which take place during the two years prior to the commencement of the bankruptcy proceedings may be declared invalid and unwound by the court and directors could be sentenced for up to two years in prison in such circumstances (see also question 17).

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There are no provisions in the UAE Bankruptcy Law that specifically deal with limitations on claims by insiders and non-arm's length creditors in the manner that this is dealt with in more sophisticated jurisdictions. We note that, under UAE law, however, courts have general discretion to invalidate and reverse transactions that are entered into on a non-arm's length basis or those that are entered into with third parties, if such third party knew at the time it entered into the relevant transaction that the company had ceased paying its debts.

Groups of companies

48 Groups of companies

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

As a general principle under UAE law, each legal entity has a separate legal personality. Shareholders of limited liability companies and public joint stock companies are not liable for the debts of the insolvent company. Notwithstanding this, it is possible under UAE law to pierce the corporate veil in certain limited circumstances, but this area of law is not very well developed and there are few published cases. In particular, decisions of the UAE courts suggest that a shareholder can be directly liable to the company's creditors in situations involving fraud, deceit and negligence or serious error in its dealings with the company's creditors - it is worth noting that these judgments have not been directly related to insolvency or restructuring cases and there is no binding system of precedent in the UAE.

Although the drafting of the provision is unclear, the UAE Bankruptcy Law provides in the penalties section that:

Every person who works at the juristic person (ie, legal entity) subject to the provisions of this Decree Law and plays an effective role in decision making therein shall be considered a manager, in this Section. This shall include the person under whose directives and instructions the manager acts.

It seems to introduce a concept of 'shadow directorship' which seems to suggest, if a purposive interpretation was applied, that where a person (including a shareholder) directs the management of a company, that person may be liable under the UAE Bankruptcy Law if any of the specified offences are committed.

The legislation does not provide any guidance on how and when distributions of group company assets (including assets owned by a group entity) will be made but, as highlighted previously, the judge has considerable discretion when considering such distributions.

49 Combining parent and subsidiary proceedings

In 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?

The UAE Bankruptcy Law does not contain provisions that address group insolvencies; however, the legislation is largely untested as there has yet to be a major corporate insolvency in the UAE using the UAE Bankruptcy Law. As noted in question 1, the DWG Decree was passed specifically in respect of the restructuring of the DWG and should the need arise to deal with a large group restructuring the issuing of a similar decree cannot be ruled out. Other large corporate reorganisations may have occurred outside the formal legal framework and it may be that group restructurings are also dealt with outside the formal insolvency framework.

International cases

50 Recognition of foreign judgments

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?

The provisions relating to liquidation apply to foreign companies that conduct their principal activity in the UAE or have their centre of management in the UAE. As noted elsewhere, there has yet to be a major corporate insolvency in the UAE and the general insolvency regime is largely untested. In addition, there is no specific legislation that deals with foreign insolvencies that may have a link to the UAE. As a result, it is likely that any such proceedings would be dealt with under normal UAE private international law and would therefore have to be enforced in accordance with the rules on enforcement of foreign judgments. Foreign judgments are not automatically enforceable in the UAE and, in particular, the Civil Procedures Code requires reciprocity of enforcement between the UAE and the country issuing the judgment. Under the Civil Procedures Code, a judgment of a foreign court may be enforced in a UAE court if:

- no UAE court has jurisdiction in the dispute and the foreign court did have jurisdiction;
- the parties in relation to which the judgment was issued have been given due notice of the proceedings and were represented;
- the foreign judgment is final; and
- the judgment does not contradict any judgment issued in the UAE and contains nothing that would be in breach of public policy, order or morals.

The UAE courts have a broad jurisdiction to hear any proceeding with a UAE element. In summary, the UAE courts may assume jurisdiction if:

- a party is domiciled in the UAE;
- the claim concerns an asset that is located in the UAE;
- the claim concerns a contract under which the contractual obligation should have been or was performed, concluded, executed, completed or relevant payments were made in the UAE;
- the claim is in respect of insolvency that has been declared in the UAE;
- the claim is against a UAE national or expatriate who is domiciled in the UAE; or
- the claim concerns a party who is employed in the UAE.

We are not aware of any international treaties on insolvency having been signed by the UAE. The UAE is a signatory to the New York Convention on the Recognition and Enforcement of Arbitral Awards and has signed a limited number of treaties on the recognition of foreign judgments, including the Riyadh Arab Agreement for Judicial Cooperation and the GCC Convention for the Enforcement of Judgments and Judicial Notices and Delegations (the GCC Convention), which was ratified by the UAE in June 1996. Under the GCC Convention, judgments issued in any of the six member countries of the GCC (UAE, Bahrain, Qatar, Kuwait, the Kingdom of Saudi Arabia and the Sultanate of Oman) are enforceable in any other GCC country.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

We are not aware of any proposal to adopt the UNCITRAL Model Law on Cross-Border Insolvency.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

The UAE Bankruptcy Law does not contain provisions that address foreign creditors specifically. Foreign creditors will have to prove their claims in a preventive composition or bankruptcy restructuring procedure as per the relevant provisions in the UAE Bankruptcy Law that apply to creditors of the debtor.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

The UAE Bankruptcy Law does not contain provisions that address cross-border transfer of assets under administration. The UAE is not party to any international insolvency or restructuring treaties and the Commercial Code, the Companies Law and the Civil Code are also silent on whether assets could be transferred from a UAE administration to a foreign administration.

54 COMI

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 Commercial Code does not set out a specific test and the question of determining this has not to our knowledge been addressed and the legislation is largely untested as there has yet to be a major corporate insolvency in the UAE using the UAE Bankruptcy Law. In principle, the UAE courts have jurisdiction to hear bankruptcy cases relating to any entity that is governed by the UAE Bankruptcy Law, that conducts its principal activity in the UAE, or that has its central management in the UAE as defined in the Commercial Code.

55 Cross-border cooperation

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?

Neither the Commercial Code, the Civil Code nor the UAE Bankruptcy Law provides guidance to courts in such circumstances. We are not aware of any formal cooperation processes between the UAE and foreign courts and officials in the context of insolvencies and restructurings. The UAE has not incorporated into national law the UNCITRAL Model Law on Cross-Border Insolvency and there are no provisions in the UAE law for recognition of insolvency proceedings commenced in other jurisdictions or for cooperation with the courts of other jurisdictions. The UAE courts may recognise a foreign judgment of insolvency on a reciprocal basis, but such recognition would be subject to a number of conditions, including compliance with public policy in the UAE, both parties having obtained adequate representation and the judgment being obtained from a jurisdiction that enforces UAE judicial rulings. As a matter of practice, however, the UAE courts will generally seek to assert their jurisdiction over any matter involving UAE parties and they are unlikely to recognise the appointment of foreign insolvency officials or proceedings without consideration of the issues independently under UAE law.

56 Cross-border insolvency protocols and joint court hearings

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?

We are not aware of the UAE courts having entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries or having communicated or held joint hearings with courts in other countries in cross-border cases.



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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

Title 11 of the United States Code (the Bankruptcy Code) governs insolvencies and reorganisations in the United States. A federal statute, the Bankruptcy Code pre-empts state laws governing insolvency and restructuring of debtor–creditor relationships.

2 Excluded entities and excluded assets

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

A debtor must have a domicile, residence, place of business or property in the United States to be eligible for relief under the Bankruptcy Code. Eligible debtors include corporations, partnerships, limited liability companies, other business organisations and individuals. Specialised provisions apply to municipalities, railways, stockbrokers, commodity brokers, clearing banks, family farmers and fishermen. Domestic insurance companies, most domestic banks, similar financial institutions and small business investment companies licensed by the Small Business Administration are excluded. State regulators have jurisdiction over insolvent insurance companies and state-chartered financial institutions. Federal regulators have jurisdiction over federally chartered financial institutions.

The commencement of a bankruptcy case other than with respect to a municipality or an ancillary proceeding under Chapter 15 creates an estate comprising all legal or equitable interests of the debtor in property as of the commencement of the case, wherever located. The Bankruptcy Code's definition of property of the estate is very broad and includes all types of property, including tangible and intangible property, as well as causes of action. Notwithstanding the breadth of the bankruptcy estate, an individual debtor may exempt certain property from its scope, thereby excluding it from his or her insolvency proceedings and rendering it immune from the claims of most pre-petition creditors. The Bankruptcy Code prescribes minimum federal exemptions with respect to statutorily delineated items. However, a state may opt out of the federal exemptions and require individual debtors to look to the state's exemption law. State law exemptions vary. The federal exemptions are illustrative of property typically exempt under state law, and include, subject to a monetary cap that varies depending on the category of property, among others, an interest in the debtor's homestead, a motor vehicle, personal jewellery, household goods and furnishings, and tools of trade. Property exempted under either the federal or state system remains subject to certain types of claims, including non-dischargeable taxes, non-dischargeable alimony, maintenance or support obligations and unavoidable liens.

3 Public enterprises

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

Chapter 9 of the Bankruptcy Code governs municipal bankruptcies. An entity may only be a debtor under Chapter 9 of the Bankruptcy Code if such entity:

- is a municipality;
- is specifically authorised in its capacity as a municipality or by name to be a debtor under such chapter by state law, or by a governmental officer or organisation empowered by state law to authorise such entity to be a debtor under such chapter;
- is insolvent;
- desires to effect a plan to adjust its debts;
- has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
- has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
- is unable to negotiate with creditors because such negotiation is impracticable; or
- reasonably believes that a creditor may attempt to obtain a transfer that is avoidable as a preferential transfer under section 547 of the Bankruptcy Code.

Assuming a municipality is eligible for Chapter 9 protection, the case proceeds like a Chapter 11 reorganisation case. The municipal debtor may assume or reject executory contracts, and attempts to negotiate a restructuring plan with its stakeholders. However, the standards for confirming a Chapter 9 plan and other aspects of a Chapter 9 case differ significantly from those applicable in a corporate restructuring under Chapter 11 of the Bankruptcy Code. The differences reflect congressional concern about maintaining the proper balance between the sovereign integrity of the state, on the one hand, versus the federal constitutional power to enact uniform laws on bankruptcy, on the other. Creditors have many of the same remedies as they do in a traditional bankruptcy case. General unsecured obligations are subject to impairment and restructuring, with special provisions applicable in Chapter 9 to certain types of obligations, such as special revenue bonds. Creditors must file proofs of claim, and while an official committee of unsecured creditors is not automatically appointed, the United States Trustee has the authority to appoint committees of creditors holding similar claims to represent such interests during the case. In the end, seeking dismissal of the Chapter 9 case, if successful, serves as a creditor's strongest remedy.

4 Protection for large financial institutions

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

In response to the 2008 financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) in 2010. The Dodd-Frank Act, inter alia: established a new

independent agency, the Consumer Financial Protection Bureau, to protect consumers from abusive practices relating to mortgages, credit cards and other financial products; established the Financial Stability Oversight Council, made up of federal financial regulators and other financial participants, charged with identifying and responding to emerging systemic risks in the financial system; and implemented legislation to manage 'too big to fail' financial institutions during times of financial stress. The regulatory reform includes creation of an orderly liquidation mechanism that allows the Federal Deposit Insurance Corporation to unwind failing systemically significant financial institutions (SIFIs) outside of bankruptcy. In addition, SIFIs must create 'living wills' detailing how the SIFI would plan for a rapid and orderly shutdown should the enterprise face financial failure. The Volcker Rule, also promulgated under the Dodd-Frank Act, imposes a number of trading restrictions on financial institutions in an effort to separate the investment banking, private equity and proprietary trading sections of a financial institution from its retail and consumer lending arms. The expansive Dodd-Frank Act legislates numerous other areas of the financial system in an effort to lower and more effectively manage systemic financial risk. Both the Volcker Rule and the Dodd-Frank Act face review and revision by regulators and Congress under the Trump administration. In May 2018, the Economic Growth, Regulatory Relief, and Consumer Protection Act (S2155) was enacted. Among other things, the Act relieves banks with less than US\$250 billion in assets from some of the Dodd-Frank Act's strictest post-financial crisis regulatory requirements.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Bankruptcy courts preside over insolvencies and reorganisations conducted under the Bankruptcy Code. They are units of the federal district courts and have limited jurisdiction. They may only enter final orders and judgments in certain 'core' matters, that is, those that invoke a substantive right under the Bankruptcy Code or that, by their nature, could only arise in bankruptcy. In non-core matters, in the absence of the parties' consent, the bankruptcy court may only submit proposed findings of fact and conclusions of law to the district court for de novo review. A non-core matter is one that does not depend on bankruptcy law for its existence and that could proceed in a non-bankruptcy forum. The federal district court in the district in which the bankruptcy court sits hears appeals from bankruptcy court decisions, although direct appeals to the federal circuit court of appeals may be taken in certain instances. With the parties' consent, a bankruptcy appellate panel (BAP) may also hear appeals from a bankruptcy court order if one has been established in the relevant judicial circuit. Panels of three bankruptcy court judges comprise BAPs. In contrast, a single district court judge typically hears appeals to the district court. Appeals to the federal circuit courts of appeal and, ultimately, the United States Supreme Court, provide additional levels of appellate review.

A party may appeal a final order of the bankruptcy court as of right, and may appeal an interlocutory (or non-final order) with leave of the court. A decision is final if it ends the litigation on the merits, and leaves nothing for the court to do but execute the judgment. An interlocutory order only decides some discrete matter pertaining to the case, and requires additional steps for full adjudication. District courts generally adopt a flexible approach to the concept of finality in the bankruptcy context, recognising that, unlike a traditional civil case, a bankruptcy case may give rise to numerous discrete disputes that could be finally adjudicated for purposes of an appeal.

Appeals of interlocutory orders require the filing of a motion for leave to appeal in addition to the filing of a notice of appeal. District courts may review an interlocutory order if: the order involves a controlling question of law as to which there is substantial ground for difference of opinion; and immediate appeal from the order may materially advance the ultimate termination of the litigation or advance the bankruptcy proceedings.

However, granting leave to file interlocutory appeals in bankruptcy cases is the exception, not the rule; interlocutory appeals are disfavoured because of the disruptive effect such appeals generally have on

the bankruptcy process and a debtor's restructuring efforts. Federal circuit courts of appeal, in contrast to district courts, generally only have jurisdiction over final orders. Appeals of bankruptcy matters to the US Supreme Court also do not proceed as of right, and are granted in the court's discretion. An appellant does not need to post security or a bond to proceed with an appeal unless the appellant seeks a stay of the order of the bankruptcy judge pending appeal. Posting security in the form of a bond protects the prevailing party against any loss that might result from a stay of the order. In determining whether a bond should be required, a court will focus on whether the bond is necessary to protect against any reduction in value of the subject property pending appeal, and to secure the prevailing party against any loss that might be sustained as a result of an ineffectual appeal. Courts have the discretion to grant a stay pending appeal without requiring the appellant to post a bond. Because a bond is meant to protect the non-moving party from the potential harm of a stay, courts consider a number of factors when sizing the amount of the bond in bankruptcy cases. Where a movant seeks to stay an appeal of a court order confirming a Chapter 11 plan, for example, the potential harm caused by the stay may be the diminishing value of the entire Chapter 11 estate occasioned by the stay. In such cases, the potential harm could be substantial, and courts have required bonds over US\$1 billion. As a practical matter, this effectively denies the stay of the order, as few parties have the funds (or appetite to risk) such amounts.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

Chapter 7 governs liquidation and is commenced by filing a petition in the bankruptcy court in the judicial district where the company is incorporated or has its principal place of business or assets or, in the case of an individual, where he or she has a domicile or residence. Filing the Chapter 7 petition immediately triggers the automatic stay and enjoins most creditor enforcement actions. It also creates the bankruptcy estate. A trustee is appointed, who typically displaces the company's management and who may operate the debtor's business for a limited period if doing so is in the best interests of the estate and consistent with its orderly liquidation. In the case of an individual debtor, the trustee will oversee and administer the case, and will liquidate the debtor's non-exempt assets. Companies and individuals may also seek to liquidate under Chapter 11.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Any eligible debtor who proceeds in good faith may commence a Chapter 11 case by filing a petition and paying a filing fee. A debtor need not be insolvent, either on a cash flow or balance sheet basis. The filing of a Chapter 11 petition immediately triggers the automatic stay and creates the Chapter 11 estate. A Chapter 11 debtor typically continues to operate its business as a 'debtor-in-possession'. It enjoys the exclusive right to propose a Chapter 11 plan for the first 120 days of the case, which exclusive right may be extended for cause to no more than 18 months, after which other interested parties may file their own plans.

8 Successful reorganisations

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

Confirmation of a plan requires, among other things, that the Chapter 11 plan:

- be proposed in good faith and not by any means forbidden by law;
- designate all claims and interests into classes (such that all claims or interests in a particular class must be substantially similar);
- specify the treatment of each class of claims or interests and state whether such classes are impaired or unimpaired;

- include, if at least one class of claims is impaired by the plan, at least one accepting class of impaired claims (determined without including any acceptances by insiders);
- provide adequate means for the plan's implementation;
- be 'feasible' (ie, not likely to be followed by the need for liquidation or another financial reorganisation); and
- with respect to each impaired class of claims or interests, provide that each holder of a claim or interest in such class either has voted to accept the plan or will receive or retain under the plan on account of such claim or interest, property of a value as of the effective date of the plan that is not less than the amount that such holder would receive or retain if the debtor were liquidated under Chapter 7 of the Bankruptcy Code.

Known as the 'best interests of creditors test', this last requirement ensures that creditors and interest holders who do not vote in favour of the plan receive at least as much under the plan as they would receive if the debtor were liquidated under Chapter 7. Unimpaired classes are classes whose claims are reinstated or paid in full as if the bankruptcy had not occurred. They are deemed to have accepted the plan and are not entitled to vote on the plan. Conversely, classes that receive no distribution under the plan, likewise, are not entitled to vote because they are deemed to have rejected the plan.

Holders of impaired claims or interests may vote to accept or reject a plan. A class of claims is deemed to accept a plan if such plan has been accepted by creditors that hold at least two-thirds in amount and more than half in number of the allowed claims of such class held by creditors that have voted. A class of interest holders accepts a Chapter 11 plan if holders of in excess of two-thirds of the number of shares actually voting accept the plan. If an impaired class rejects a plan, the plan may be confirmed only through 'cramdown'. Cramdown requires, in addition to the requirements above, that the plan does not 'discriminate unfairly'; and it must be 'fair and equitable' with respect to each impaired, non-accepting class. To avoid unfair discrimination, a plan must classify similarly situated claims together and treat them similarly. The 'fair and equitable' standard strives to respect the existing priorities of claims and interests (the 'absolute priority rule') so that senior claims in dissenting classes must be satisfied in full before junior claims or interests can receive or retain any property under the plan.

While debtors may in appropriate circumstances release others, courts remain divided over whether a plan may include releases by creditors and other parties in interest in favour of non-debtors. Such releases are permitted only in unusual circumstances, if at all. At a minimum, third-party releases must be necessary and fair. 'Deemed releases,' that is, releases granted automatically by a plan based on a creditor's unimpairment or failure to elect not to grant a release, remain controversial and some district courts have held such releases exceed a bankruptcy court's jurisdiction. A plan may, however, contain releases and exculpations in favour of the debtor's officers, directors, advisers and other professionals, as well as statutory committees and their advisers, and in appropriate instances other key stakeholders who provided substantial consideration to the reorganisation (including lenders) and their advisers, for acts and omissions made in connection with or arising from the Chapter 11 case itself.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Creditors may file an involuntary Chapter 7 liquidation against any debtor that would be eligible to file a voluntary case that is not paying its debts, other than farmers, railways and not-for-profit corporations. In general, at least three creditors holding in aggregate unsecured claims of US\$15,775 that are not contingent as to liability or in dispute as to liability or amount, must sign the involuntary petition. If contested, the court may not order relief unless the debtor is generally not paying its debts as they become due (unless such debts are the subject of a bona fide dispute as to liability or amount), or the debtor turned its assets over to a custodian for liquidation in the 120 days before the date of the filing of the petition. Balance sheet insolvency is not grounds for involuntary relief. The filing of an involuntary petition triggers the

automatic stay. The debtor may continue to operate its business during the 'gap' period while an involuntary petition is contested, although the court may appoint an interim trustee for cause. If the court grants an involuntary petition, the case proceeds in the same manner as a voluntary Chapter 7 case and a trustee is appointed. The debtor may convert an involuntary Chapter 7 case to a voluntary Chapter 11 case to maintain control of the bankruptcy process.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Creditors must meet the same requirements applicable to an involuntary Chapter 7 case to obtain involuntary Chapter 11 relief. If the court grants the involuntary Chapter 11 petition, the case proceeds like any other Chapter 11 case.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

The Bankruptcy Code specifically authorises expedited reorganisations and permits prepackaged plans that a debtor negotiates and in respect of which it solicits votes prior to filing for Chapter 11 relief. A debtor may also file a 'pre-arranged' Chapter 11 case in which it negotiates pre-Chapter 11 the terms of its reorganisation with major creditor constituencies but does not solicit votes in favour of a plan until after the Chapter 11 filing.

12 Unsuccessful reorganisations

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 Chapter 11 plan must meet the confirmation requirements described in question 8. Failure to confirm a Chapter 11 plan provides grounds for dismissal or conversion of the case to a liquidation under Chapter 7. A court may also permit the filing of an alternative plan. Material default under a confirmed plan or inability to substantially consummate a confirmed plan constitute grounds for dismissal or conversion to liquidation under Chapter 7. The court may give a plan proponent the opportunity to cure a default under a confirmed plan. A debtor may also modify a plan after its confirmation and before its substantial consummation if the modified plan meets the requirements for confirmation.

13 Corporate procedures

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

A corporation may dissolve or liquidate under state law. Modern corporate statutes generally provide that directors of dissolved corporations may distribute assets to shareholders only after discharging or making reasonable provision for the payment of creditors. Unlike bankruptcy, state law dissolution provides little court supervision and lacks the benefit of an automatic stay. State law procedures are also not subject to oversight by the US trustee or official creditors' committees and no collective enforcement action exists. Under state law, directors and officers may be personally liable for unlawful distributions or the failure to adequately provide for claims, including unknown and contingent claims. In contrast, the bankruptcy process provides a centralised and judicially supervised forum for winding up a company's affairs. While more formal than state dissolution processes, bankruptcy provides greater transparency to stakeholders and ensures a greater degree of immunity for officers and directors acting on behalf of the company.

14 Conclusion of case**How are liquidation and reorganisation cases formally concluded?**

In a Chapter 7 case, after all available assets have been sold and proceeds distributed to creditors, the trustee files a final report and account and certifies that the estate has been fully administered after which the court discharges the trustee and enters an order closing the case. A Chapter 11 debtor emerges from bankruptcy protection when its confirmed plan becomes effective, at which time it can resume operating without court oversight. Most Chapter 11 plans become effective upon their substantial consummation, that is, when:

- all or substantially all of the property proposed by the plan to be transferred has been transferred;
- the debtor or its successor has assumed management of all or substantially all of the property the plan addresses; and
- distributions under the plan have commenced.

After the Chapter 11 estate is fully administered, the court enters a final decree closing the case.

Insolvency tests and filing requirements**15 Conditions for insolvency****What is the test to determine if a debtor is insolvent?**

Two primary tests for insolvency exist under US law: equitable insolvency, generally defined as a debtor's inability to pay debts as they become due in the usual course of business; and balance sheet insolvency, generally defined as a financial state in which the amount of the debtor's liabilities exceeds the value of its assets. The Bankruptcy Code adopts the balance-sheet test for insolvency and defines 'insolvent' as a financial condition such that the sum of the debtor's debts is greater than all of the debtor's property at a fair valuation. The Bankruptcy Code uses the term in various provisions, including with respect to the fixing of statutory liens, reclamation rights, avoiding powers (eg, fraudulent and preferential transfers) and set-offs. Bankruptcy courts have generally adopted a flexible approach to insolvency analysis. They value companies that can continue day-to-day operations on a going concern or market price basis, and may rely on a combination of valuation methodologies. Exceptions exist to the use of the balance sheet insolvency test with respect to involuntary bankruptcy petitions and a municipality's eligibility for bankruptcy relief: in those cases, the Bankruptcy Code employs a variant of the equitable insolvency standard and only permits relief if the debtor is generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute as to liability or amount. A debtor need not be insolvent to file for bankruptcy relief.

16 Mandatory filing**Must companies commence insolvency proceedings in particular circumstances?**

US law imposes no absolute obligation on a company's board to commence insolvency proceedings. The board of an insolvent company may in good faith pursue strategies to maximise the value of the company that do not involve commencement of insolvency proceedings.

Directors and officers**17 Directors' liability – failure to commence proceedings and trading while insolvent****If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?**

When a company is actually insolvent, the directors' fiduciary duties to the corporation under many states' laws expand to include the interests of creditors, as well as of shareholders. But no other consequences exist if a company carries on business while insolvent, assuming it does so in good faith and in accordance with applicable law. Courts generally view creditors in such circumstances as having sufficient protections through their contractual arrangements with the company, or

fraudulent conveyance law and the implied covenant of good faith and fair dealing, such that additional layers of protection are considered unnecessary.

18 Directors' liabilities – other sources of liability**Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?**

As noted in questions 16 and 17 above, US law imposes no obligation to file a company for bankruptcy relief when the company is insolvent. Accordingly, corporate officers and directors are not personally liable for 'failure to file for proceedings'. If officers and directors comply with corporate law formalities, they are generally not liable for the debts and liabilities of the corporations they serve. Liability may arise on a corporate veil piercing theory. An officer or director who is a 'control person' may also be liable for certain state and federal payroll taxes that were not withheld and paid over to taxing authorities. Similarly, corporate directors and officers do not have personal liability for pre-bankruptcy actions unless they are found to have breached their fiduciary duties. Generally, no fiduciary obligations to creditors exist. Creditor rights are governed by contract, statute and case law concerning debtor-creditor relationships. Upon insolvency (or near insolvency), the directors' and officers' fiduciary obligations to the corporation may expand to take into account the interests of creditors who, upon insolvency, become the residual risk-bearers in the enterprise; however, state law is not necessarily consistent or fully developed with respect to such matters. As in all situations, directors and officers may be criminally prosecuted for fraud, securities law violations and other crimes related to the conduct of the business. Mere insolvency, or operating a company while insolvent, however, does not give rise to liability.

19 Shift in directors' duties**Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?**

Upon insolvency (or near insolvency), the directors' and officers' fiduciary obligations to the corporation may expand to take into account the interests of creditors who, upon insolvency, become the residual risk-bearers in the enterprise; however, state law is not necessarily consistent or fully developed with respect to such matters. The Supreme Court of Delaware, for example, has ruled that directors of a solvent Delaware corporation operating in the 'zone of insolvency' must continue to discharge their fiduciary duties to the corporation and its shareholders, not its creditors. Accordingly, in Delaware, the actual point of insolvency determines when the directors' duties may shift to include creditor interests.

20 Directors' powers after proceedings commence**What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?**

In general, directors and officers continue to exercise their normal powers in the ordinary course after the commencement of a Chapter 11 case and a bankruptcy court will not interfere in the corporate governance of the debtor absent a showing of 'clear abuse'. Thus, the Bankruptcy Code leaves state corporate governance law largely untouched and bankruptcy courts generally do not take sides in corporate governance disputes. The primary exception is the power to order the appointment of a Chapter 11 trustee. Section 1104 of the Bankruptcy Code authorises a bankruptcy court to appoint a Chapter 11 trustee 'for cause' or 'if such appointment is in the interests of the creditors, any equity security holders, and other interests of the estate'. Courts consider a number of factors when determining whether to appoint a trustee, and doing so does not necessarily require a finding of fault. These factors include, among others: the trustworthiness of the debtor; the debtor-in-possession's past and present performance and prospects for the debtor's rehabilitation; the confidence – or lack thereof – of the business community and of creditors in present management; and the

benefits derived by the appointment of a trustee, balanced against the cost of appointment. The appointment of a Chapter 11 trustee, however, remains the exception rather than the rule.

In contrast, in a Chapter 7 case, an independent trustee is appointed who displaces management. The board typically resigns. The Chapter 7 trustee's primary purpose is to collect, liquidate and distribute estate property as expeditiously as is compatible with the best interests of the parties. In rare instances, a Chapter 7 trustee may continue to operate the debtor's business for purposes of maximising its liquidation value.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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 filing of a bankruptcy petition (other than a petition for ancillary relief under Chapter 15) triggers an automatic stay and no formal court order need be obtained. The automatic stay is broad in scope and applies to almost all types of creditor actions against the debtor or property of its estate. The limited statutory exceptions to the stay include criminal proceedings against the debtor, enforcement of a governmental unit's police or regulatory powers, a non-debtor party's right to close out most securities and financial contracts, and certain other actions taken by specified parties. A court may, upon a creditor's request and after notice and a hearing, grant relief from the automatic stay: 'for cause, including the lack of adequate protection of an interest in property' held by such creditor; or with respect to an action against property of the estate, if the debtor does not have any equity in such property (ie, the claims against such property exceed its value) and such property is not necessary for the debtor's effective reorganisation.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

No specific conditions apply to a debtor's ordinary course operation of its business during a reorganisation and it may do so without notice to creditors or court order. The debtor-in-possession, however, becomes an officer of the court and has a fiduciary duty to protect and preserve the assets of the estate and to administer them in the best interests of its creditors. Creditors who supply goods or services post-petition are usually paid on a current basis and, if not, have an administrative expense claim that usually entitles them to a full recovery as a condition to the debtor's emergence from Chapter 11.

One or more official and, often, unofficial committees and the US trustee monitor the debtor's activities during reorganisation. The court may also appoint a trustee for cause, including fraud, dishonesty, incompetence or gross mismanagement and, in certain cases, an examiner may be appointed to investigate specified matters. The court generally does not insert itself into the day-to-day management of the debtor's affairs and when court approval is required, generally defers to the debtor's business judgment. A debtor must obtain court approval for transactions not in the ordinary course; use of a secured lender's cash collateral (in the absence of its consent); compromises and settlements; and debtor-in-possession financing. The court must also approve the debtor's retention and payment of professionals.

23 Post-filing credit

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

Section 364 of the Bankruptcy Code governs post-petition financing. A debtor-in-possession may obtain post-petition unsecured credit in the ordinary course of its business without court approval. Other financing requires court approval. The court may authorise unsecured

post-petition credit as an administrative expense. It may also grant the lender a 'super priority' claim that has priority over all other administrative priority and general unsecured claims, other than the payment of administrative expenses in a superseding Chapter 7 case. A debtor-in-possession may also obtain secured credit and the court may authorise a lien that is junior, senior or equal to an existing lien on the debtor's assets. Liens that are senior or equal to existing liens may be granted if the debtor demonstrates that it is unable to obtain credit otherwise, and adequate protection of the existing lienholder's interests exists. Non-consensual priming liens are rare, as debtors usually cannot provide pre-petition secured lenders with adequate protection because of a lack of unencumbered cash flow and assets. Trustees in Chapter 7 cases may also obtain credit if authorised to operate the debtor's business.

24 Sale of assets

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?

Sections 363 and 365 of the Bankruptcy Code govern the sale of assets outside the ordinary course of business (including the sale of some or all of the debtor's business), and assumption and assignment of leases and executory contracts. A debtor must support such a proposed sale or use of property with an articulated business reason. This business judgment standard is flexible, and courts consider all salient factors pertaining to the proceeding and proposed sale when determining whether a proffered business justification satisfies the standard with respect to any particular transaction. A debtor may also sell assets or its business pursuant to a Chapter 11 plan. A purchaser typically acquires the assets free and clear of any claim or interest. Future claims, that is, claims where the injury has not yet manifested itself (typically based on product liability or similar tortious conduct), present the principal exception to this general rule and may give rise to successor liability.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The Bankruptcy Code permits private asset sales as well as auctions. Auctions typically take place outside the courtroom pursuant to judicially approved sales procedures. Auctions often include a sale agreement that sets the floor for other bids – a 'stalking horse bid'. The court approves the terms of the stalking horse bid, including any break-up fee or other buyer protections.

Unless the court for cause orders otherwise, the Bankruptcy Code in general permits a secured creditor to bid up to the full amount of its claim to purchase a debtor's assets during a bankruptcy case and the practice is common. The Bankruptcy Code does not define 'cause'. Courts interpret the term flexibly and apply it on a case-by-case basis. Little case law exists addressing what constitutes 'cause' to deny a secured creditor's right to credit bid. Rulings suggest that a court will only limit a secured creditor's right to credit bid where the creditor's lien is not fully perfected, collusion exists, or allowing the original credit bid would chill the bidding process and suppress the sale price. Absent collusion or lack of good faith, the fact that the credit bidder is an assignee of the original secured creditor should not affect the assignee's right to credit bid, and the practice is common. The US Supreme Court has definitively ruled that a secured creditor has an absolute right to credit bid when a debtor sells a secured creditor's collateral under a Chapter 11 plan, rather than pursuant to section 363 of the Bankruptcy Code during the pendency of the case.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

Upon notice and a hearing, a debtor may reject almost any pre-petition executory contract or lease other than a collective bargaining agreement, which it may only reject or modify in compliance with section 1113 of the Bankruptcy Code. A debtor may also not unilaterally reject or fail to pay retiree insurance benefits; these may only be modified or rejected in compliance with section 1114 of the Bankruptcy Code. The rejection of a contract is deemed a pre-petition breach that gives rise to an unsecured claim for damages. Rejection of the contract relieves the debtor and non-debtor party to the contract of continued performance. Where a debtor's obligations stem from pre-petition contractual liability, even a post-petition breach will be treated as a pre-petition liability if the debtor elects to reject the agreement. When a debtor elects to assume a contract, it is required to cure any defaults including amounts owed on account of post-petition breaches. Where a debtor-in-possession elects to continue to receive benefits from the non-debtor contract counterparty to an executory contract pending a decision to assume or reject the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services. Thus, claims of contract counterparties who are induced to supply goods or services to a debtor-in-possession pursuant to a contract that has not been rejected are afforded administrative priority to the extent that the consideration supporting the claim was supplied during the reorganisation.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The automatic stay prevents an IP licensor from terminating the debtor's right to use the licensed intellectual property. Courts usually treat IP licences as executory contracts and a debtor may continue using the IP during its Chapter 11 case if it pays royalties and otherwise complies with the licence. A debtor's ability to assume an IP licence and continue using it after exiting from bankruptcy, or selling the IP licence to a third party, may generate controversy and depends on the nature of the licence under non-bankruptcy law. Section 365(n) of the Bankruptcy Code protects a licensee's right to use intellectual property where the debtor is the IP licensor. Prior to rejecting an IP licence, the debtor must perform the contract, provide the licensee with the IP and otherwise not interfere with the licensee's contractual rights. A licensee may elect to retain its rights under the IP licence, as such rights existed immediately before the commencement of the bankruptcy case, notwithstanding the debtor's rejection of the IP licence if it makes royalty payments and waives any set-off and administrative claims arising under the licence.

28 Personal data

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

The Bankruptcy Code restricts the ability to sell or lease estate assets if the assets include 'personally identifiable information' about non-debtor individuals, and if the debtor, in connection with offering a product or service, has in effect on the petition date a policy that prohibits transfer of such information. Personally identifiable information is broadly defined to mean information provided by an individual to a debtor in connection with obtaining a product or a service from the debtor primarily for consumer use. It includes a person's name, address, contact information, social security number, birth date and the like. In such circumstances, personally identifiable information may only be sold or leased if the sale is consistent with the debtor's

policy, or if, after the appointment of a consumer privacy ombudsman, the court gives due consideration to the facts, circumstances, and conditions of the sale or lease and no violation of applicable non-bankruptcy law would ensue. The court directs the US trustee to appoint a consumer privacy ombudsman if a transaction requires doing so. The consumer privacy ombudsman is a disinterested person compensated by the debtor's estate who assists the court in its consideration of the facts and circumstances of the proposed sale or lease. Relevant information that the ombudsman may present to the court for consideration includes the impact of the transaction on the potential loss of consumer privacy, and the related potential harm and cost.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Federal law and courts strongly favour the use of alternative dispute resolution, and arbitration procedures are employed in bankruptcy cases, although mediation is more commonly used. A court has the discretion to deny arbitration over a core matter integral to the bankruptcy case. The automatic stay enjoins arbitrations commenced prior to the bankruptcy filing from continuing against a debtor, although courts may grant relief from the stay to permit the proceeding to continue and often do so. Disputes that arise in an insolvency case after it is filed, most commonly relating to claims adjudication and avoidance proceedings, may also be subject to arbitration or mediation and bankruptcy courts have the authority to direct parties to submit to such procedures. Large, complex Chapter 11 cases often employ court approved alternative dispute resolution procedures tailored to address the specific exigencies of the case. No types of insolvency disputes exist that are categorically exempt from arbitration and mediation. Indeed, bankruptcy courts may appoint a mediator to facilitate confirmation of a reorganisation plan. In some cases, a party may waive its right to arbitration if, for example, it engages in protracted litigation that prejudices the opposing party. Waiver of arbitration, however, is not lightly inferred and remains the exception rather than the rule.

Creditor remedies

30 Creditors' enforcement

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?

Article 9 of the UCC permits a secured party to repossess collateral by self-help when it can be done without breach of the peace. Disposition of the collateral may be by public or private sale. Every aspect of the disposition must be commercially reasonable. In practice, court proceedings are usually commenced to obtain judicial approval of the repossession and disposition of substantial assets.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

An unsecured creditor generally has no special rights to any of the debtor's property until it obtains and enforces a judgment; commencement of a lawsuit to collect on the debt remains a creditor's principal remedy. A debt collection action may be a streamlined proceeding that gives rise to a judgment in a few months. The suit's complexity typically determines its length. Pre-judgment remedies (writs of attachment, garnishment and replevin) exist. Special procedures generally do not apply to foreign creditors of US debtors, except for the enforcement of arbitration awards involving foreign creditors against US debtors, which generally proceed under federal law.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Creditors receive notice of most significant aspects of a liquidation or reorganisation case, including:

- case commencement;
- the bar date for filing claims;
- dates for the meeting of creditors;
- any proposed sale, use or lease of property outside of the ordinary course of business;
- the deadline to vote on a plan; and
- fee applications of professionals.

Shortly after a case is filed, the US trustee convenes a meeting of creditors at which they may examine the debtor. On motion of any party in interest, the court may also order the examination of any entity, including the debtor. Numerous reporting obligations exist. A debtor (or trustee) must file operating and financial reports that disclose the debtor's business and financial performance while in bankruptcy. A debtor also has a duty to keep records of receipts and disposition of assets, and in a Chapter 11 case, report financial information concerning entities in which the debtor holds a controlling interest.

33 Creditor representation

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 Chapter 11 cases, the US trustee must appoint a committee of creditors holding unsecured claims and may appoint additional committees (eg, to represent equity holders, mass tort claimants or employees). Five to seven creditors, selected from the debtor's 20 largest creditors and who have indicated a willingness to serve, usually comprise a statutory committee. Statutory creditors' committees serve as fiduciaries for unsecured creditors generally and perform an oversight function. They may investigate the debtor's acts, conduct, assets, liabilities, financial condition, business operations and any other matter relevant to the case or to the formulation of a plan. Subject to court approval, a creditors' committee may retain attorneys, financial advisers and other professionals. The debtor pays their approved fees and expenses. Unofficial (or ad hoc) committees, including committees of secured (or undersecured) lenders, equity holders, noteholders and trade creditors, may also play an important role in reorganisations. Ad hoc committees are self-appointed and self-regulated. Like other interested parties, they have standing to be heard on most issues in a case, may file motions, and may otherwise appear before the court and participate in the restructuring process. Ad hoc committees routinely retain attorneys and financial advisers. The debtor may be required to pay an ad hoc committee's professional fees and expenses if the court finds that the committee made a 'substantial contribution' to the case, or if a Chapter 11 plan so provides, although the latter is subject to some debate.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

The court may grant a creditor or, more often, a creditors' committee, derivative standing to pursue actions on behalf of the debtor or its estate, but litigation proceeds generally inure to the benefit of the estate. Alternatively, the trustee may retain an attorney on a contingency fee basis under which the attorney receives a fixed percentage of any recovery, with the excess reverting to the debtor's estate. With

court approval, a debtor's secured lenders or others may fund the debtor's prosecution of a valuable estate claim for the benefit of the estate generally.

35 Claims

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

A debtor lists all known claims in its schedules of assets and liabilities and classifies them as 'disputed', 'unliquidated' or 'contingent' where appropriate. A Chapter 11 debtor usually obtains a court order setting a bar date by which creditors must file proofs of claim; however, if the claim is scheduled in the proper amount and not as disputed, unliquidated or contingent, no proof of claim need be filed in a Chapter 11 case. In Chapter 7 cases, a claim is timely if it is filed no later than 90 days after the first date set for the section 341 creditors' meeting, unless the case is a 'no asset' case in which the claim deadlines may be deferred. Creditors may object to a debtor's characterisation of their claim, and a debtor may object to a creditor's proof of claim. Parties adjudicate a claim dispute before the court. Non-bankruptcy law determines its validity, although the Bankruptcy Code governs the allowance of the claim in bankruptcy and sometimes trumps non-bankruptcy law rights, for example, by disallowing an unsecured creditor's claim for interest accruing post-petition and limiting a landlord's lease rejection damages to a percentage of remaining lease payments. Bankruptcy court orders disallowing a claim may be appealed. In addition, a court may for cause reconsider a claim that has been allowed or disallowed. The Bankruptcy Code defines 'claims' broadly and, as a result, claims for contingent or unliquidated amounts can be recognised and discharged. Courts must estimate contingent or unliquidated claims for purpose of allowance if the fixing or liquidating of the claim would unduly delay the administration of the case. The goal of estimation is to reach a reasonable valuation of the claim as of the date of the bankruptcy filing. The court may estimate contingent or unliquidated claims under whatever method it finds best suited to the particular exigencies of the case, but in determining the amount of the claim, is generally bound by the applicable non-bankruptcy substantive law governing the claim (eg, claims based on alleged breach of contract are estimated under accepted contract law principles). An active and well-developed claims market exists. In the absence of a court order to the contrary, parties may freely transfer bankruptcy claims and the applicable rules have essentially rendered the sale of claims a private transaction between buyer and seller mostly free from court interference. For claims not based on publicly traded securities, the Federal Rules of Bankruptcy Procedure require a transferee to file evidence of the transfer of a claim, typically in the form of an assignment of claim. Any objection to the transfer must be filed within 21 days of the mailing of the notice to the transferor. In the absence of an objection, the transfer is valid. A claim acquired at a discount is enforced for its full face value, and not the discounted purchase price, if the claim is otherwise valid. An exception to this rule is bond debt acquired with an original issue discount, a portion of which may be treated as unmatured post-petition interest. The Bankruptcy Code disallows claims for unmatured post-petition interest unless the creditor claiming the interest is a secured creditor the value of whose security exceeds its claims, or the estates are solvent and can pay unsecured claims in full.

36 Set-off and netting

To what extent may creditors 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 Bankruptcy Code generally honours a creditor's set-off right of mutual pre-petition debts and treats it like a secured claim. Courts have interpreted the Bankruptcy Code's 'mutual debt' requirement, however, as requiring a mutuality of parties, thereby rendering ineffective in bankruptcy agreements to set off amounts owed to affiliates of a counterparty ('triangular set-offs' or cross-affiliate netting),

even though such agreements are enforceable under non-bankruptcy contract law. Except for set-offs arising from certain securities transactions, a creditor must obtain relief from the automatic stay prior to setting off. The Bankruptcy Code does not recognise a set-off if the creditor asserting the right acquired the claim against the debtor from another creditor either after the debtor's bankruptcy filing or within 90 days of the filing while the debtor was insolvent. Set-offs are also barred if the creditor became indebted to the debtor for the purpose of obtaining the set-off, and the creditor incurred the debt within 90 days of the debtor's filing while the debtor was insolvent. Limits also exist on recovery of certain preferential set-offs taken within the 90 days immediately preceding the debtor's filing of its bankruptcy case.

37 Modifying creditors' rights

May the court change the rank (priority) 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 treatment of creditors' claims through equitable subordination, recharacterisation and substantive consolidation. Equitable subordination lowers the priority of a creditor's claim by subordinating it to similarly situated claims upon a showing of wrongful conduct by the claim holder that damaged other creditors. Recharacterisation involves the allowance of a claim based on its economic substance rather than form. A court may recharacterise a debt claim as an equity interest if the purported claim lacks the usual attributes of indebtedness and otherwise functions like equity. A court may 'substantively consolidate' estates. By pooling the assets of, and claims against, two or more entities, substantive consolidation may eliminate differences in relative recoveries or structural priority between the claimants of affiliated entities. Finally, at least some courts have held that they also have the power to disallow claims on equitable grounds in 'rare' cases.

38 Priority claims

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

The major non-employee related unsecured claims entitled to priority in both liquidations and reorganisations are:

- expenses of administering the debtor's estate, along with judicial fees and costs;
- the value of any goods received by the debtor within 20 days before the filing of the case, which goods have been sold to the debtor in the ordinary course of the debtor's business;
- claims arising during the 'involuntary gap period' from the time an involuntary petition is filed to the time the court enters an order granting the requested relief;
- subject to a statutory cap, claims for certain kinds of consumer deposits;
- claims for taxes and customs duties and related liabilities assessed within a certain pre-petition time frame; and
- claims for depository institution capital-maintenance commitments.

Apart from priming liens approved in connection with debtor-in-possession financing, only claims relating to the debtor's preservation or disposition of a secured creditor's collateral, to the extent of any benefit to the secured creditor, are entitled to priority over a secured creditor's lien.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

In general, applicable non-bankruptcy law determines the existence of any employee claims, regardless of whether the employee is terminated before or during a reorganisation or liquidation case, and no

special bankruptcy procedures exist. For example, an employee may have a claim for unpaid severance if he or she is terminated before or during a bankruptcy case, and applicable contract and labour law determines the amount of his or her claim although the Bankruptcy Code imposes a one-year cap on damages arising from rejection of an employment contract. Similarly, non-bankruptcy labour law, including the federal WARN Act, may impose damages or fines on a company for terminating large numbers of employees without adequate notice, and bankruptcy recognises such claims. Whether a particular mass lay-off triggers any such claim depends on the facts and circumstances of the particular case, as well as on the applicable labour statutes (which vary from state to state). Subject to a statutory cap, the Bankruptcy Code affords priority in payment to an employee's pre-petition claims for wages, salaries and commissions (including holiday, severance and sick leave) earned by an individual within 180 days of a bankruptcy filing. In addition, employee wages earned post-petition, or claims that arise post-petition, are generally considered administrative expenses and entitled to payment in full to the extent earned or accrued post-petition. Special provisions exist for terminating collective bargaining agreements and qualified registered employee pension plans and for modifying certain retiree benefits. Very generally, a debtor may not unilaterally amend or terminate such obligations unless, among other things, it can demonstrate that the modification or termination is necessary to permit the debtor's reorganisation.

40 Pension claims

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

Most private-sector pension plans are governed by federal statute, the Employee Retirement Income Security Act (ERISA). ERISA requires, inter alia, certain minimum funding levels for qualified registered employee pension plans. The Pension Benefit Guaranty Corporation (PBGC) is the federal agency responsible for enforcing ERISA and for managing the mandatory government insurance programme that protects covered pensions. Under ERISA, a bankruptcy court may only approve a debtor's termination of an ERISA-covered plan if, absent such termination, the debtor will be unable to pay all of its debts pursuant to a plan of reorganisation and will be unable to continue in business outside the Chapter 11 reorganisation process. In addition, section 1113 of the Bankruptcy Code provides the exclusive means by which a Chapter 11 debtor can assume, reject or modify a collective bargaining agreement, including any additional pension-related obligations such an agreement may impose.

If a debtor terminates an ERISA-governed pension plan in bankruptcy, the PBGC may participate as a creditor holding claims for both the amount of any underfunding as well as any unpaid contributions. Outside of bankruptcy, a statutory lien arises in favour of the PBGC for unpaid mandatory plan contributions and underfunding. In bankruptcy, the automatic stay precludes imposition of these liens and the PBGC's claims for withdrawal liability or unpaid pension plan contributions are therefore generally considered pre-petition unsecured claims and afforded no special treatment. Some courts, however, have afforded administrative expense treatment to the portion of the PBGC's underfunding or withdrawal liability claims that are attributable to the employees' post-petition labour. Unpaid pension contributions incurred post-petition but prior to plan termination may also be treated as administrative expense priority claims, although the law remains unsettled on this issue. Finally, section 507(a)(5) of the Bankruptcy Code grants priority to claims up to a limited statutory cap for pre-petition contributions to employee benefit plans.

Unlike private-sector pensions, public pensions (ie, those sponsored by states or municipalities) are governed by state and local law, not ERISA. Many states treat public pension benefits as constitutionally protected, which severely limits the public employer's ability to reduce or modify public pension benefits both inside and outside of bankruptcy. A municipality eligible to file for bankruptcy under Chapter 9 of the Bankruptcy Code, however, may have some ability to modify its pension obligations through the leverage gained by imposition of the automatic stay and the ability to assume and reject executory contracts, although the effectiveness of Chapter 9 for these purposes remains largely untested.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

A debtor in bankruptcy must comply with all applicable environmental laws and regulations – and the exercise of the government's police power through such laws and regulations – while operating during and after bankruptcy. This means that a company that owns environmentally contaminated property cannot use bankruptcy to cleanse itself of its obligations related thereto. It must remediate the property in accordance with applicable laws, regulations, consent decrees, judgments and similar requirements. Likewise, bankruptcy does not empower an owner-operator of contaminated property to escape owner-operator liability after emerging from bankruptcy. The extent to which environmental obligations otherwise can be discharged in bankruptcy remains hotly contested and has generated inconsistent and often conflicting case law. While no clear lines can be drawn, as a very general matter, claims by the government and potentially responsible third parties to recover the cost of remediation work on sites formerly owned by the debtor, and fines and penalties for pre-filing violations of regulatory requirements, are the environmental obligations most susceptible to discharge in bankruptcy. Environmental obligations associated with properties owned during and after bankruptcy, in most cases, cannot be discharged. Whether such claims travel with the assets, or can be asserted against successor entities or third parties, depends on the facts of the individual case and the outcome remains uncertain. In general, however, absent criminal conduct, the debtor's officers and directors are not held personally liable for environmental remediation claims.

42 Liabilities that survive insolvency or reorganisation proceedings

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

Confirmation of a Chapter 11 reorganisation plan generally discharges a business debtor of all its pre-petition debts to creditors. However, a plan that provides for the liquidation of all, or substantially all, of the property of the estate when the debtor does not engage in business after consummation of the plan, does not result in a discharge. A business debtor likewise does not receive a discharge in a Chapter 7 case. Upon completion of a Chapter 7 or liquidating Chapter 11 case, however, only a corporate shell remains against which claims could be satisfied. Bankruptcy discharges most debts of individual debtors with certain statutory exceptions.

A debtor may also be unable to discharge responsibility for environmental contamination obligations through the bankruptcy process. The question turns on whether a particular environmental clean-up obligation constitutes a 'claim' as defined by the Bankruptcy Code, or alternatively, a form of injunctive relief that cannot be reduced to a 'right to payment'. Environmental liability that constitutes a 'claim' (eg, a regulatory fine or claim for reimbursement) may be discharged, but other types of remedial obligations (eg, where a debtor must take action to ameliorate ongoing pollution regardless of cost to the debtor) may not. The distinction often proves unclear and courts have struggled with the conflicting aims of US bankruptcy and environmental laws in this area, resulting in inconsistent case law. Recent decisions suggest a trend towards favouring environmental over bankruptcy goals, with some courts concluding that where the government brings an action for injunctive relief against a company under an environmental protection statute that does not authorise any form of monetary relief, the obligation with respect to such injunctive relief is not a 'claim', and the company therefore cannot discharge its remediation obligations through bankruptcy.

43 Distributions

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

A Chapter 11 plan specifies the time and manner of distributions. A Chapter 7 trustee generally does not make distributions until he or she has liquidated estate assets, including completion of litigation. Interim distributions may be made if sufficient liquid assets exist. Payment on account of administrative or priority claims, like wage claims or fully secured claims, may be made during the pendency of the case with court approval.

Security**44 Secured lending and credit (immovables)**

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

The mortgage constitutes the principal form of security device for real property and may extend to rents, proceeds and fixtures. Other real property security devices exist under state laws, including the deed of trust and land sale contract.

45 Secured lending and credit (movables)

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

The security interest constitutes the principal security device taken on movable property. Article 9 of the Uniform Commercial Code (UCC), enacted in all states, governs the creation and perfection of security interests in most goods. Other provisions of the UCC apply to security interests in intangible property. State certificates of title statute govern security devices in vehicles. Federal law governs the creation and perfection of security interests in most intellectual property and in aircraft and vessels.

Clawback and related-party transactions**46 Transactions that may be annulled**

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Preferential, fraudulent and post-petition transfers made without necessary court authorisation may be avoided. Broadly, a preferential transfer is one made within 90 days before the commencement of the case (or one year if to insiders) on account of antecedent debt that results in the recipient receiving a greater recovery than it would have received if the transfer had not been made and the debtor were liquidated in a Chapter 7 case. In general, a fraudulent transfer is: any transfer of the debtor's property, or any obligation incurred by the debtor, that was made with the 'actual intent to hinder, delay, or defraud' present and future creditors; or any transfer made or obligation incurred for less than reasonably equivalent value while the debtor was insolvent, thereby rendered insolvent, had unreasonably small capital to operate its business, intended or believed that it would incur debts beyond its ability to pay as they matured, or made to an insider if certain other circumstances exist.

The Bankruptcy Code's fraudulent transfer provision has a two-year reach-back period but the Code also permits use of longer reach-back periods available under state law, which typically range from four to six years. The Bankruptcy Code permits the recovery of the property transferred, or its value. The Code also disallows any claim by a transferee against the estate unless the transferee disgorges any avoided transfer for which the court finds it liable. If the transferee returns the avoided transfer, it receives a pre-petition general unsecured claim as compensation.

47 Equitable subordination**Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?**

In bankruptcy, a party may be an 'insider' if the party either meets the statutory definition of insider (which includes, in the case of a company, 20 per cent voting equity holders, the debtor's directors, officers, general partner, persons in control, an affiliate or insider of an affiliate as if such affiliate were the debtor, managing agents, and relatives of same); or has such a close relationship with or control over the debtor so as to render transactions with the debtor not at arm's length. Claims by insiders are not per se invalid; however, because transactions with insiders are by their nature not arm's-length transactions, and accordingly, give rise to the fear that insiders might receive more favourable treatment or superior terms at the expense of general creditors, courts subject insider claims and transactions to heightened scrutiny. Insider claims are thus more likely to be recharacterised as equity or equitably subordinated and courts factor the insider nature of a claim into the equitable subordination and recharacterisation analysis. Similarly, rather than relying on the business judgment standard, courts subject sales to and transactions with insiders to heightened scrutiny when determining whether the transaction is fair to a debtor and its stakeholders. In some cases involving insider sales, a court may appoint an independent examiner to vet the process. Along with having their claims and transactions subject to heightened scrutiny, insider votes are not counted for purposes of determining whether at least one impaired class of claims has voted to accept a Chapter 11 reorganisation plan. Finally, the look-back period for insiders during which transfers may be subject to avoidance as preferential is longer than for non-insider creditors, and transfers or obligations incurred to or for the benefit of an insider may be avoided as constructively fraudulent if the debtor received less than reasonably equivalent value in exchange and made the transfer or incurred the obligation under an employment contract and not in the ordinary course of business, regardless of the debtor's solvency at the time. Under some state fraudulent transfer laws that include good faith as an element of a non-avoidable transfer, courts have held that transfers to insiders during the suspect period per se lack good faith, and accordingly, can be avoided as constructively fraudulent if the other elements of the statute are also satisfied.

Groups of companies**48 Groups of companies****In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?**

In general, absent a contractual agreement to the contrary (eg, a guarantee), a parent or affiliated corporation is not responsible for the liabilities of its subsidiaries or affiliates. Exceptions exist under certain statutes, which impose direct liability on parent companies for the actions of their subsidiaries on principles of indirect operator liability, where a parent exercises direct and pervasive control over its subsidiary, common ownership, agency and veil piercing. These statutes include federal environmental, pension, labour and anti-foreign corrupt practices laws, inter alia. In addition, US common law recognises exceptions to the default rule of limited corporate liability under various equitable theories known as 'alter ego', 'piercing the corporate veil' or 'single business enterprise'. While the exact standards for these equitable remedies vary, in general, a court may ignore the separateness of corporate entities and impose liability on parent or affiliated corporations within the same enterprise group when three factors exist: dominion and control by one corporation over another, improper conduct or purpose and harm or loss caused by the misuse of the corporate form.

Common fact patterns for invoking these principles include the use of a corporate entity to defraud creditors, evade existing obligations, circumvent a statute or perpetuate illegal acts. Finally, commercial tort principles may expose corporate group members to extra-contractual claims arising from otherwise entity-specific contracts (eg, a lender seeks to hold a controlling parent liable for the false and misleading statements of its subsidiary borrower).

49 Combining parent and subsidiary proceedings**In 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?**

A court routinely administers the bankruptcy cases of affiliated corporate debtors jointly. However, absent substantive consolidation, the court cannot distribute group company assets pro rata without regard to the assets and liabilities of the individual corporate entities involved. In practice, when formulating distributions to stakeholders under a jointly administered Chapter 11 plan, financial advisers model the distributive value allocable to each legal entity within a corporate group based on the assets and liabilities of each entity.

International cases**50 Recognition of foreign judgments****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?**

Most foreign judgments, other than those involving foreign penal and revenue laws, enjoy a strong presumption of validity in US courts. Their recognition depends primarily on principles of comity as well as state law, typically common law or the Uniform Foreign Money Judgments Recognition Act where enacted. The US is not a signatory to a treaty specifically addressing international insolvency or the recognition of foreign judgments.

51 UNCITRAL Model Law**Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?**

Congress adopted the UNCITRAL Model Law on Cross-Border Insolvency, with some modifications, as Chapter 15 of the Bankruptcy Code in 2005. Chapter 15 enables a foreign representative of a foreign entity to obtain US bankruptcy court recognition of the foreign proceedings and thereby access a panoply of relief with respect to the foreign debtor's assets and operations in the US, including the imposition of the automatic stay, administering the foreign debtor's US assets, and operating the foreign debtor's US business. Foreign creditors have the same rights regarding the commencement of, and participation in, a bankruptcy case as domestic creditors.

52 Foreign creditors**How are foreign creditors dealt with in liquidations and reorganisations?**

Foreign creditors generally have the same rights regarding the commencement of, and participation in, a bankruptcy case as do domestic creditors.

53 Cross-border transfers of assets under administration**May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?**

In cases involving jointly administered corporate groups, the court may in appropriate circumstances authorise the use of cash and other assets by non-debtor affiliates (including those located outside the United States), typically with the secured creditors' consent. In addition, Chapter 15 of the Bankruptcy Code authorises the court, upon recognition of a foreign proceeding, to entrust the administration or realisation of all or part of the debtor's assets within the territorial jurisdiction of the United States to a foreign representative. The court may also entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative for administration in the foreign proceeding, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.

Update and trends

Restructuring work remains stable despite the continued trend towards fewer actual filings compared to prior years. A few high-profile cases captured the spotlight, including the Chapter 11 filing of the Weinstein Co and its affiliates. The movie company suffered an immediate and rapid decline following an article in the *New York Times* reporting on multiple sexual harassment claims against its founder, Harvey Weinstein. The majority of corporate Chapter 11 cases were filed in Delaware and New York, which kept their status as the most popular venues for such filings.

Among corporate filings generally, the retail industry remained vulnerable with a slew of brand names seeking bankruptcy protection, including Nine West Holdings, Claire's, The Walking Company, the Bon Ton Stores, Toys R Us and Brookstone. Restaurant chains were also pressured, and radio and broadcasting giants iHeart Media, Cumulus Media and Relativity Media all found themselves restructuring their balance sheets through Chapter 11 filings.

The US bankruptcy legal and legislative landscapes stayed relatively unchanged, although the US Supreme Court did address three bankruptcy issues on which the lower circuit courts had been split. Most notably, in *Merrit Management Group, LP v FTI Consulting, Inc*, 138 S Ct 883 (2018), the Supreme Court held that when determining whether the securities safe harbour exempts from avoidance a transfer that a trustee seeks to avoid under a clawback or fraudulent transfer action, courts should look to the overarching transfer that the trustee seeks to avoid, rather than any of its component parts. The circuit courts of appeal were split on whether the safe harbour applied to a transaction that included a component transfer made 'to' a protected entity, even if the protected entity served merely as a conduit for the ultimate transferee.

Compare *In re Quebecor World (USA) Inc*, 718 F3d 94 (2d Cir 2013) (safe harbour applies where transfer was to a protected entity, even if the entity served only as an intermediary as part of an overarching transfer); *In re QSI Holdings, Inc*, 571 F3d 545 (6th Cir 2009) (same), with *In re Munford, Inc*, 98 F3d 604 (11th Cir 1996) (the safe harbour does not apply where the protected entity is only an intermediary). The *Merrit Management* decision makes it easier for a trustee or debtor-in-possession to bring an avoidance action to recover a transfer made through otherwise statutorily protected financial intermediaries.

Separately, in the case of *US Bank NA v Village at Lakeridge, LLC*, 138 S Ct 960 (2018), the US Supreme Court held that a bankruptcy court's determination that a creditor was a non-statutory insider presented a mixed question of law and fact that was subject to review for clear error on appeal. The ruling defers to the bankruptcy court's factual findings, and emphasises the importance of the bankruptcy court's role as the trier of fact, with the closest and deepest understanding of the record.

In restructuring practice generally, the inclusion of third-party releases in Chapter 11 plans continues to proliferate, and bankruptcy courts are struggling with both their scope and the degree of action creditors must take with respect to the plan in order to be bound by such releases. The law continues to develop regarding whether creditors who do not vote, or fail to 'opt out' of a release, are bound by it. Reorganising debtors also continue to use rights offerings as a part of their financial repertoire to fund their emergence from bankruptcy. The practice is not without controversy depending on the participation terms, and the overall effect the rights offering has on transferring value of the reorganised debtor to select stakeholder groups, among other issues.

54 COMI

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 Bankruptcy Code does not define 'centre of main interests' for purposes of recognising foreign proceedings in a Chapter 15 case. Bankruptcy courts have accordingly developed the following factors to consider when making a COMI determination:

- the location of the debtor's headquarters;
- the location of those who actually manage the debtor (which conceivably could be the headquarters of a holding company);
- the location of the majority of the debtor's creditors or a majority of the creditors who would be affected by the case;
- the jurisdiction whose law would apply to most disputes; and
- the expectations of third parties with regard to the debtor's COMI.

Chapter 15 also does not specifically address corporate groups. In the US, some bankruptcy courts rely on a corporate group's 'nerve centre' when determining the subsidiary's COMI in the context of multinational corporate group insolvencies. The term 'nerve centre' derives from the US federal courts' description of the factors that determine where a corporation has its 'principal place of business' for purposes of diversity jurisdiction under US law. Under that test, where a corporation is engaged in far-flung and varied activities that are carried on in different states, its principal place of business is the nerve centre from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective. The test applied is thus that place where the corporation has an 'office from which its business was directed and controlled' – the place where 'all of its business was under the supreme direction and control of its officers'. The 'nerve centre' approach has not been universally adopted by bankruptcy courts nationwide, however, and the law concerning determination of a corporate group's COMI for Chapter 15 purposes continues to evolve.

55 Cross-border cooperation

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?

Chapter 15 of the Bankruptcy Code directs the bankruptcy court and the trustee, or other person, including an examiner, to 'cooperate to the maximum extent possible' with a foreign court or foreign representative. In addition, the bankruptcy court or trustee may communicate directly with, or request information or assistance from, a foreign court or foreign representative. Chapter 15 of the Bankruptcy Code lists forms of cooperation that may occur between the US court or trustee and the foreign court, including the appointment of a person or body to act at the direction of the court, communication of information by any appropriate method, coordination of the administration and supervision of the foreign debtor's assets and affairs, approval or implementation of agreements concerning the coordination of proceedings and coordination of concurrent proceedings involving the same debtor.

Chapter 15 requires a bankruptcy court to enter an order recognising a foreign proceeding if three conditions are met. First, the entity applying for recognition must be a 'foreign representative' within the meaning of the statute. Second, certain procedural requirements must be satisfied. Finally, the foreign proceeding must be either a foreign main proceeding – that is, a foreign proceeding pending in the country where the debtor has its COMI – or a foreign non-main proceeding – that is, a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment. While recognition is routinely granted in the overwhelming majority of Chapter 15 cases, US courts have refused to recognise a foreign proceeding that is neither a main nor non-main proceeding.

Upon recognition, Chapter 15 mandates US courts to grant comity or cooperation to the foreign representative unless doing so would be manifestly contrary to US public policy. The exception should be construed narrowly and only invoked under exceptional circumstances concerning matters of fundamental importance for the US. Two factors generally govern application of the exception: the procedural fairness of the foreign proceeding; and whether an action taken in the Chapter 15 case would frustrate a US court's ability to administer the Chapter 15 case or impinge severely a US constitutional or statutory

right. Despite the limited scope of the 'public policy' exception, a few courts have invoked the exception as grounds for denying relief to a foreign representative in a Chapter 15 case. Specifically, courts have refused to apply foreign law as contrary to US public policy where the foreign law, unlike US law, allowed the debtor to terminate a licensee's right to use the debtor's patents; the foreign law permitted the administrator of the foreign entity to intercept the debtor's personal postal and electronic mail, a practice banned under US law and that might result in criminal liability; and the foreign law approved a restructuring plan that extinguished the guaranty obligations of the foreign debtor's non-debtor subsidiaries.

56 Cross-border insolvency protocols and joint court hearings

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?

Bankruptcy courts routinely enter orders approving protocols for managing cross-border insolvency proceedings. US courts have a long history of communicating with courts in foreign countries and have done so with courts in countries including Brazil, Burundi, Canada, Israel, Switzerland and the United Kingdom. In February 2017, the United States Bankruptcy Court for the District of Delaware (via Local Bankruptcy Rule 9029-2) and the United States Bankruptcy Court for the Southern District of New York (via General Order M-511) adopted fourteen guidelines, or best practices, including procedures for joint hearings, that were considered by judicial officials at the Judicial Insolvency Network conference. These guidelines formalise many of the standard provisions courts typically approve in cross-border protocols.

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

General insolvency and reorganisation legislation

The legislation principally applicable to the insolvency of companies established in Vietnam is Law No. 51/2014/QH13 on Bankruptcy of the National Assembly of Vietnam dated 19 June 2014 (the Bankruptcy Law 2014). The Bankruptcy Law 2014 is largely untested. We are not aware of any high-profile bankruptcy petitions that have been filed since the Bankruptcy Law came into effect on 1 January 2015.

Law No. 68/2014/QH13 on Enterprises (the Enterprise Law) and its implementing regulations applies generally to the reorganisation or liquidation of companies in Vietnam outside of insolvency proceedings.

The reorganisation or liquidation of credit institutions, which includes banks, finance companies and finance leasing companies, is also subject to Law No. 47/2010/QH12 on Credit Institutions (as amended) (the Law on Credit Institutions) and its implementing regulations. The government of Vietnam is in the process of drafting a new Law on Restructuring of Credit Institutions and Bad Debts that would apply to the reorganisation of credit institutions. However, it is unclear when this draft law will become law.

Vietnamese law generally

Vietnamese law generally is not well developed, is often vague or ambiguously drafted and does not have a system of case law precedents or other interpretative aids of binding value. This is also the case in respect of the Bankruptcy Law 2014. The law often only sets out basic principles and needs implementing regulations to be effective. Further, in part because of lack of clarity, Vietnamese law in any specific instance is subject to broad interpretation and different lawyers, governmental agencies and officials can have contrasting views on the application and interpretation. As a matter of practice, the ultimate arbiter is often the government body responsible for administering the relevant law.

2 Excluded entities and excluded assets

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

Outside of insolvency proceedings, there are no exclusions from customary insolvency or reorganisation proceedings. In insolvency proceedings, as a general rule, all companies established in Vietnam will be subject to the provisions of the Bankruptcy Law 2014. Unlike its predecessor, which provided for exceptions to insolvency proceedings (eg, special enterprises directly servicing national defence and security, companies operating in the sectors of finance, banking and insurance, and companies operating in sectors that regularly and directly provide essential public utility services (Special Companies)), the Bankruptcy Law 2014 does not provide for any exceptions other than the bankruptcy of credit institutions (see below). Notwithstanding that the Bankruptcy Law 2014 does not contemplate different insolvency

proceedings for Special Companies, as the regulations implementing the old bankruptcy law applicable to Special Companies have not been specifically repealed, the courts could still refer to such regulations when handling insolvency proceedings of such Special Companies. If so, the procedure would be slightly different (see question 4).

Special regimes applicable to credit institutions

The Bankruptcy Law 2014 provides for special insolvency proceedings in respect of credit institutions, which includes banks, finance companies and finance leasing companies. Under the Bankruptcy Law 2014, before the court accepts a bankruptcy petition (step 2 of the insolvency process), an insolvent credit institution must have undergone the 'special control' imposed by the State Bank of Vietnam (the SBV) in accordance with relevant regulations of the SBV. The court will only accept the bankruptcy petition if the SBV has issued a written decision on termination of the 'special control' regime or cessation of application of special measures for recovery.

Excluded assets

If any credit institution that has received special loans from the SBV or from other credit institutions is declared bankrupt, it must return such special loans to the SBV or other credit institutions prior to the distribution of assets to other creditors.

3 Public enterprises

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

As noted in question 2, there is a possibility that the court would apply the regulations implementing the old bankruptcy law on Special Companies. Accordingly, upon receiving the bankruptcy petition in respect of a Special Company, the court is obliged to inform the state agency overseeing the Special Companies so that the relevant state agency can first apply 'recovery measures', and the court can only accept the bankruptcy petition if the state agency has issued a written decision on termination or cessation of the 'recovery measures'. Under the regulations, the list of Special Companies is to be promulgated by the relevant state agencies. However, to our knowledge, no such list has been promulgated.

4 Protection for large financial institutions

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

No. However, in practice, the state has in the past 'propped up' institutions such as banks, shipbuilding and shipping companies that it considered 'too big to fail'.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Court involvement

There is no involvement of the court in the reorganisation or liquidation of companies in Vietnam outside of insolvency proceedings under the Bankruptcy Law 2014.

In the insolvency process under the Bankruptcy Law 2014, depending upon the complexity and nature of the case, the People's Court at the provincial or district level in the locality where the insolvent company's registered head office has jurisdiction over the bankruptcy of such company.

Right of appeal

In general, any decision or order of the court can be appealed. Under Vietnamese bankruptcy law, decisions of the court made in an insolvency proceeding can be appealed as follows:

- if, after receipt of the bankruptcy petition (step 1 of the insolvency process), the court decides to object to the petition, within three business days from the date of receipt of an objection decision, the petitioner or the people's procuracy at the same level may appeal the decision by requesting the chief judge of the court that made the decision to reconsider. If the petitioner or the people's procuracy is not satisfied with the decision of the chief judge on reconsideration, a further appeal may be made to the chief judge of the court at an immediately higher level, whose decision will be final;
- after the acceptance of the bankruptcy petition (step 2 of the insolvency process), the court may decide whether or not to commence insolvency proceedings. The decision can be appealed by any participant in the insolvency proceedings (ie, creditors, debtors, employees, the insolvent company and its shareholders and other relevant persons) or the people's procuracy at the same level. The request must be sent within seven business days of the date of receiving the decision to commence or not to commence insolvency proceedings. The immediately higher court has the authority to consider the appeal request, and that decision will be final;
- the receiver can be changed by the court (step 4 of the insolvency process), the decision on change of the receiver can be appealed by any participant in the insolvency proceedings. The request must be sent within three business days of the date of receiving the decision on change of the receiver. The chief justice of the court has the authority to consider the appeal request, and that decision will be final;
- after the court issues a decision to declare the company bankrupt (step 7 of the insolvency process), the petitioner, the insolvent company, the creditors, or the people's procuracy may appeal the decision within 15 days of the date of receiving the decision. The immediately higher court has the authority to consider the appeal request. The decision of the higher court may be further reconsidered by the Supreme Court at the request of a participant in the insolvency proceedings or the Supreme People's procuracy;
- during insolvency proceedings, the court may issue a decision to declare a transaction invalid (see question 46). Within five business days of the date of receiving a decision declaring a transaction invalid, the insolvent company or the counterparty to the transaction may make a written request to the chief judge of the court that made the decision to reconsider the decision, whose decision will be final; and
- during insolvency proceedings, the court may issue a decision to apply interim relief (see question 31 on pre-adjustment attachments). Any participant in the insolvency proceedings or the people's procuracy at the same level may appeal the decision to the chief judge of the court that made the decision, whose decision will be final.

Requirement to post security to proceed with an appeal

There is no requirement to post security to proceed with an appeal.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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: voluntary liquidation in accordance with the Enterprise Law and the charter (equivalent to the memorandum and articles of association) of the company; and voluntary liquidation in accordance with the bankruptcy law by filing a petition.

Voluntary liquidation outside insolvency proceedings

A company established in Vietnam can be liquidated and dissolved in accordance with the decision of its owners, members or shareholders. The requirements for passing a liquidation or dissolution decision are subject to the company's charter.

The winding up of a company will generally be carried out as follows:

- the owners, members or shareholders of the company will pass a decision on liquidation and dissolution of the company;
- the company will notify the business registration body of the decision on liquidation and dissolution within seven business days of the issuance of the decision;
- the owners, members or the board of directors (as the case may be) of the company will be responsible for liquidating the company, or, if the company's charter so provides, a liquidation board will be established to carry out the liquidation of the assets of the company;
- after completion of liquidation and payment of all outstanding debts and liabilities, the company will prepare a report and submit the dissolution file to the business registration body; and
- the business registration body will deregister the company from the company registry (ie, the National Registration Portal) within five business days of the receipt of the complete dissolution file or 180 days of the receipt of the decision on liquidation and dissolution unless otherwise objected by relevant parties.

Voluntary liquidation in insolvency proceedings

If a company becomes insolvent, the company can be liquidated under the Bankruptcy Law 2014 according to the following steps (the insolvency process):

Step 1: Filing bankruptcy petition

Court-driven insolvency proceedings may be commenced by, among others, an unsecured creditor or partially secured creditor, the legal representative or the owner of the insolvent company, or a union representative or elected representative of employees.

Step 2: Court's acceptance of the bankruptcy petition

After the acceptance of the bankruptcy petition: within three business days after receipt, the court should notify the acceptance to the petitioner in writing or, if it is the insolvent company that files the bankruptcy petition, all creditors of the company as provided by the company. The insolvent company and the creditor filing such petition may request that the court postpones the acceptance in order for the parties to negotiate the withdrawal of the petition.

Step 3: Court's decision on commencement of an insolvency proceeding

It is possible that the court could decide to reject the petition if it believes that it would be inappropriate to continue with the bankruptcy proceeding. The insolvent company and the creditors may request that the court postpones the acceptance in order for the parties to negotiate the withdrawal of the petition. After the issue of a decision to commence insolvency proceedings, the court should send the decision to, among others:

- the person filing the petition; and
- the insolvent company.

Step 4: Appointees and duties

The appointment of an asset management officer or a firm in charge of asset management and liquidation (in this chapter, referred to as the

receiver), preparation of the asset inventory, the list of creditors and the list of debtors.

This receiver is appointed by the court. It is possible for the person filing the petition to propose a receiver to the court, and the judge can appoint such person if they have sufficient qualifications and there is no conflict of interest. The identity of the receiver will be published together with the decision to call a creditors' meeting. The receiver plays a role similar to that of a receiver (or in case of liquidation, liquidator) in bankruptcy proceedings.

The insolvent company must conduct a full inventory of assets within 30 days of the date of the decision to commence insolvency proceedings, which may be extended twice, each time for no more than 30 days.

Within 30 days of the date of the decision to commence insolvency proceedings, creditors must send their claims to the receiver, and the list of creditors will be established within 15 days thereafter. The list of creditors of the insolvent company must be publicly posted at the head office of the court, the registered head office of the insolvent company and the National Registration Portal, and must be sent to creditors who made claims within 10 business days of the date of posting. A creditor or the insolvent company may request the judge to adjust the list of creditors.

The list of debtors of the insolvent company must be prepared and publicly posted at the head office of the court and the registered office of the insolvent company within 45 days of the date of the decision to commence the insolvency proceedings, and must be sent to creditors who made claims within 10 business days of the date of posting.

Step 5: Holding creditors' meetings

The creditors' meeting provides a forum for the receiver to report to the creditors on the financial situation of the insolvent company, the results of asset inventories and debtor and creditor lists, for the insolvent company's management to express their views on the reports of the receiver and to propose a restructuring plan, as well as for the creditors and interested parties to express their views on specific matters to be resolved.

The creditors' meeting has the authority to:

- request the suspension of the insolvency proceedings if the debtor has not become insolvent;
- request to proceed with business restoration;
- request for bankruptcy;
- approve a recovery plan; and
- appoint the members of a representative board of creditors (see question 33).

All creditors named on the list of creditors have the right to attend the meeting. A creditor may appoint a proxy to attend the meeting on its behalf.

To convene a creditors' meeting, the judge must send a notice of the creditors' meeting and other relevant documents to creditors no later than 15 days prior to the meeting. The notice and accompanying documents must be delivered by hand or sent by registered or non-registered mail, fax, telex or email or by other means provided that the sending is recorded. The notice must specify the time, venue, agenda and contents of the creditors' meeting.

A quorum of creditors' representing at least 51 per cent of the total value of unsecured debt must be present, and a resolution of the creditors' meeting is carried when approved by a simple majority of those unsecured creditors in attendance representing at least 65 per cent of the total unsecured debt amount.

Step 6: Rehabilitation of the business

In the event that the creditors' meeting passes a resolution to the effect that recovery measures should be applied, there is a 30-day window for the insolvent company to formulate a detailed plan for recovery (the recovery plan) which should include, inter alia, the following measures: raising capital, changing business lines, disposing of unnecessary assets, selling shares to creditors and restructuring management. The recovery plan must be first sent to the judge, the creditors and the receiver for comments and then must be approved by the creditors' meeting.

After the recovery plan is approved by the creditors' meeting, the implementation of the recovery plan will be under the supervision of the receiver and creditors. As discussed in the response to question 33,

a representative board of creditors may, acting on behalf of the creditors, be appointed to supervise the implementation of the resolutions of the creditors' meeting and request the receiver to implement the resolutions of the meeting of creditors. During the process of implementation of the recovery plan, once every six months, the insolvent company must report on the status of the implementation plan to the receiver, who shall be responsible for reporting to the judge and notifying creditors.

The time limit for implementation of the recovery plan will be decided by the creditors' meeting. If the creditors' meeting fails to specify a time limit, the time limit for implementation of such plan will not exceed three years from the date the plan is approved by the creditors' meeting.

Step 7: Declaration of bankruptcy

The judge will declare the company bankrupt and insolvency proceedings would move into the liquidation phase if:

- the creditors' meeting could not be convened;
- the creditors' meeting could not pass any resolution;
- the creditors' meeting did not approve or could not pass the resolution on the recovery plan;
- the creditors' meeting requested for declaring the company bankrupt; or
- the insolvent company could not formulate the recovery plan within the time limit or failed to implement the recovery plan.

Within 10 business days of issuing the bankruptcy decision, the court must send the decision to, among others, the person filing the petition, the insolvent company and creditors, and must post the decision on the National Registration Portal (ie, the companies registry) and publish it in two consecutive editions of a local newspaper.

Step 8: Liquidation of assets

Assets of the bankrupt company can be sold by auction or private sale (see the response to question 24). After the liquidation and distribution of the assets is completed, the judgment enforcement agency will decide to terminate the bankruptcy decision.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Similar to voluntary liquidation, there are two different procedures for the voluntary reorganisation of a company: voluntary reorganisation outside the insolvency proceeding; and voluntary reorganisation in accordance with the bankruptcy law.

Voluntary reorganisation outside insolvency proceedings

There are no regulations governing a financial reorganisation commenced by a debtor outside insolvency proceedings. Reorganisation is a matter of agreement between the debtor and its creditors. Depending on the nature of the arrangement, the reorganisation may be subject to provisions of:

- the Enterprise Law and its implementing regulations, which apply to corporate governance and operation of companies in Vietnam;
- the Investment Law (National Assembly, 29 November 2014) and its implementing regulations, which apply to investment by investors in projects in Vietnam; and
- banking regulations, which apply to financing activities in Vietnam.

In the absence of specific laws and regulations governing the reorganisation of a company (either voluntary or involuntary) and because reorganisation is generally a matter of agreement between the debtor and its creditors, for the purpose of this Vietnam chapter, unless the contrary is stated, all references to reorganisation will be to reorganisation as a part of insolvency proceedings.

Voluntary reorganisation in insolvency proceedings

If a company becomes insolvent, the company can submit a petition and initiate the insolvency process, which involves the reorganisation of the company according to the steps discussed in step 6 of the insolvency process.

8 Successful reorganisations

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

The insolvent company may be required to formulate the recovery plan (see step 6 of the insolvency process). The recovery plan must be approved by the creditors' meeting. Once the recovery plan is completed as planned, the judge will decide to terminate the 'operation recovery' process and the company is no longer deemed to be insolvent.

Release of non-debtor parties from liability

As discussed in question 26, the court may temporarily suspend and then terminate the implementation of a contract that could have an adverse effect on the debtor. Accordingly, a non-debtor party may be released from liability under such contracts.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Creditors can only place a debtor into involuntary liquidation through insolvency proceedings. There are no material differences to proceedings opened voluntarily.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

As is the case for voluntary reorganisations, there are no regulations governing a financial reorganisation commenced by a creditor outside of insolvency proceedings. There are no material differences to proceedings opened voluntarily.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Although there are expedited procedures for the court to issue a bankruptcy decision (step 7 of the insolvency process), there are no such procedures for expedited reorganisations. The implementation time will depend on the complexity of the reorganisation and on the approval of the creditors.

12 Unsuccessful reorganisations

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?

In case of reorganisation in insolvency proceedings, a creditors' meeting should take place to decide if the insolvent company should propose a recovery plan. If the creditors' meeting decides to propose that the court declares the bankruptcy then, within 15 days of receipt of a report on results of the creditors' meeting, the judge should issue a decision declaring that the company is bankrupt.

If the creditors' meeting decides that the insolvent company should propose a recovery plan, then the insolvent company should propose a recovery plan in accordance with procedures discussed in step 6 of the insolvency process. However, if the insolvent company fails to propose a recovery plan within the time limit or the creditors' meeting does not approve the proposed recovery plan, the judge should issue a decision declaring the company bankrupt.

If the creditors' meeting approves a recovery plan, but the insolvent company fails to implement the recovery plan, the judge should issue a decision declaring the company bankrupt.

13 Corporate procedures

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

See question 6.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In a voluntary liquidation outside of insolvency proceedings, the liquidation of a company is completed once the business registration body deregisters the company from the company registry (ie, the National Registration Portal). See question 6 for more detail.

In the case of liquidation insolvency proceedings, the liquidation of a company is completed after completion of the distribution of assets or after the judge declares the company bankrupt if the company has no assets to be liquidated and distributed.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

Under the Bankruptcy Law 2014, a company is considered to be 'insolvent' if it fails to repay a debt within three months from the due date.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Under the Bankruptcy Law 2014, the following are obliged to make a bankruptcy filing if such person becomes aware that the company has become 'insolvent':

- the legal representative of the company, being the person identified in the enterprise registration certificate or the equivalent document as such (being either the chairman, chief executive officer or another person); and
- the owner of a single member limited liability company, the chairman of the members' council of a two or more member limited liability company, or the chairman of the board of directors of a joint stock company.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

If a person specified in question 16 fails to make a bankruptcy filing upon becoming aware that the company has become 'insolvent', he or she would be subject to a monetary fine ranging from 1 million dong to 3 million dong (US\$43 to US\$86). In part because of the size of the potential fine, very few companies have filed for a bankruptcy petition notwithstanding the insolvency of a large number of companies.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Officers and directors will not generally be personally liable for obligations of the company. However, officers can be held personally liable in the following circumstances:

- under the Civil Code, a corporate officer and director of a company would be personally responsible for a transaction entered into by him or her without or beyond the scope of authorisation from the

company unless the company consents to such transaction or is aware but has not objected to the transaction, or the other counterparty is aware of the lack of authorisation but agrees to proceed with the transaction;

- officers and directors of a company are generally responsible for executing their tasks honestly, and in a manner that they believe to be in the best interests of the company and with a degree of prudence; they are also required to avoid conflicts of interest. Officers and directors may be found liable in the event of breach of such duties; and
- the legal representative of a company may be held liable for directing the company to violate the law (eg, as discussed in the response to question 41). Under the current criminal law, criminal sanctions can be applied to individuals, and corporate bodies.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Vietnamese law does not have the concept of a 'zone of insolvency'. As such, no higher degree of care is owed by executive officers and directors to the company and its creditors in the months prior to an entity actually becoming insolvent.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

After the commencement of insolvency proceedings, directors and officers still have the authority to manage business operations but are subject to the restrictions and the supervision of the judge and the receiver as discussed above. However, at the request of the creditors' meeting or the receiver, the judge may change the legal representative of the insolvent company.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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?

Under article 41 of the Bankruptcy Law 2014, within five business days of the date of the court's acceptance of the bankruptcy petition (step 2 of the insolvency process), the following proceedings and actions are temporarily suspended:

- enforcement of a court or arbitral judgment, award or decision against assets of the company, except for enforcement of any judgment, award or decision obliging the insolvent company to compensate for life, health or honour or to pay wages to employees;
- civil, business, commercial or labour legal proceedings (but not criminal or administrative proceedings) to which the insolvent company is a party; and
- enforcement of security over assets of the insolvent company by secured creditors, except for assets that are exposed to a risk of being destroyed or a considerable decrease in value.

If the court decides to not issue a decision for commencement of insolvency proceedings (step 3 of the insolvency process), the stay discussed above will be lifted.

However, if the court decides to issue a decision for commencement of insolvency proceedings (step 3 of the insolvency process), the enforcement of a court judgment or arbitral award will be suspended. Such suspension will be lifted if the court decides to terminate the insolvency proceeding because the company is no longer 'insolvent' or the recovery plan terminates.

Regarding the enforcement of security over assets, at the request of the receiver, the court will take one of the following decisions: (i) if the collateral is needed for business recovery, the enforcement will be subject to the decision of the creditors' meeting, (ii) if there is no recovery

plan (see step 6 of the insolvency process), or if the secured asset is not subject to the recovery plan, the enforcement will be conducted in the manner set out in the security agreement and (iii) if there is risk that the secured assets lose material value, the enforcement will be done promptly. Such enforcement may resume if the receiver recommends resuming the enforcement of the secured assets and when the bankrupt company is liquidated (step 8 of the insolvency process).

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? 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?

In general, after the court issues the decision for commencement of insolvency proceedings (step 3 of the insolvency process), the company will continue to operate the business but will be subject to the supervision of the judge and the receiver. In particular:

- following the issuance of the decision to commence insolvency proceedings, and before issuance of the decision to recognise the resolutions of the creditors' meeting approving the recovery plan (step 6 of the insolvency process) the company is prohibited from:
 - concealing, disposing of or donating any assets;
 - paying any unsecured debts except for the unsecured debts arising subsequent to the commencement of the bankruptcy procedure and paying wages to employees of the company;
 - abandoning any right to claim a debt; and
 - converting unsecured debts into debts secured or partly secured by the assets of the company;
- the company must report to, and obtain the consent of, the receiver prior to carrying out the following activities:
 - borrow or pledge, mortgage, guarantee, purchase, sale, assignment, leasing out of the assets;
 - sale or conversion of the shares;
 - transfer of the ownership rights in any asset;
 - termination of performance of an effective contract;
 - making payment for debts arising subsequent to the commencement of the insolvency proceedings; and
 - paying wages to employees; and
- following the issuance of the decision to recognise the resolution of the creditors' meeting approving the recovery plan (step 6 of the insolvency process):
 - business operations, including the use or sale of assets, of the company should be carried out in accordance with the approved recovery plan and under the supervision of the receiver and creditors; and
 - every six months, the company must report on the status of implementation of the recovery plan to the receiver who will then be responsible for reporting to the judge and creditors.

Treatment of creditors supplying goods or services after the filing

See question 23.

Powers of directors and officers after the commencement of insolvency proceedings

See question 20.

23 Post-filing credit

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

As discussed in question 22, after the commencement of insolvency proceedings (step 3 of the insolvency process) the company still continues its business operations subject to the supervision of the judge and the receiver. Furthermore, after the court issues the decision for recognition of the resolution of the creditors' meeting approving the recovery plan (step 6 of the insolvency process), business operations of the company should be carried out in accordance with the approved recovery plan and under the supervision of the receiver and creditors. Accordingly, the debtor may incur secured or unsecured debts after filing of the bankruptcy petition.

Debts arising subsequent to the commencement of the insolvency proceedings that are used for business recovery of the company will take priority over other unsecured debts (see question 38).

24 Sale of assets

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?

The sale of assets after the issuance of decision on commencement of an insolvency proceeding (step 3 of the insolvency process) is subject to the consent of the receiver, who is responsible for reporting to the judge (see discussions in the response to question 22).

After the court issues the decision for recognition of the resolution of the creditors’ meeting approving the recovery plan (step 6 of the insolvency process), the sale of assets of the company must be carried out in accordance with the approved recovery plan and under the supervision of the receiver and creditors.

In respect of secured assets, under article 53 of the Bankruptcy Law 2014, the enforcement of secured assets (including the sale of the secured assets) will be subject to the decision of the judge upon recommendation of the receiver according to the following principles:

- if the secured assets are needed for the business recovery (step 6 of the insolvency process), the use of the secured assets will be subject to the resolutions of the creditors’ meeting;
- if the secured assets are not needed for business recovery, then the enforcement will be subject to the provisions of the security agreement; and
- if the secured assets are subject to risk of destruction or considerable decrease in value, the receiver may recommend the judge permit the immediate enforcement of the assets.

When liquidating the assets under step 8 of the insolvency process, the assets of the bankrupt company can be sold at auction or by private sale provided that the movable assets having a value of greater than or equal to 10 million dong and real property must be sold by auction.

The ownership of a purchaser acquiring assets from an insolvent company in a manner not in accordance with the above requirements is open to question. Indeed, given that Vietnamese law is so general and ambiguous, there is no guarantee that a purchaser’s ownership is ‘free and clear’ of claims even where a purchaser acquires assets in accordance with the above requirements.

25 Negotiating sale of assets

Does your system allow for ‘stalking horse’ bids in sale procedures and does your system permit credit bidding in sales?

The regulations on auction sale do not contemplate the use of ‘stalking horse’ bids or credit bidding.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or 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?

Article 61 of the Bankruptcy Law 2014 allows a creditor or the debtor to request that the court temporarily suspends the implementation of a contract that could have an adverse effect on the debtor. The law suggests that such request must be made within five business days of the date of acceptance of the bankruptcy petition (step 2 of the insolvency process).

In addition, within five business days from the date when the people’s court issues the decision to commence the insolvency proceeding (step 3 of the insolvency process), the court must review the temporarily suspended contracts and decide whether to:

- continue the performance of the contract if the performance will not cause any disadvantage to the company; or
- terminate the contract, in which case the counterparty may be awarded damages and it will have the same rights as an unsecured creditor in respect of such damages.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor’s right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

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 the event of default and termination provisions. As discussed in question 26, the court may decide to temporarily suspend or terminate a debtor’s contract.

28 Personal data

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

The Bankruptcy Law 2014 does not provide for specific requirements for the use of personal information or customer data collected by an insolvent company during the insolvency proceedings. This is subject to the agreement between the insolvent company and the persons providing information and data and regulations on the collection, storage and use of personal information or customer data including the Civil Code and the Law on Information Technology.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Following the court’s acceptance of the bankruptcy petition (step 2 of the insolvency process), the legal proceedings, including arbitration proceedings must be temporarily or permanently suspended (see question 21). The Bankruptcy Law 2014 is silent on arbitration proceedings arising post-filing, and it is not clear how the court will handle such arbitration proceedings.

Creditor remedies

30 Creditors’ enforcement

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 its security outside of court proceedings (however, the enforcement of security may be stayed after the date of the court’s acceptance of the bankruptcy petition – see the answer to question 21). Possessing the secured asset is one enforcement measure if it is agreed by the parties.

Before enforcing the security, the person foreclosing on the secured asset (realisor) must either deliver an enforcement notice to other secured parties or register the enforcement notice with the security registrar.

Secured assets may be foreclosed within a time limit agreed by the parties; or, if there is no such agreement, the realisor will have the right to make a decision on the time for realisation, which must not be earlier than seven days in the case of movables and 14 days in the case of immovables, calculated from the date of the enforcement notice.

While the law technically permits secured creditors to foreclose on secured assets without the need for judicial proceedings or the permission of a court or any other party in Vietnam upon the occurrence of an event of default, in practice, the ease of enforcement depends upon numerous factors, including: the type of collateral, the cooperation of the securing party and the assistance of the authorities. In

many instances, secured creditors are unable to enforce security without a court judgment and the subsequent assistance of the judgment enforcement team, which assists the secured party in enforcement of the judgment.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Right of unsecured creditors

The Bankruptcy Law 2014 makes a fundamental distinction between fully secured creditors and unsecured creditors and partially secured creditors. A fully secured creditor is not entitled to file a bankruptcy petition nor vote in the creditors' meeting, while unsecured and partially secured creditors are entitled to do so (see the insolvency process).

Pre-judgment attachments

At the request of persons who have the right or obligation to make a bankruptcy filing (including unsecured creditors) or the receiver, the court may issue a decision to apply an interim relief during insolvency proceedings, for example, permission for the sale of certain assets such as perishable goods, attachment and sealing up of assets of the company, freezing of bank accounts of the company, freezing assets and prohibiting the transfer of property.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

See the insolvency process outlined in question 6.

33 Creditor representation

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 creditors' meeting may appoint a representative board of creditors composed of between three and five members. The representative board of creditors will, acting on behalf of the creditors, supervise the implementation of the resolutions of the creditors' meeting and request the receiver to implement the resolutions of the meeting of creditors. If the receiver fails to carry out such request, the representative board of creditors may report such failure in writing to the judge. The Bankruptcy Law 2014 gives no guidance as to how to appoint members to a representative board of creditors.

The Vietnamese bankruptcy law is silent on whether the representative board of creditors may retain advisers and, if so, how their expenses would be funded.

34 Enforcement of estate's rights

If the liquidator 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? Can they be assigned to a third party?

While the insolvent company may incur additional debts after the banking filing (see question 23, which could arguably be used for pursuing a claim), the bankruptcy law does not provide for circumstances where the creditors may pursue a claim by themselves. Any fruits of the remedies will belong to the insolvency estate and be distributed in the manner discussed in question 38.

35 Claims

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

Submission of creditor's claims

Except in the event of force majeure, within 30 days of the date of the decision to commence an insolvency proceeding (step 3 of the insolvency process), creditors must send the claim for debts to the receiver.

The claim must be accompanied by supporting documents, and be signed by the creditor or his or her legal representative.

List of creditors and appeal

The list of creditors will be prepared by the receiver within 15 days after the deadline for submission of claims. The list of creditors must be publicly posted at the head office of the court, the registered head office of the insolvent company and the National Registration Portal and sent to creditors who made claims within 10 business days from the date of posting.

A creditor or the insolvent company may request that the judge adjust the list of creditors within five business days after the ending date of the posting. However, the bankruptcy law is silent on how long the list of creditors will be posted for and on what the ending date of the posting will be.

Transfer of claims

Vietnamese bankruptcy law does not contemplate the purchase, sale or transfer of claims. Because the Bankruptcy Law 2014 does not provide procedures for changing the list of creditors once it has been prepared, it is not clear if the court would accept the transferee of a claim to be a new creditor and be entitled to rights as a creditor of the insolvent company in the insolvency proceedings.

Amounts of claims and interests

The amount of claims against the insolvent company created before the date of commencement of insolvency proceedings will be determined at the time of issuing the decision to commence the insolvency proceeding (step 3 of the insolvency process).

The amount of claims against the insolvent company created after the court's decision to commence the bankruptcy procedure will be determined at the time of issuing the decision to declare bankruptcy (step 7 of the insolvency process).

After the decision to commence the insolvency proceeding (step 3 of the insolvency process), interest is still accrued on outstanding loans but the payment of the interest will be temporarily suspended. After the decision to declare bankruptcy (step 7 of the insolvency process), no interest will be accrued on loans. As for new debts obtained after the commencement of the insolvency proceedings, the interest on such debts will be determined as agreed between the lender and the debtor.

36 Set-off and netting

To what extent may creditors 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?

Article 63 of the Bankruptcy Law 2014 specifically allows a creditor of an insolvent company to agree with the company to offset obligations arising out of contracts entered into between the parties prior to the date of the court's decision commencing the insolvency proceeding (step 3 of the insolvency process) provided that the set-off must be approved by the receiver, who is then responsible to report to the judge on the set-off.

There are, however, specific provisions relating to insolvency that could limit the operation of a set-off in certain circumstances. For instance, a set-off in the event of insolvency could be regarded as 'making payment or setting off the obligations in favour of the creditor under a contract under which the obligations are not due or in an amount greater than the obligations of the insolvent company' under article 59

of the Bankruptcy Law 2014 and could accordingly be held invalid by the court. See the discussion in question 46.

Another problem is that the Bankruptcy Law 2014 provides that after receiving the court's decision on the bankruptcy declaration (step 7 of the insolvency process), a bank holding an insolvent company's accounts cannot settle debts owed by that company without the approval of the judge.

37 Modifying creditors' rights

May the court change the rank (priority) 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.

38 Priority claims

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

The liquidated assets of the bankrupt company (excluding those assets being subject to valid security interest) are distributed in the following order (step 8 of the insolvency process):

- first, costs and expenses related to the bankruptcy proceeding;
- second, unpaid wages, severance allowances, social insurance and health insurance and other employee benefits;
- third, debts arising subsequent to the commencement of the insolvency procedure that are used for the purpose of business recovery of the company;
- fourth, financial obligations to the state; unsecured debts payable to the creditors named in the list of creditors; and secured debts that remain unpaid because of the value of the secured assets being insufficient to repay them; and
- the remaining assets will be distributed to the owner or owners of the bankrupt company.

Distribution of liquidated assets of bankrupt credit institutions

Unlike other normal companies, the assets of a bankrupt credit institution are distributed differently. The insolvent credit institution receiving special loans from the SBV or from other credit institutions is required to return such special loans to the SBV or other credit institutions in priority to the distribution of assets to other creditors.

After the payment of special loans, the liquidated assets of the bankrupt credit institution are distributed in the following order:

- first, costs and expenses related to the bankruptcy proceeding;
- second, unpaid wages, severance allowances, social insurance and health insurance and other employee benefits;
- third, deposits; amounts payable by deposit insurance institutions to depositors;
- fourth, financial obligations to the state; unsecured debts payable to the creditors named in the list of creditors and secured debts that remain unpaid because of the value of the secured assets being insufficient to repay them; and
- the remaining assets will be distributed to the owner or owners of the bankrupt credit institution.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Employment contracts can be unilaterally terminated by the company in the case of restructuring of the company or liquidation of the company, as a part of the insolvency proceedings or otherwise.

Termination because of restructuring

Under article 44 of the Labour Code of Vietnam (National Assembly, 18 June 2012), an employer may unilaterally terminate the employment with its employee because of 'organisational restructuring' or 'economic reasons'.

In the event that the employment is terminated pursuant to article 44 of the Labour Code, the termination must be carried out in accordance with the following procedures:

- first the employer must prepare a restructuring plan (the employment restructuring plan), which includes, among other things, information on the concerned employees whose labour contracts will be terminated;
- if the employment restructuring plan results in termination of employment with multiple employees, the trade union of the company must be consulted on the plan, and thereafter notified to the labour authority. The law only requires the company to consult with the trade union and to notify the plan to the labour authority, but it does not require any consent of the trade union or the labour authority; and
- the employment can only be terminated after the date falling 30 days after the date of notification to the labour authority.

By law, if the termination of employment is because of restructuring under article 44 of the Labour Code, employees are entitled to a redundancy allowance equal to the aggregate amount of one month's salary and benefits for every year of service, subject to a minimum payment of two months' salary and benefits. However, if the employer has paid unemployment insurance for the terminated employees for the period after 1 January 2009, the redundancy allowance will only be paid in respect of the working period prior to 1 January 2009. For the working period after 1 January 2009, the employees are entitled to an unemployment allowance to be paid by the state. In addition to the redundancy allowance, upon termination of an employment contract, the employer would also be required to make other payments, including:

- payment of salary in lieu of any accrued annual leave that has not been taken by the employee prior to the termination; and
- any other amounts payable under existing labour contracts and collective labour agreement (if any).

Termination because of liquidation

Under the Labour Code, once a company is liquidated, the employment contracts between the company and its employees are terminated.

Unlike the termination because of restructuring as discussed above, if the employment is terminated because of liquidation of the employer, the employees are entitled to a severance allowance, which is equal to the aggregate amount of half of one month's salary for each year of employment but, like the redundancy allowance, the company is not required to pay severance allowance for the period that it has paid unemployment insurance, which may have been effected since 1 January 2009. In addition to the severance allowance, upon the termination of a labour contract, the employer would also be required to make other payments, including:

- payment of salary in lieu of any accrued annual leave that has not been taken by the employee prior to the termination; and
- any other amounts payable under the existing labour contracts and collective labour agreement (if any).

40 Pension claims

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

In the case of liquidation of a bankrupt company, claims of employees will rank behind claims for costs and expenses related to the bankruptcy proceedings (and claims of secured creditors in respect of the secured assets) – see the answer to question 38.

41 Environmental problems and liabilities

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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Environmental damage could give rise to civil liabilities, administrative liabilities and criminal liabilities.

In general, the legal representative of the company causing environmental problems is responsible for the consequences, including criminal liability if such violation amounts to criminal liability, and the company causing environmental problems is responsible for damages, if any. The insolvency administrator, secured or unsecured creditors are generally not responsible for environmental problems caused by the debtor.

42 Liabilities that survive insolvency or reorganisation proceedings

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

If the debtor is liquidated after being declared bankrupt, there are no surviving liabilities.

43 Distributions

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

See question 38.

Security

44 Secured lending and credit (immovables)

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

Security over immovable (real) property should be created through a mortgage. A mortgage is an arrangement whereby the mortgagor uses its assets, without handing over possession of the assets to the mortgagee, as security for the performance of an obligation.

45 Secured lending and credit (movables)

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

Security over movable (personal) property can be created through either a mortgage (see above) or pledge. A pledge is an arrangement whereby the pledgor hands over possession of an asset to the pledgee as security for the performance of an obligation.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Under article 59 of the Bankruptcy Law 2014, the following transactions may be held by the court to be invalid if conducted within six months prior to the date of commencement of an insolvency proceeding (step 3 of the insolvency process):

- transfer of property that is not at market price;
- conversion of an unsecured debt into a secured debt or partly secured debt on the assets of the company;
- making payments, or setting off an obligation in favour of a creditor, where the debt is not yet due or in relation to a sum that is larger than the debt becoming due;
- donation of assets;
- conducting transactions outside the purpose of the business operations of the insolvent company; and
- other transactions for the purpose of 'dispensing' assets.

The six-month voidable period referred to above is extended to 18 months where the transaction is between the insolvent company and a 'related person'. The 'related persons' of an insolvent company are defined to include:

- (i) the parent company of the insolvent company, a manager of the parent company or any person who has the power to appoint such managers;
- (ii) any subsidiary company of the insolvent company;

- (iii) persons or a group of persons capable of controlling the decision making and operations of the insolvent company via its management bodies;
- (iv) a manager of the insolvent company;
- (v) the spouse, parent or foster parent, child, adopted child, or sibling of a manager of the insolvent company, or of a member or shareholder who holds the controlling capital contribution or shares in the insolvent company;
- (vi) any individual authorised to represent (i), (ii), (iii), (iv) and (v) above;
- (vii) any company in which any of the persons identified in (i), (ii), (iii), (iv), (v), (vi) above and (viii) below hold interests to the extent that they control the decision-making process of the management bodies of the company; and
- (viii) any group of persons who agree to act in concert in order to take over an interest in the insolvent company or in order to control the insolvent company.

Any participants in insolvency proceedings (including creditors, debtors, employees, the insolvent company and its shareholders and other relevant persons) or the receiver may request the court to declare the relevant contract or transaction invalid. The court itself can declare a contract or transaction invalid if it is aware that the contract or transaction falls into circumstances provided for under article 59 of the Bankruptcy Law 2014.

If a transaction is declared to be invalid, any recovered assets must be included in the total assets of the insolvent company.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

As discussed in the response to question 38, shareholders are last in the order of distribution in respect of their share capital, after the claims of 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) or their claims are related to debts arising subsequent to the commencement of the insolvency procedure that serves the purpose of business recovery of the company.

The suspect period for voidable transactions is extended from six months to 18 months in the case of transactions with related persons. See question 46 for more detail.

Groups of companies

48 Groups of companies

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 rarely be pierced, so the circumstances where a parent or affiliated company could be liable for its subsidiaries or its affiliates are limited. However, the Enterprise Law contains specific exceptions to the limited liability principle, for example:

- if an owner or shareholder of a company fails to contribute the charter capital as committed, the owner or shareholder must be responsible for the company's liabilities to the extent of its committed capital;
- the owners or shareholder of a company is only permitted to withdraw capital from the company in the form of selling its interest in the company; in the case of withdrawal of all or part of its contributed charter capital from the company in another form, the owner or shareholder and the concerned person must be jointly liable for debts and other liabilities of the company;
- the owners or ordinary shareholders of a company are not permitted to distribute profits if the company is unable to repay due debts; in the case of breaching this provision, the owner or shareholders must return the distributed profit; and
- transactions or contracts between a company (as one party) and its owners or shareholders and their related persons (as the other party) are considered to be related party transactions and must be approved by the relevant corporate bodies of the company.

49 Combining parent and subsidiary proceedings

In 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?

Under Vietnamese law, each member of a corporate group is a separate legal entity except for in very specific circumstances. Accordingly, the assets and liabilities of companies are not combined into one pool for distribution in an insolvency process.

International cases**50 Recognition of foreign judgments**

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?

Unless there is a treaty on legal assistance between Vietnam and the foreign country, the recognition and assistance of foreign insolvency proceedings in Vietnam is generally regulated by the Civil Procedure Code (National Assembly, 25 November 2015) and the Legal Assistance Law (National Assembly, 21 November 2007). Vietnam has only signed bilateral treaties on legal assistance with a few countries and territories, other than France and the Republic of China (Taiwan), most of those countries were, or still are, communist states: Russia, Cuba, the Czech Republic, Slovakia, Hungary, Bulgaria, Poland, China, Laos and North Korea. Nor is Vietnam a signatory to any multilateral international conventions on reciprocal enforcement of judgments. Therefore, the orders, decisions and judgments of most of the courts of developed jurisdictions would not be recognised in Vietnam.

Under the Legal Assistance Law, the relevant foreign body seeking judicial assistance in Vietnam should send a civil legal mandate dossier to the Ministry of Justice of Vietnam requesting assistance. After examining the validity of the dossier, the Ministry of Justice of Vietnam will transfer it to the competent Vietnamese authority for implementation.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

No.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors will be able to provide evidence of their claims in Vietnamese liquidation proceedings in the normal way.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

For the reason discussed above, judgments of foreign courts are generally unenforceable against assets in Vietnam. There is no legal basis for the transfer of assets subject to administration under insolvency in Vietnam to an administration in another country.

54 COMI

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?

Vietnamese insolvency law does not provide for the concept of the COMI (centre of main interests) of a debtor company or group of companies. Most foreign businesses establish a separate legal entity in Vietnam, and the insolvency proceedings of other members of the group are separate from those applied to the company in Vietnam.

55 Cross-border cooperation

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?

No. See also questions 50 and 51.

56 Cross-border insolvency protocols and joint court hearings

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?

No.



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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice.

The information in each table has been supplied by the authors of the relevant chapter.

AUSTRALIA	Applicable insolvency law, reorganisations: liquidations
	Corporations Act 2001 (Cth).
	Customary kinds of security devices on immovables
	Mortgage (both equitable and legal).
	Customary kinds of security devices on movables
	Security interest (charge, pledge, lien, etc) registered on the Personal Properties Securities Register.
	Stays of proceedings in reorganisations/liquidations
	With effect from 1 July 2018, the federal government's new ipso facto laws (which were introduced by the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017 (Cth)) impose an automatic stay on the enforcement of ipso facto clauses in certain contracts entered into on or after 1 July 2018 (Automatic Stay). The Automatic Stay will apply where one of the following insolvency events occurs in relation to a company: voluntary administration; a receiver or controller is appointed over the whole or substantially the whole of the company's assets; the company announces, applies for or becomes subject to a scheme of arrangement in order to avoid a winding up; or the appointment of a liquidator immediately following an administration or a scheme of arrangement. A moratorium on legal actions exists in both voluntary administration and liquidation. No such moratorium exists upon the commencement of a receivership.
	Duties of the insolvency administrator
	Insolvency practitioners have a number of duties including: to act with reasonable care and skill; to act in good faith; to act bona fide; and to be independent. Each insolvency administrator is also considered an officer of the company so must also comply with the duties of officers of the company (both statutory and at common law). Liquidators and administrators also considered fiduciaries and are held to a higher standard than receivers.
	Set-off and post-filing credit
	Available under section 553C of the Act. Operates automatically in a liquidation when there is a mutuality of transactions between the debtor and the creditor. Not available if the creditor knew of the debtor's insolvency.
	Creditor claims and appeals
	Proof of debts are filed in liquidation, administrations, deeds of company arrangement and schemes of arrangement. A similar process exists for all of these. The insolvency practitioner maintains a high degree of discretion with respect to admitting (or rejecting) claims, and may require further information. Aggrieved creditors can seek recourse through the courts if a proof of debt is rejected. The courts have exhibited a reluctance to overturn decisions of independent insolvency practitioners.
	Priority claims
	Secured creditors have priority. Under section 556 of the Act certain other creditors are afforded a level of priority (including employees, providers of funding and the costs of the insolvency administrator).
	Major kinds of voidable transactions
	Uncommercial transactions; unfair preferences; unreasonable director-related transactions; and unfair loans.
	Operating and financing during reorganisations
	Financing permitted under all forms of Australian administration (voluntary administration, deeds of company arrangement, liquidation and receivership). Such financing is afforded a level of priority either under statute or existing security documents.
International cooperation and communication	
Australia has adopted the UNCITRAL Model Law on Cross-Border Insolvency by implementing legislation called the Cross-Border Insolvency Act 2008 (Cth).	
Liabilities of directors and officers	
Directors and offices may be liable for insolvent trading (subject to both criminal and civil penalties). Consequences include civil penalty orders or orders requiring a director to compensate either the company or aggrieved creditors. In September 2017, new section 588GA was introduced into the Act to afford directors protection in certain circumstances to enable a company to delay entering into a formal insolvency process, and instead pursue a turnaround plan (ie, provide directors with a 'safe harbour protection'). Under this new section, a director will not be liable for debts incurred by a company while it is insolvent if, 'at a particular time after the director starts to suspect the company may become or be insolvent, the director starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company' than the 'immediate appointment of an administrator or liquidator to the company'.	
Pending legislation	
Draft legislation aimed at combatting illegal phoenix activity through the introduction of new phoenix offences targeted at directors and advisors who engage in creditor-defeating transactions. The draft legislation also proposes to restrict the voting rights of related creditors to remove an external administrator.	

AUSTRIA	Applicable insolvency law, reorganisations: liquidations
	Insolvency proceedings comprising bankruptcy proceedings, reorganisation proceedings and reorganisation proceedings with self-administration are governed by the Austrian Insolvency Code. The EU Insolvency Regulation will affect cross-border insolvencies.
	Customary kinds of security devices on immovables
	The main type of security on immovables is the mortgage.
	Customary kinds of security devices on movables
	The possible security devices on movables are the pledge or the transfer of title. For movables other than rights, these devices are not very practical. Creditors, however, commonly make use of an assignment of receivables as security.
	Stays of proceedings in reorganisations/liquidations
	There is a complete stay of proceedings on the commencement of insolvency proceedings. Secured creditors can still continue to enforce their rights.
	Duties of the insolvency administrator
	In bankruptcy the insolvency administrator takes control over the debtor's assets and effects the distribution of such assets. In reorganisation proceedings (without self-administration) the insolvency administrator takes control over the debtor's assets and reviews the reorganisation plan. In reorganisation proceedings (with self-administration) the reorganisation administrator supervises the debtor (who generally stays in control of its assets) and reviews the reorganisation plan.
	Set-off and post-filing credit
	Generally, creditors are entitled to exercise their rights of set-off in all types of insolvency proceedings. Claims that are to be compensated must have been compensatable at the opening of the bankruptcy proceedings. In insolvency proceedings an insolvency administrator is entitled to conclude credit agreements on behalf of the insolvent's estate.
	Creditor claims and appeals
	In insolvency proceedings, the creditor must file its claims with the court. If the claim is disputed, the creditor must commence (or continue) legal proceedings to establish its claim, if it had not obtained an enforceable judgment prior to the initiation of the insolvency proceedings.
	Priority claims
	Claims against the debtor that arise from the continuing of business activities or liquidation of the business during the insolvency proceedings are generally granted priority.
	Major kinds of voidable transactions
Under certain preconditions the debtor's transactions are voidable where they give preference to one creditor over others.	
Operating and financing during reorganisations	
In reorganisation proceedings the debtor can continue to operate if and to the extent ordered to do so by the administrator, or, in the case of reorganisation proceedings with self-administration subject to the administrator's supervision. Claims against the debtor arising from the continuation of business during the reorganisation proceedings are granted priority.	
International cooperation and communication	
Austrian law allows for cross-border cooperation in several ways and provides for information transfers to foreign administrators and the foreign administrators right to submit proposals and statements relating to reorganisation plans and the liquidation or utilisation of assets located in Austria.	
Liabilities of directors and officers	
Directors can be personally liable for damage suffered because of the late filing of a petition. Managing directors may be personally liable for taxes and social security contributions.	
Pending legislation	
None.	

BAHAMAS	Applicable insolvency law, reorganisations: liquidations
	The Companies Act, the International Business Companies Act and subsequent amending acts and subsidiary legislation.
	Customary kinds of security devices on immovables
	Legal and equitable mortgages, debentures including fixed and floating charges.
	Customary kinds of security devices on movables
	Chattel mortgages, debentures including fixed and floating charges.
	Stays of proceedings in reorganisations/liquidations
	General stay automatically issues on commencement of an involuntary winding up. Actions by creditors etc may only be commenced or continued with the leave of the court.
	Duties of the insolvency administrator
	Secure all the assets of the company being wound up, prosecute appropriate claims against former directors or delinquent creditors of the company, release assets held in trust or pledged as security to beneficial owners or secured creditors, pay statutory priority claims, prepare the accounts of the company, receive and process all creditor claims, submit scheduled reports to the supervising court and to the creditors committee if one has been appointed.
	Set-off and post-filing credit
	These rights remain enforceable.
	Creditor claims and appeals
	Claims are first approved or rejected by the liquidator, whose decisions are subject to appeal to the court.
	Priority claims
	Unpaid wages, taxes due and owing and secured creditors.
	Major kinds of voidable transactions
Fraudulent preferences, transactions at an undervalue, onerous contracts.	
Operating and financing during reorganisations	
No specific statutory regime but within the discretion of the court.	
International cooperation and communication	
Procedures for recognising and assisting foreign office-holders in respect of foreign companies in liquidation, limited to 'relevant foreign countries'. No recognition of foreign office-holders in respect of Bahamian companies.	
Liabilities of directors and officers	
Liable for any pre-liquidation breach of duties owed to the company. Also, liable to cooperate fully with the liquidator throughout winding-up proceedings including provision of information.	
Pending legislation	
None.	

BAHRAIN	Applicable insolvency law, reorganisations: liquidations
	Law No. 11 of 1987 (the Bankruptcy Law), the Civil Code, the Companies Law and CBB and Financial Institutions Law.
	Customary kinds of security devices on immovables
	Mortgages, pledges and assignments.
	Customary kinds of security devices on movables
	Pledges, assignments and rights of retention.
	Stays of proceedings in reorganisations/liquidations
	Stay of proceedings will come into force upon commencement of any reorganisation proceedings or administration of any financial institution. Stay of proceedings is also applicable in bankruptcy proceedings, but does not extend to secured creditors.
	Duties of the insolvency administrator
	To administer and preserve the debtors funds and act on its behalf in relation to transactions and report to the court.
	Set-off and post-filing credit
	Set-off is exercisable in bankruptcy proceedings if debts are interrelated. Post-credit filing is possible in certain circumstances to the extent necessary.
	Creditor claims and appeals
	Creditors are invited to submit claims upon commencement of insolvency proceedings. Appeals are available.
	Priority claims
	Generally, expenses of insolvency proceedings and taxes owed to government.
Major kinds of voidable transactions	
Transactions that increase financial obligations of the debtor give unjustified preference to creditors. Transactions that are at an undervalue, fraudulent or preferential in the context of financial institutions.	
Operating and financing during reorganisations	
Possible provided it is in the course of business. Approval of the court will be required otherwise.	
International cooperation and communication	
Generally, save for GCC countries, there are no international treaties in place to allow for cooperation between domestic and foreign courts.	
Liabilities of directors and officers	
Directors are liable for fraud and mismanagement. Directors of insolvent financial institutions are liable for carrying on licensed activity when the institution was insolvent.	
Pending legislation	
Bahrain has published a new Reorganisation and Bankruptcy Law (Law No. (22) of 2018) in the Bahrain Official Gazette on 7 June 2018. However, the new law will be enforced on 7 December 2018. Please see 'Update and trends' section above for further details.	

BELGIUM	Applicable insolvency law, reorganisations: liquidations
	Book XX of the Belgian Code of Economic Law.
	Customary kinds of security devices on immovables
	The most important form of security is the mortgage.
	Customary kinds of security devices on movables
	The principal type of security is a pledge. Other types of security: statutory lien of the unpaid seller, fiduciary transfer of title and retention of title.
	Stays of proceedings in reorganisations/liquidations
	Judicial reorganisation: within 15 days of the debtor's request for the reorganisation, the court may grant a moratorium for a maximum of six months. During this moratorium period, no enforcement can take place in principle against the debtor's assets and no bankruptcy proceedings can be opened. Bankruptcy: any legal or enforcement proceedings are suspended. Secured creditors can only commence or continue enforcement proceedings subject to limits set by the bankruptcy legislation.
	Duties of the insolvency administrator
	Judicial reorganisation: the judge will appoint a delegated judge to report to the court on the process of the reorganisation procedure; in case of debtor's obvious and serious defaults, the judge may designate a temporary administrator for the moratorium period setting out its duties. Bankruptcy: the bankruptcy trustee's main duty is to liquidate the assets of the debtor to satisfy creditors' claims. The trustee will review creditors' claims and, if he or she disputes them, refer them to the court.
	Set-off and post-filing credit
	Creditors can in certain circumstances exercise their right of set-off provided it was agreed prior to the insolvency and provided further that it relates to mutual debts existing prior to the insolvency. Loans and credit granted after the commencement of liquidation proceedings will receive preferential treatment over other claims.
	Creditor claims and appeals
	Judicial reorganisation: the debtor must draw up a list containing all outstanding claims and send this to their creditors, within eight days after the moratorium period is granted. This information will then be verified by each creditor. In case of disagreement between the creditor and the debtor, the court will resolve such dispute. Creditors can also file their claims in the reorganisation register. Bankruptcy: creditors must file their claim in the bankruptcy register by the day mentioned in the bankruptcy declaration. If the bankruptcy trustee disputes the claim, the court will decide. Decisions can be appealed.
	Priority claims
	The basic concept for priority rules is the difference between specific statutory liens and general statutory liens. The former will nearly always rank in priority to the latter.
	Major kinds of voidable transactions
The main voidable transactions are transactions at an undervalue or security arrangements entered into during a 'suspect period' of a maximum of six months preceding a bankruptcy decision, as well as transactions entered into during such period with counterparties that were aware that the debtor was actually insolvent.	
Operating and financing during reorganisations	
The court will in principle allow the debtor to continue to operate the business during the moratorium period. All ongoing contracts will continue notwithstanding the judicial reorganisation.	
International cooperation and communication	
A Belgian bankruptcy trustee will provide information and cross-border cooperation in respect of foreign court proceedings, in accordance with the relevant provisions of the Regulation (EU) 2015/848 of the European Parliament and Council of 20 May 2015 on insolvency proceedings and the Belgian private international law code.	
Liabilities of directors and officers	
In general, directors and officers are not liable for the company's debts. They may become liable if, as a result of their obvious default, not all of the company's debts can be paid in full.	
Pending legislation	
N/A	

BERMUDA	Applicable insolvency law, reorganisations: liquidations
	Companies Act 1981 Companies (Winding Up) Rules 1982 Banking (Special Resolution Regime) Act 2016.
	Customary kinds of security devices on immovables
	Mortgages (legal and equitable); and Fixed charges.
	Customary kinds of security devices on movables
	Mortgages (legal and equitable); Fixed charges; Floating charges; Pledges; Liens; and Retention of title clauses in contract.
	Stays of proceedings in reorganisations/liquidations
	Automatic stay of proceedings upon the appointment of a provisional liquidator and/or the granting of winding-up order.
	Duties of the insolvency administrator
	The role of an insolvency administrator does not exist in Bermuda.
	Set-off and post-filing credit
	Automatic set-off upon the winding up of a company. Post-filing credit paid in priority to other unsecured claims.
	Creditor claims and appeals
	Claims must be lodged with the liquidators in the permitted time. A rejection of claim may be appealed within 21 days of receiving notice of the rejection.
	Priority claims
	Priority of claims is determined by the Companies Act 1981 and the rules of bankruptcy.
	Major kinds of voidable transactions
	Fraudulent preference; Undervalued floating charges; Onerous transactions; Disposition of property after the commencement of winding up; and Fraudulent conveyance.
	Operating and financing during reorganisations
	Operating and financing during reorganisation may proceed in the ordinary course, subject to the oversight of any provisional liquidator, if applicable.
International cooperation and communication	
No international conventions. The Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency matters based on the draft guidelines adopted by the Judicial Insolvency Network in October 2016.	
Liabilities of directors and officers	
Liabilities of directors and officers determined by the Companies Act 1981.	
Pending legislation	
None.	

BRAZIL	Applicable insolvency law, reorganisations: liquidations
	Federal Law No. 11.101/2005 (BRL), applicable to judicial reorganisation, out-of-court reorganisation and forced liquidation proceedings.
	Customary kinds of security devices on immovables
	Mortgage and fiduciary transfer.
	Customary kinds of security devices on movables
	Pledge and fiduciary transfer.
	Stays of proceedings in reorganisations/liquidations
	180 days in judicial reorganisation proceedings; indefinitely in forced liquidation proceedings; not applicable to claims with no predetermined amount.
	Duties of the insolvency administrator
	Depends on the proceeding. In a judicial reorganisation, analyse the creditors' claims and consolidate the list of creditors, provide monthly reports of the debtor company's activities and supervise the debtor company's activities and fulfilment of the judicial reorganisation plan. In forced liquidation proceedings, analyse the creditors' claims and consolidate the list of creditors, collect and sell the assets, distribute the proceeds of the assets sale among creditors, according to legal order of payment. Always provide information requested by the court or by creditors.
	Set-off and post-filing credit
	Set-off is possible in forced liquidation proceedings but, in principle, is not possible in judicial reorganisations. In judicial reorganisations, credits that are post-filing are not affected by the proceeding and may be enforced.
	Creditor claims and appeals
	Creditors are given the opportunity of presenting statement of credit to the judicial administrator and proof of claim to the bankruptcy court, and are able to appeal from several decisions.
	Priority claims
	Labor claims up to 3 minimum wages; judicial administrator fees; sums provided to the bankruptcy estate by the creditors; expenses with schedules, management, asset sale and distribution of the proceeds; court costs of the forced liquidation proceedings; court costs with respect to actions and enforcement suits found against the bankruptcy estate; obligations resulting from valid legal acts performed and contracts agreed during the judicial restructuring proceeding, or after the decree of the forced liquidation, and taxes relating to triggering events postdating the decree of the forced liquidation.
Major kinds of voidable transactions	
Payment of unmatured debts during the suspect period; payment of overdue debts effected during the suspect period in a manner that is different from what was established in the original agreement; the creation of security interests during the suspect period to secure payment of pre-existing indebtedness; donations and other equivalent actions effected within the period of two years preceding the forced liquidation; any action aimed at intentionally defrauding creditors.	
Operating and financing during reorganisations	
It is allowed and given priority in case of forced liquidation.	
International cooperation and communication	
No provision in the BRL.	
Liabilities of directors and officers	
In forced liquidation proceedings, shareholders, controlling shareholders, directors and executive officers may be considered liable for debts and/or acts liabilities if the bankruptcy court verifies that they performed any act or omission that contravenes Brazilian Law, regardless of the collection of the assets and impossibility to pay all the creditors of the company; possibility of disregard of corporate veil.	
Pending legislation	
Bill of law No. 10.220/2018.	

BRITISH VIRGIN ISLANDS	Applicable insolvency law, reorganisations: liquidations
	BVI Business Companies Act 2004; Insolvency Act 2003; and Insolvency Rules 2005.
	Customary kinds of security devices on immovables
	Mortgages; and Equitable fixed charges.
	Customary kinds of security devices on movables
	Equitable or legal mortgages over the shares of a BVI company; Charges over bank accounts; and Fixed and floating charges over assets.
	Stays of proceedings in reorganisations/liquidations
	Schemes of arrangement: no automatic moratorium on commencement or pursuit of winding-up proceedings whilst the scheme is being considered. Liquidation: once a liquidator is appointed, there is a moratorium on the ability to pursue proceedings to judgment or execution in the British Virgin Islands (but this does not operate extraterritorially). However, no moratorium on the rights of a secured creditor to enforce its security following the appointment of a liquidator.
	Duties of the insolvency administrator
	The principal duties of a liquidator appointed under the Insolvency Act 2003 are: <ul style="list-style-type: none"> • to take possession of, protect and realise the assets of the company; • to distribute the assets or the proceeds of realisation of the assets in accordance with the Act; and • if there are surplus assets remaining, to distribute them, or the proceeds of realisation of the surplus assets, in accordance with the Act.
	Set-off and post-filing credit
	Save where the creditor had actual notice that the company was balance sheet insolvent at the time the creditor gave/received credit or acquired the claim against the company; or there is a contractual right of set-off or non-set-off, set-off will be automatic in an insolvent liquidation (section 150.(1) of the Insolvency Act 2003) and an account shall be taken of what is due from each party to the other in respect of mutual credits, mutual debts or other mutual dealings, as at the date of the commencement of the liquidation.
	Creditor claims and appeals
	Creditors submit claims in the liquidation in writing to the liquidator together with supporting documents. If the liquidator rejects the claim, he or she shall provide the creditor with a notice of rejection detailing the reasons for the rejection of the claim. Any creditor that is dissatisfied with the decision of the liquidator may make an application to the court under section 273 of the Insolvency Act 2003 or (where the decision is taken at a meeting) under rule 59 of the Insolvency Rules 2005.
	Priority claims
	The costs and expenses of the winding up. Employees' wages, salaries and holiday pay. Amounts due by the debtor to the BVI Social Security Board. Amounts due by the debtor in respect of pension contributions or contributions in respect of medical insurance. Sums due to the government of the Virgin Islands in respect of any tax, duty, including stamp duty, licence fee or permit. Sums due to the Financial Services Commission in respect of any fee or penalty.
Major kinds of voidable transactions	
Unfair preferences. Transactions at an undervalue. Voidable floating charges. Extortionate credit transactions.	
Operating and financing during reorganisations	
The powers of the directors remain in full force and effect during any application to sanction a scheme of arrangement. Thereafter, it will be subject to the terms of the scheme.	
International cooperation and communication	
Part XIX of the Insolvency Act 2003 (Orders In Aid Of Foreign Proceedings) enables orders to be made in the BVI, on the application of a 'foreign representative', in aid of foreign insolvency proceedings in certain designated jurisdictions (ie, Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the UK and the USA).	
Liabilities of directors and officers	
Directors may be found liable in cases of: <ul style="list-style-type: none"> • insolvent trading; • fraudulent trading; • breach of statutory or fiduciary duties to the company; and • an unlawful distribution of the company's assets when the company was insolvent. 	
Pending legislation	
N/A.	

CANADA	Applicable insolvency law, reorganisations: liquidations
	Bankruptcy and Insolvency Act (BIA) (used for liquidations and smaller reorganisations) and Companies' Creditors Arrangement Act (CCAA) (used for larger commercial reorganisations). Insolvencies of banks, insurance companies and significant financial institutions are dealt with under the Federal Winding Up and Restructuring Act (WURA).
	Customary kinds of security devices on immovables
	Mortgages (liens or charges) that are registered on immovable property in the public land registration office in the province where the immovable is located.
	Customary kinds of security devices on movables
	'Security interests' on movables under personal property security legislation have replaced chattel mortgages, conditional sales (hire-purchase) agreements and assignments of book debts, although some of these terms are still used to describe their particular form of security interest.
	Stays of proceedings in reorganisations/liquidations
	Reorganisations: BIA stays against secured and unsecured creditors' claims are automatic on filing. Courts can lift the stays in cases of unfairness. CCAA stays are broader and are created by court order when CCAA protection is granted. Liquidations: stays of proceedings by unsecured creditors and limited stays of proceedings against secured creditors.
	Duties of the insolvency administrator
	Reorganisations: a 'proposal trustee' under the BIA and a 'monitor' under the CCAA are appointed in all cases and review the financial condition of the debtor, administer the claims-proving process and carry out distributions under the proposal (BIA) or plan (CCAA). Liquidations: a BIA bankruptcy trustee is vested with the debtor's unencumbered property, collects and disposes of assets, supervises the claims-proving process and distributes funds to creditors.
	Set-off and post-filing credit
	Rights of set-off are preserved in the BIA. They are restrained in CCAA reorganisations but are customarily recognised in CCAA plans. Netting is specifically preserved for eligible financial contracts in both the BIA and the CCAA. Post-commencement financing is authorised under the BIA and the CCAA, and the court may allow it to prime (ie, have priority over) existing security. Existing pre-filing secured claims continue to apply to the assets of a reorganising business. There is no general administrative expense priority in either the BIA or the CCAA although court orders occasionally permit it. Both the BIA and the CCAA permit suppliers to require COD or cash terms. Under the CCAA, the court may, on suitable terms, compel a critical supplier to continue to supply.
	Creditor claims and appeals
	Proofs of claim must be filed by both secured and unsecured creditors. Claims may be disallowed by the trustee (BIA) or monitor (CCAA). Disallowances can be appealed to the court within a limited time frame.
	Priority claims
	Governmental claims for statutory deductions from employees' wages are given priority over all other claims including secured claims on movables (but not over charges on immovables). New legislation provides for limited super-priority for employee wage arrears and unlimited super-priority for pension contribution arrears. Limited supplier reclamation rights are available for goods supplied shortly before bankruptcy, but are not very effective. There is no express administrative expense priority in reorganisations. Preferred claims include costs of administration and up to three months' rent for landlords.
Major kinds of voidable transactions	
Preferences (transactions made by the debtor with the intent of preferring some creditors over others) within three months of bankruptcy (for arm's-length creditors) or, (in the case of transactions with non-arm's length creditors) within 12 months of bankruptcy where the effect of the transaction is to prefer the creditor; transfers at undervalue (ie, for less than fair market value); unperfected security interests; dividends issued by insolvent debtor corporations and, under most provincial legislation, transactions that are intended to defeat creditors' claims.	
Operating and financing during reorganisations	
The debtor generally maintains management control subject to review by a proposal trustee (BIA) or a monitor (CCAA) and supervision by the court. The BIA and CCAA now provide for post-filing financing for reorganising debtors, similar to US debtor-in-possession financing, which may rank in priority over existing security. Sale of assets BIA: in liquidations, the trustee can sell assets with approval of the inspectors. In reorganisations, sales of assets out of the ordinary course of business require court approval. CCAA: court orders govern the sales of assets. Sales out of the ordinary course of business require court approval.	
International cooperation and communication	
Canada has adopted the general framework of the UNCITRAL Model Law and has applied it successfully in a large number of cross-border cases. Canadian courts have communicated with foreign courts in international cases for many years.	
Liabilities of directors and officers	
General corporate duty to act honestly and in good faith with fiduciary obligations to the company. Specific statutory liabilities for unpaid employees' wages, certain unremitted employee tax collections and dividends issued while insolvent. Numerous other corporate liabilities to governmental agencies can crystallise into personal liabilities of directors. There can be significant exposure to environmental liabilities.	
Pending legislation	
Several significant changes to the BIA and the CCAA became effective in September 2009.	

CAYMAN ISLANDS	Applicable insolvency law, reorganisations: liquidations
	Companies Law (2018 Revision); Companies Winding Up Rules, 2018.
	Customary kinds of security devices on immovables
	Registered charge.
	Customary kinds of security devices on movables
	Mortgages, fixed and floating charges, liens, pledges, retention of title clause.
	Stays of proceedings in reorganisations/liquidations
	Court permission is required to commence or continue proceedings against a company in respect of which a winding-up order has been made. After commencement of insolvency proceedings but before winding-up order is made, the company, or a creditor or member may apply for order staying continuation or restraining commencement of proceedings against the company.
	Duties of the insolvency administrator
	Collect and realise assets; adjudicate claims and make distributions to creditors; report on conduct of liquidation.
	Set-off and post-filing credit
	Automatic set-off in insolvency, subject to contractual disapplication and notice of commencement of liquidation.
	Creditor claims and appeals
	Proof of debt with supporting evidence submitted to liquidator. If claim rejected entirely or in part by liquidator, appeal to court within 21 days of notification.
	Priority claims
	Employee-related claims, debts due to bank depositors, taxes due to the government.
	Major kinds of voidable transactions
Voidable preference; transaction at undervalue.	
Operating and financing during reorganisations	
Subject to terms of restructuring plan.	
International cooperation and communication	
Courts generally willing to cooperate with foreign courts, and to recognise or assist foreign insolvency representatives. The Grand Court has provided further guidance on cross-border insolvency protocols through the introduction of Practice Direction 1 of 2018.	
Liabilities of directors and officers	
None, unless personally guaranteed or breached duties.	
Pending legislation	
Data Protection Law (due to come into force in 2019).	

CHINA	Applicable insolvency law, reorganisations: liquidations
	The Enterprise Bankruptcy Law of the People's Republic of China [2006] (the EBL).
	Customary kinds of security devices on immovables
	Mortgage; finance lease.
	Customary kinds of security devices on movables
	Mortgage; pledge; lien.
	Stays of proceedings in reorganisations/liquidations
	Stays of proceeding will come into force on the commence of bankruptcy procedures.
	Duties of the insolvency administrator
	The administrator takes charge of the operation of the enterprise and the disposal of assets.
	Set-off and post-filing credit
	The administrator shall set off the debt if a creditor owes a debt to the debtor before the court accepts the bankruptcy application.
	Creditor claims and appeals
	Where a bankruptcy application is not accepted by the People's Court, the applicant who is not satisfied with this ruling may appeal to the higher-level court within ten days from the date of delivery of the rule.
	Priority claims
	Expenses for bankruptcy proceedings, the common benefits debts, employee-related claims, social security expenditure, tax owed by the debtor, the priority of the individual house buyer and the priority of construction projects, as well as personal injury caused by debtors.
Major kinds of voidable transactions	
Transactions occurring within one year prior to the acceptance of the bankruptcy application: transactions conducted at an obvious unreasonable price; the settlement of undue debt; the waiver of creditors' claims; the transfer of property without compensation or security provision for debts without security.	
Operating and financing during reorganisations	
The administrator or the debtor operates the enterprise during the reorganisation.	
International cooperation and communication	
If the foreign bankruptcy proceedings neither violate the basic principles of the PRC's laws nor harm national sovereignty, security and public interest, and do not harm legal rights and interests of creditors within the territory of the PRC, the court will recognise and enforce the foreign proceeding.	
Liabilities of directors and officers	
The director, supervisor or senior management personnel of an enterprise have duties of loyalty and diligence duties based on laws.	
Pending legislation	
None.	

CYPRUS	Applicable insolvency law, reorganisations: liquidations
	The Companies Law of Cyprus (Cap. 113). Bankruptcy Law (Cap. 5) Insolvency of Individuals (Personal Repayment Relief Plans) Law
	Customary kinds of security devices on immovables
	Mortgage Deposit of Sale's Contract Memo (in case of court judgment)
	Customary kinds of security devices on movables
	Lien Pledge Floating charge
	Stays of proceedings in reorganisations/liquidations
	Section 215 of Companies Law – Stay of proceedings after application before a court staying a specific court proceeding or any other court proceedings pending conclusion of the one under which application was made. Section 220 of Companies Law – Once winding-up order made or provisional liquidator appointed, no action or proceeding shall continue against liquidated company except by leave of the court. In examinership, no claims brought or orders made until examinership process is concluded or set aside.
	Duties of the insolvency administrator
	In general to protect property of company so as to be able to repay the amount owed to the debenture holder without breaching general fiduciary duties as an in effect director.
	Set-off and post-filing credit
	Set-off rights may be exercised unless creditor had notice. Post-filing credit in case of bankruptcy is an offence. In case of a company, general rule is that insolvent companies cannot enter into further transactions after liquidation order. Same goes for examinership unless it involves new expenses duly incurred, are vital for continuation of company as going concern.
	Creditor claims and appeals
	Any creditor must submit proof of claim to liquidator within 35 days from issuance of liquidation order. As in any judgment, appeal can be made against any order or judgment to Supreme Court without need to post security.
	Priority claims
	Costs of winding up. All government and local taxes. Sums due to employees. Secured creditors, like secured by floating charge. Unsecured creditors.
	Major kinds of voidable transactions
	Conveyance, charge, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company within six months before the commencement of its winding up.
	Operating and financing during reorganisations
	Depending on form of reorganisation. Extra financing exceptionally allowed if shown necessary for company to continue as going concern.
International cooperation and communication	
Under treaties signed by Cyprus and relevant EU Regulation.	
Liabilities of directors and officers	
Failure to file for proceedings – criminal offence. Fraudulent trading provisions. Tax obligation provisions etc.	
Pending legislation	
N/A	

DOMINICAN REPUBLIC	Applicable insolvency law, reorganisations: liquidations
	Law 141-15 on Restructuring and Liquidation of Companies and Business Persons, along with Decree No. 20-17.
	Customary kinds of security devices on immovables
	Mortgages and privileges.
	Customary kinds of security devices on movables
	Chattel pledges, both ordinary and non-possessory.
	Stays of proceedings in reorganisations/liquidations
	The stay in proceedings commences after the decision approving the reorganisation request becomes irrevocable and is overturned with the approval of the reorganisation plan or the initiation of the liquidation process.
	Duties of the insolvency administrator
	Dispose only of the necessary assets for the ordinary course of business, under the supervision of the officers. Render accounts to the court.
	Set-off and post-filing credit
	Set off and netting of debts are allowed during the insolvency proceedings. The court may authorise the debtor to obtain secured and unsecured loans or credits, as well as new securities.
	Creditor claims and appeals
	Most decisions rendered during the proceedings may be appealed.
	Priority claims
	Credits originated after the commencement of the insolvency proceedings, when approved by the court, have a higher priority in relation to all other than those owed to the tax authorities, to the employees or originated by the insolvency proceedings.
	Major kinds of voidable transactions
Transactions involving the free transfer of assets or those entered into with related parties.	
Operating and financing during reorganisations	
Debtor remains in possession of the business and may dispose of the necessary assets for the ordinary course of business, under the supervision of the conciliator. The court may authorise new financing.	
International cooperation and communication	
Cooperation and coordination between domestic and foreign courts and administrators is conceived in our legislation.	
Liabilities of directors and officers	
Officers are subject to administrative sanctions and are responsible civilly and criminally for their own acts, as well as for the acts of their expert advisers. Corporate officers and directors may be liable for labour claims and tax claims, as well as criminal claims regarding to the crime of bankruptcy.	
Pending legislation	
There is no pending legislation regarding insolvency proceedings.	

ENGLAND & WALES	Applicable insolvency law, reorganisations: liquidations
	Principal legislation: Insolvency Act 1986. Subordinate legislation: Insolvency (England and Wales) Rules 2016. Other relevant legislation: Company Directors Disqualification Act 1986 and Companies Act 2006, the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003/3226), the EU Insolvency Regulation and the Cross-Border Insolvency Regulations 2006 affect cross-border insolvencies.
	Customary kinds of security devices on immovables
	Principal type of security: legal mortgage (conveyance or assignment of the whole of the legal ownership). Other types of security: equitable mortgage (transfer of beneficial interest only) and fixed charge.
	Customary kinds of security devices on movables
	Principal types of security: mortgages, fixed charges, floating charges, pledges, liens.
	Stays of proceedings in reorganisations/liquidations
	Voluntary liquidations: No automatic moratorium on proceedings against company. Involuntary liquidations: Once order for liquidation has been made, no action can be started or proceeded against the company, without the permission of the court. Administration: Automatic moratorium on proceedings against company and enforcement of security. Reorganisations: No moratorium unless company also in administration (subject to potential new restructuring plan and restructuring moratorium). Potential 28-day moratorium for small companies putting a CVA together.
	Duties of the insolvency administrator
	Liquidation: Liquidator will realise and distribute assets in accordance with distribution priority rules in insolvency. Administration: Administrator has the power to carry on the business of the company and sell its assets where likely to promote purposes of the administration. Administrator may also make distributions. Administrative receivership: Administrative receiver will realise assets to satisfy secured creditor's claim.
	Set-off and post-filing credit
	Legal and equitable set-off rules apply to administrations before a notice of intended distribution is given, receiverships and voluntary arrangements and are confined to money obligations between the insolvent company and the creditor. Insolvency set-off operates in liquidations and administrations once the administrator has given a notice of his or her intention to make a distribution and applies to mutual dealings between a creditor and the company. A liquidator or administrator can raise money, secured on the company's assets. Such credit has priority over ordinary unsecured creditors only in respect of the new funds. New loans or security will not be capable of taking priority over pre-existing secured debt unless this is permitted under the terms of the pre-existing secured indebtedness. Expenses of the administration (or liquidation) will rank ahead of floating charges.
	Creditor claims and appeals
	Creditors submit claims to liquidator and administrator by way of 'proof of debt'. Time limits may be set before interim dividends paid. Creditor can appeal to court against a rejection of its proof within 21 days.
	Priority claims
	There are comparatively few types of preferential claims. The main ones are occupational pension schemes in respect of unpaid contributions and employees who are owed remuneration up to a set amount. In relation to a financial institution, certain debts in relation to the Financial Services Compensation Scheme will also rank as preferential claims. The expenses of preserving and realising the assets, including the costs and expenses of the various office holders will also take priority over certain groups of creditors. In a reorganisation the order of priority will be a matter of negotiation between the parties.
	Major kinds of voidable transactions
	Transactions at an undervalue, preferences, certain floating charges granted in suspect period.
	Operating and financing during reorganisations
	In an administration the directors' powers cease (although they remain in office) and the administrator has the power to carry on the business of the company and to sell its assets. In a scheme and CVA the directors remain in control.
International cooperation and communication	
Section 426 of the Insolvency Act, the EU Insolvency Regulation and the Cross-Border Insolvency Regulations work in parallel, together with common law principles of comity and to a certain extent, modified universalism.	
Liabilities of directors and officers	
Misfeasance or breach of fiduciary or other duty, fraudulent trading, wrongful trading.	
Pending legislation	
N/A	

EUROPEAN UNION	Applicable insolvency law, reorganisations: liquidations
	The Recast Regulation on Insolvency Proceedings (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015) (the Recast Regulation). Other relevant legislation: Credit Institutions Directive, Insurance Undertakings Directive, Bank Recovery and Resolution Directive, Financial Collateral Arrangements Directive.
	Customary kinds of security devices on immovables
	Mortgages and fixed charges (but no EU-wide harmonised system).
	Customary kinds of security devices on movables
	Security assignments, fixed charges, floating charges, pledges, liens (but no EU-wide harmonised system).
	Stays of proceedings in reorganisations/liquidations
	This is a matter for the law of the member state in which those proceedings are opened.
	Duties of the insolvency administrator
	The duties of the insolvency office holder will depend on the type of insolvency procedure the debtor is undergoing.
	Set-off and post-filing credit
	Set off: The conditions under which set-offs may be invoked are determined by the laws of the member state in which proceedings are opened. The opening of insolvency proceedings must not affect the right of creditors to demand set-off of a creditor's claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the debtor's claim. Post-filing credit: procedures vary significantly between jurisdictions.
	Creditor claims and appeals
	This is a matter for the law of the member state in which those proceedings are opened.
	Priority claims
	Most jurisdictions afford some measure of priority for certain tax and other governmental claims. In some jurisdictions there is a requirement for money to be ring-fenced for employees. Most jurisdictions also provide that the costs of an insolvency process and the insolvency office holder's fees and expenses are paid out first.
Major kinds of voidable transactions	
The rules are a matter for the law of the state where the insolvency proceedings are opened.	
Operating and financing during reorganisations	
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. 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.	
International cooperation and communication	
The Recast Regulation governs cross-border insolvency proceedings for member states. In particular under the Recast Regulation 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 appropriate. Any insolvency office holder appointed over a group member of companies can request the court to open group coordination proceedings. The UNCITRAL Model Law on Cross-Border Insolvency has currently only been implemented by Greece, Poland, Romania, Slovenia and the United Kingdom. Office holders in main proceedings and secondary proceedings have a duty to communicate and cooperate.	
Liabilities of directors and officers	
The laws governing liability will generally be those of the jurisdiction of incorporation, where insolvency proceedings are commenced in that jurisdiction. Generally, directors and officers may be liable to contribute to the debtor's assets, but this is normally limited to where conduct falls below the requisite standard. Directors are also exposed to a range of criminal sanctions arising from their conduct prior to insolvency.	
Pending legislation	
The Commission adopted a proposal for a directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures on 22 November 2016. The European Parliament and Council are considering the proposal. 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).	

FRANCE	Applicable insolvency law, reorganisations: liquidations
	Articles L610-1 to L680-7 and article L811-1 et seq of the French Commercial Code.
	Customary kinds of security devices on immovables
	Mortgages.
	Customary kinds of security devices on movables
	Pledges.
	Stays of proceedings in reorganisations/liquidations
	A stay of proceedings is applicable from the date of the judgment opening safeguard, reorganisation or liquidation proceedings.
	Duties of the insolvency administrator
	To supervise, assist or replace the management in place depending on the type of insolvency proceedings or the situation at stake.
	Set-off and post-filing credit
	Set-off between a pre-filing and a post-filing credit is possible in limited circumstances.
	Creditor claims and appeals
	Creditors generally have two months (+ two months for foreign creditors) from the official publication of the judgment ordering the opening of safeguard or insolvency proceedings to send a statement of their claim to the court-appointed creditors' representative. In certain circumstances, creditors enjoy a right of appeal and opposition to safeguard or insolvency judgments.
	Priority claims
	Certain claims enjoy a priority repayment, including certain employee-related claims, tax claims and claims resulting from new money or goods provided to the debtor company in a conciliation.
	Major kinds of voidable transactions
Transactions entered into during the 'suspect period' – the period between the date on which the debtor is deemed to have become insolvent and the date on which the insolvency proceedings are opened – may be declared null and void.	
Operating and financing during reorganisations	
New financing granted to a company in conciliation or insolvency proceedings will enjoy a priority repayment.	
International cooperation and communication	
Cooperation between insolvency practitioners usually results in the signing of cooperation protocols.	
Liabilities of directors and officers	
Directors and officers can be held personally liable for all or part of the debts of the company placed in liquidation proceedings if they are found to have mismanaged the company's business. In limited circumstances, directors and officers can also be held criminally liable.	
Pending legislation	
Not applicable.	

GERMANY	Applicable insolvency law, reorganisations: liquidations
	The German Insolvency Act. The EU Insolvency Regulation and the EU Recast Regulation affect cross-border insolvencies.
	Customary kinds of security devices on immovables
	<i>Hypothek</i> : charge on real property as security for payment of a certain sum that equals the secured personal debt. <i>Grundschild</i> : charge on real property for payment of a definite sum of money.
	Customary kinds of security devices on movables
	Retention of title; fiduciary transfer of assets; fiduciary transfer of receivables; and chattel pledge.
	Stays of proceedings in reorganisations/liquidations
	For the duration of insolvency proceedings, claims cannot be enforced by individual insolvency creditors (save for enforcement actions by secured creditors). The insolvency court may prohibit or suspend measures of execution against the debtor's assets for the period between the application for the opening of insolvency proceedings and the ruling on the application.
	Duties of the insolvency administrator
	The insolvency administrator (in both liquidations and reorganisations) takes possession of and administers all assets that comprise the insolvency estate. The powers of the debtor's management pass to the insolvency administrator.
	Set-off and post-filing credit
	Generally, claims by or against the insolvency estate existing as of the date of the opening of the insolvency proceedings may be set off against each other, provided that the set-off position has been created prior to the opening. If a debt is to be incurred that would significantly burden the insolvency estate, the insolvency administrator must obtain the consent of the creditors' meeting. Besides this, an insolvency plan can give priority to creditors that make loans or other credits available to the debtor or a takeover company.
	Creditor claims and appeals
	Creditors must submit their claims to the administrator within a period set by the court between two weeks and three months from the date of the order opening the insolvency procedure. If the claim is disputed by the administrator or another creditor, the creditor can issue an appeal.
	Priority claims
	Creditors with proprietary claims for the return of assets not belonging to the insolvency estate are not affected by the insolvency. Costs of the insolvency rank in priority over unsecured creditors.
	Major kinds of voidable transactions
The insolvency administrator may set aside transactions that prefer one creditor over another or where there has been a fraudulent conveyance. The repayment of shareholder loans made within the last year prior to the filing for the opening of insolvency proceedings is voidable.	
Operating and financing during reorganisations	
Generally, the right to manage and transfer the debtor's assets passes to the insolvency administrator upon the opening of the insolvency proceedings. The debtor may apply to court for self-management under an insolvency practitioner's supervision.	
International cooperation and communication	
A German insolvency administrator shall 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. German insolvency courts usually cooperate with foreign insolvency courts in order to avoid jurisdictional conflicts.	
Liabilities of directors and officers	
The managing directors of a German limited liability company and the members of the management board of a stock corporation may have a (personal) liability to third parties and the company itself. In particular, such liability may result from the delayed application for the opening of insolvency proceedings or an action that leads to a reduction of the (insolvency) estate.	
Pending legislation	
N/A	

GREECE	Applicable insolvency law, reorganisations: liquidations
	Law No. 3588/2007, as amended. Law No. 3858/2010. The EC Regulation on insolvency proceedings.
	Customary kinds of security devices on immovables
	Prenotation of mortgage. Mortgage.
	Customary kinds of security devices on movables
	Pledge. Notional pledge. Floating charge. Retention or fiduciary transfer of ownership.
	Stays of proceedings in reorganisations/liquidations
	Automatic stay upon commencement of bankruptcy proceedings. Automatic stay upon application of pre-packaged recovery process. Stay at the request of the debtor or the creditors prior to the submission of the recovery agreement. Automatic stay upon commencement of special administration proceedings.
	Duties of the insolvency administrator
	Management of the insolvency estate.
	Set-off and post-filing credit
	Yes provided that the claim fell due prior to the declaration of bankruptcy. The claims that arise from post-filing financing provided on the basis of a recovery agreement or reorganisation plan are ranked ahead of any other pre-existing claim.
	Creditor claims and appeals
	Announcement of creditors' claims. Appeal against the judgment that accepts or rejects a creditor's claim.
	Priority claims
	<ul style="list-style-type: none"> • New and interim financing provided on the basis of a recovery agreement (super-priority status), satisfied in full and ahead of all other creditors' claims, regardless of the ratification by the Bankruptcy Court. • Unpaid employee remuneration incurred in the two years prior to bankruptcy being declared and employment termination compensation; lawyers' fees that date up to six months prior to the declaration of bankruptcy, and claims for compensation of salaried lawyers because of termination of their contract for a salaried mandate; social security contributions that arose until the declaration of bankruptcy; claims of the state arising from value added tax (VAT) and its surcharges. • Other claims of the state excluding claims arising from VAT.
	Major kinds of voidable transactions
	<ul style="list-style-type: none"> • Donations and gratuitous acts; • payments of debts that did not fall due; • payments of due debts that were not made in cash; and • security over the debtor's estate for pre-existing debts.
	Operating and financing during reorganisations
	In recovery procedure, no conditions or restrictions are set by law on the debtor's conduct of business. Upon declaration of bankruptcy, the bankruptcy administrator manages the debtor's assets and affairs. Upon application, the court may permit the debtor to remain in administration of its assets always along with the bankruptcy administrator's cooperation.
International cooperation and communication	
Law No. 3858/2010 (UNCITRAL Model Law on Cross-Border Insolvency). The EC Regulation on insolvency proceedings.	
Liabilities of directors and officers	
The general partner of a limited partnership; personally liable for corporate debts. Directors and officers of a private company, limited liability company and a <i>société anonyme</i> : in principle, no liability. Exceptions are: <ul style="list-style-type: none"> • personal liability in the event of delay with regard to the filing of the bankruptcy petition; or fraudulent act or gross negligence; and • personal and joint liability with regard to the payment of corporate taxes. 	
Pending legislation	
Not applicable.	

HONG KONG	Applicable insolvency law, reorganisations: liquidations
	Companies (Winding Up and Miscellaneous Provisions) Ordinance, Companies Ordinance, Bankruptcy Ordinance, Banking Ordinance, Resolution Ordinance, subsidiary legislation.
	Customary kinds of security devices on immovables
	Mortgages and charges.
	Customary kinds of security devices on movables
	Mortgages. Charges (fixed and floating). Pledges. Liens. Quasi-security (eg, set-off and retention of title arrangements).
	Stays of proceedings in reorganisations/liquidations
	Discretionary stay with court leave of legal actions and enforcement procedures after petition presented. Absolute stay absent court leave when provisional liquidator appointed or winding-up order made. No statutory stay in reorganisations.
	Duties of the insolvency administrator
	Duties of a liquidator: <ul style="list-style-type: none"> • to receive statement of affairs; • to adjudicate on creditors' claims; • to collect and preserve debtor's assets; and • to realise the debtor's assets and to distribute dividends to creditors. Duties of a receiver: <ul style="list-style-type: none"> • to realise secured assets for charge holder; and • to return surplus assets to company.
	Set-off and post-filing credit
	Generally there is automatic and mandatory set-off of mutual credits, mutual debts and other mutual dealings.
	Creditor claims and appeals
	Creditors file proof of debts with liquidator. Rejections can be appealed to the High Court.
	Priority claims
	Costs and expense of the insolvency proceedings. Creditors secured by a fixed charge. Preferential creditors (eg, employees, Hong Kong government). Creditors secured by a floating charge. Unsecured creditors.
	Major kinds of voidable transactions
Unfair preferences, fraudulent dispositions/conveyance, invalid floating charges and transactions at an undervalue.	
Operating and financing during reorganisations	
Currently no statutory reorganisation procedure. Directors remain in control until a provisional liquidator or liquidator is appointed to the company. No special financing regime during reorganisation.	
International cooperation and communication	
Principles based on comity have evolved to guide the practical coordination of Hong Kong and foreign proceedings.	
Liabilities of directors and officers	
Fraudulent trading. Misfeasance. Falsification or destruction of books and records. Disqualification of directors.	
Pending legislation	
Legislation is expected to be introduced in respect of insolvency reform generally. It is likely that the legislation will introduce, inter alia, a provisional supervision regime and insolvent trading provisions.	

HUNGARY	Applicable insolvency law, reorganisations: liquidations
	Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings.
	Customary kinds of security devices on immovables
	Real property mortgage and the independent lien.
	Customary kinds of security devices on movables
	Mortgage on movables, pledge on movables, floating charge and security deposit in the form of money, securities or payment account balances.
	Stays of proceedings in reorganisations/liquidations
	Moratorium in case of reorganisation.
	Duties of the insolvency administrator
	To provide information, authorise any kind of business activity in case of reorganisation and act as the executive officer of the business organisation under liquidation.
	Set-off and post-filing credit
	As a general rule under the duration of the stay of payment set-off may not be applied against the debtor. In case of reorganisation, the debtor shall be allowed to undertake any new commitment subject to the consent of the administrator. In case of liquidation, the head of the debtor economic operator shall be restricted from entering into any contract considered to be in excess of the scope of normal operations.
	Creditor claims and appeals
	No claim will be registered in the event of the creditor's failure to do so in due time. The registration of claims is subject to a registration fee payable by the creditor. Creditors may appeal the decisions of the administrator regarding the approval or the ranking of their claims.
	Priority claims
	Certain claims such as secured claims or debts owed to social security funds enjoy priority status.
Major kinds of voidable transactions	
Contracts if intended to conceal the debtors' assets or to defraud any one creditor or the creditors, contracts if intended to transfer the debtors assets without any compensation or to undertake any commitment for the encumbrance of any part of the debtors' assets, or if the stipulated consideration constitutes unreasonable and extensive benefits to a third party, contracts if intended to give preference and privileges to any one creditor or to provide financial collateral to a creditor that does not have any, in certain cases may be considered voidable.	
Operating and financing during reorganisations	
With the authorisation of the bankruptcy administrator.	
International cooperation and communication	
The EU Insolvency Regulation applies.	
Liabilities of directors and officers	
Creditors or the liquidator may bring action during the liquidation proceedings to establish that the former executives of the economic operator failed to properly represent the interests of creditors. Any creditor may bring action for the court to establish the liability of the debtor's former executive and hence to order this executive to satisfy the debtor's claim to the extent of its claims not yet satisfied.	
Pending legislation	
Adoption of legislation on restructuring and insolvency law is not expected in the near future.	

INDIA	Applicable insolvency law, reorganisations: liquidations
	Insolvency and Bankruptcy Code, 2016 Companies Act, 2013.
	Customary kinds of security devices on immovables
	Mortgages of various types.
	Customary kinds of security devices on movables
	Pledges, hypothecation, charges, liens, assignment, escrow.
	Stays of proceedings in reorganisations/liquidations
	All suits and proceedings against the debtor are stayed during insolvency resolution and liquidation. However, secured creditors can enforce security in liquidation by standing outside the proceedings. No stay is available for reorganisations under the Companies Act
	Duties of the insolvency administrator
	To conduct the business as a going concern. To invite, verify and admit claims from various creditors of the company. To take control and custody of assets of the company. To oversee the resolution process. To invite resolution plans for the company and check for compliance. To apply to NCLT for avoidance of transactions.
	Set-off and post-filing credit
	Post-admission (as opposed to filing) credit can be availed by the interim resolution professional and resolution professional subject to certain restrictions. The same forms part of insolvency resolution process costs. Set-off (of pre-insolvency commencement dues) may not be available to a creditor during corporate insolvency resolution process as it may amount to recovery action by the creditor. Set-off on account of mutual dealings is mandatory in liquidation.
	Creditor claims and appeals
	Claims can be filed by creditors with the insolvency professional during resolution and liquidation process. Creditor may appeal to NCLT against the decision of the insolvency professional.
	Priority claims
	Insolvency resolution process costs and liquidation costs.
	Major kinds of voidable transactions
	Preference, undervalued transaction, extortionate credit transactions, fraudulent and wrongful trading. In liquidation - in addition, disclaimer of onerous contract.
	Operating and financing during reorganisations
	The company's operations are continued by the insolvency professional as a going concern. Interim finance can be availed subject to certain restrictions.
International cooperation and communication	
While foreign judgments are recognised, the provisions relating to cross-border insolvency and cooperation are not notified as yet.	
Liabilities of directors and officers	
Directors and officers can be made liable to contribute to a company's assets for fraudulent or wrongful trading undertaken prior to the insolvency commencement. They can also be made liable for offences relating to misrepresentation to creditors or concealment of assets from creditors.	
Pending legislation	
Laws relating to cross-border insolvency. Notification of provisions in IBC for personal and partnership bankruptcy. Laws relating to insolvency of financial service providers.	

ISLE OF MAN	Applicable insolvency law, reorganisations: liquidations
	Companies Act 1931. Companies Act 2006. The Companies (Winding Up) Rules 1934.
	Customary kinds of security devices on immovables
	Mortgages. Fixed and floating charges. Debentures.
	Customary kinds of security devices on movables
	Liens. Pledges. Debentures. Title retention.
	Stays of proceedings in reorganisations/liquidations
	Winding-up order made by court. Provisional liquidator appointed.
	Duties of the insolvency administrator
	N/A.
	Set-off and post-filing credit
	Set-off is applicable in both insolvencies and reorganisations.
	Creditor claims and appeals
	Creditors must submit proofs of debt to the liquidator. Appeals against liquidator's decision to the court.
	Priority claims
	Liquidator's costs. Debts to the Crown. Employees. Unpaid pensions. Secured creditors. Unsecured creditors.
	Major kinds of voidable transactions
	Fraudulent preference.
	Operating and financing during reorganisations
	Companies can carry on operating. Directors to manage the business appropriately.
International cooperation and communication	
Courts are keen to assist foreign jurisdictions. UNCITRAL not adopted.	
Liabilities of directors and officers	
Fraudulent trading. Misfeasance.	
Pending legislation	
None.	

ITALY	Applicable insolvency law, reorganisations: liquidations
	The Civil Code. The Insolvency Act 1942. The Legislative Decree governing the extraordinary administration. Provisions set out by Law Decree No. 83/2012 (converted into Law No. 134/2012), which introduced important amendments to the insolvency proceedings (the Development Decree). The Law governing the extraordinary administration of large enterprises. The Legislative Decrees implementing the Bank Recovery and Resolution Directive. Several provisions of the Banking Law that apply where banks and financial intermediaries are subject to compulsory administrative liquidation. The EU Insolvency Regulation that affects cross-border insolvencies.
	Customary kinds of security devices on immovables
	Mortgages
	Customary kinds of security devices on movables
	Pledges over property, bank accounts and shares. Non-possessory pledge over equipment used in business activities.
	Stays of proceedings in reorganisations/liquidations
	Involuntary liquidation: Foreclosure proceedings commenced by creditors are suspended. Voluntary and involuntary reorganisations: Foreclosure proceedings commenced by creditors are suspended.
	Duties of the insolvency administrator
	Insolvency: Articles 31 et seq of the Insolvency Act set out the duties of the insolvency administrator, who, inter alia, has to notify the creditors of the insolvency order and has to notify those creditors whose claims have been partially admitted or rejected. Reorganisation procedures: Article 165 of the Insolvency Act, article 15 of Law No. 270/1999 and article 3 of Law No. 39/2004 set out the duties of the commissioner, who, among other things, will supervise the day-to-day running of the entity.
	Set-off and post-filing credit
	Article 56 of the Insolvency Act provides for a particular form of legal set-off within bankruptcy proceedings. If it takes place prior to the commencement of bankruptcy it cannot be revoked or avoided.
	Creditor claims and appeals
	Claims normally to be lodged within two months after the declaration of insolvency is made. Outcome of hearing of all the claims may be challenged by any creditors whose claims have not been recognised or have been partially recognised within 30 days.
	Priority claims
	These rank ahead of secured claims: <ul style="list-style-type: none"> • preferential claims (general or special) over moveable property; and • preferential claims (general or special) over immoveable property.
	Major kinds of voidable transactions
	The relevant rules are set out in Articles 64-70 of the Insolvency Act. Any gratuitous transaction that was completed two years prior to the insolvency order may be set aside. The transactions executed and payments made by the insolvent debtor declared bankrupt during a certain 'suspect period' may be subject to a clawback action. Finally, Article 2901 of the Italian Civil code provides that some acts of disposal of the bankrupt's assets may be declared ineffective against the relevant creditor, when the following conditions are met: 1) the debtor knew the prejudice that the act would cause to the interests of the creditor or, in case of acts done before the origination of the credit, the act was intentionally pre-ordained to adversely affect the fulfilment of the obligation; 2) for acts for consideration, the third party was aware of the prejudice and, in case of acts done before the origination of the credit, he or she intentionally participated in the debtor's plan.
	Operating and financing during reorganisations
	Compositions and judicial moratoria: trading allowed only to the extent necessary to complete particular transactions. Extraordinary administration and extraordinary administration of large enterprises: ministerial decree may allow the company to continue its business.
	International cooperation and communication
There has been little use of the instruments of cooperation envisaged by Regulation No. 1346/2000. Italian operators in the sector maintain that simpler, more informal types of contact and exchanges of information are needed. As regard to the recognition of judgments declaring insolvency issued in another member state, Italian case law reveals a generalised application of such principle.	
Liabilities of directors and officers	
May be liable to the company, the company's creditors and to third parties under rules established by the Civil Code. In addition, under the Insolvency Act, directors and de facto officers may be charged with criminal liability for fraudulent bankruptcy, simple bankruptcy and illicit borrowing.	
Pending legislation	
Legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has not yet been adopted.	

JAPAN	Applicable insolvency law, reorganisations: liquidations
	Bankruptcy Act for the bankruptcy proceeding; Companies Act for the special liquidation proceeding; Civil Rehabilitation Act for the civil rehabilitation proceeding; and Corporate Reorganisation Act for the corporate reorganisation proceeding.
	Customary kinds of security devices on immovables
	Mortgage.
	Customary kinds of security devices on movables
	Assignment of movables as security, title retention (reservation of ownership), etc.
	Stays of proceedings in reorganisations/liquidations
	Respective collection of unsecured claim will be stayed in bankruptcy, civil rehabilitation and corporate reorganisation. Secured claim will not be stayed in bankruptcy and civil rehabilitation, while it will be stayed in corporate reorganisation.
	Duties of the insolvency administrator
	Duty of care to interested parties, especially creditors.
	Set-off and post-filing credit
	Set-off is permissible as a general rule; however, it is prohibited under certain circumstances. In civil rehabilitation and corporate reorganisation, set-off notice must be completed by the bar date of the filing the proof of claim. DIP financing is protected as an administrative claim, as a general rule.
	Creditor claims and appeals
	The creditors must file the proof of unsecured claim in bankruptcy and civil rehabilitation, and the proof of secured and unsecured claim in corporate reorganisation.
	Priority claims
	Treatment of the priority claims (including but not limited to tax claims and labour claims) differs depending upon the proceedings.
Major kinds of voidable transactions	
Fraudulent conveyance and preferential payment or collateralisation.	
Operating and financing during reorganisations	
In civil rehabilitation, as a general rule, the debtor company keeps operating the business as a debtor in possession. In the corporate reorganisation, the court-appointed trustee will handle the operation of business. In either case, DIP financing is available as a general rule.	
International cooperation and communication	
Japan was one of the earliest countries to adopt the UNCITRAL Model Law on Cross-border Insolvency and enacted the Act on Recognition of and Assistance for Foreign Insolvency Proceedings.	
Liabilities of directors and officers	
Directors and officers may be responsible for their pre-commencement conduct.	
Pending legislation	
None.	

JERSEY	Applicable insolvency law, reorganisations: liquidations
	The Companies (Jersey) Law 1991 and the Bankruptcy (Désastre) (Jersey) Law 1990.
	Customary kinds of security devices on immovables
	Security over immovable property in Jersey is taken by way of one of three varieties of hypothec (mortgage): legal, conventional or judicial.
	Customary kinds of security devices on movables
	Other than in relation to ships, the only method of creating security over tangible movables in Jersey is by way of pledge. Specific charges or chattel mortgages do not exist in Jersey.
	Stays of proceedings in reorganisations/liquidations
	Leave of the court is required to commence or to continue legal action against a debtor which is <i>en désastre</i> , or which is subject to a creditors' winding-up.
	Duties of the insolvency administrator
	The Viscount is an officer of the Royal Court and the Official Receiver of Jersey. The Viscount is responsible for determining the validity of creditor claims and realising and distributing the assets available accordingly. Where a liquidator is appointed, duties include investigating the assets of the company; realising the company's property and distributing it accordingly, and reporting any potential criminal offences to HM Attorney General.
	Set-off and post-filing credit
	Set-off is a mandatory rule where there have been mutual credits, mutual debts or other mutual dealings between the debtor and a creditor such that the balance of the account, and no more, shall be claimed or paid on either side. It is an offence under article 25 of the Bankruptcy Law to obtain credit in excess of £250 without disclosing to the intending creditor the fact that the company is <i>en désastre</i> .
	Creditor claims and appeals
	The Royal Court of Jersey (Samedi Division) is the court of first instance. An appeal lies to the Court of Appeal and onwards to the Privy Council. Permission to appeal is not generally required, save from a procedural decision.
	Priority claims
	Viscount or liquidator; payments under the Banking Business (Depositors Compensation) (Jersey) Regulations 2009; Health Insurance Fund, Social Security Fund, Income Tax and Goods and Services Tax; rent; parochial rates (local property taxes); all other debts proved.
Major kinds of voidable transactions	
The principal types of transactions that can be set aside in liquidations are extortionate credit transactions, transactions at an undervalue and preferences.	
Operating and financing during reorganisations	
There is no concept of corporate rescue in Jersey that would allow a business to continue to trade once a creditors' winding-up under the Companies Law has commenced or a declaration <i>en désastre</i> under the Bankruptcy Law has been made. In exceptional circumstances it may be possible to bring this about under the just and equitable winding-up procedure, or by way of a letter of request to the English Court to appoint administrators.	
International cooperation and communication	
Certain foreign judgments may be registered in Jersey under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 if they originate from one of the following jurisdictions: England & Wales, Scotland, Northern Ireland, the Isle of Man and Guernsey, whereafter they are enforceable as if they were a domestic judgment. Judgments from other jurisdictions may be enforced by way of a fresh action in Jersey. Under the Bankruptcy Law, the court may assist the courts of designated territories (presently the United Kingdom, the Isle of Man, Guernsey, Finland and Australia) in all matters relating to the insolvency of any person or entity.	
Liabilities of directors and officers	
If a company trades whilst insolvent, transactions entered into at the time in question are at risk of being set aside. Its directors will also be at risk of personal liability. Other potential risks are wrongful and fraudulent trading. A director who signs a certificate delivered to the registrar of companies without having reasonable grounds for believing that the statements in it are true is guilty of an offence. Liability can also arise out of the duty to cooperate with the liquidator of the company in a creditors' winding up or to supply the Viscount with such information and do everything possible to assist the Viscount in the realisation of property and the distribution of the proceeds amongst creditors. Where a company is <i>en désastre</i> , it is an offence: to fail to keep proper accounts in respect of any business carried on by the company for the two years prior to the commencement of winding up; to fail to appear before the Viscount on a summons; and to obtain credit in excess of £250 without disclosing to the intending creditor the fact that the company is <i>en désastre</i> . A person who acts as a director while disqualified is guilty of an offence punishable by imprisonment for up to two years or a fine and may be declared personally responsible for the debts of any company of which he or she acts as a director while disqualified.	
Pending legislation	
Bank (Recovery and Resolution) (Jersey) Law 2017.	

KENYA	Applicable insolvency law, reorganisations: liquidations
	The Insolvency Act, Act No. 18 of 2015 and the Insolvency Regulations 2016.
	Customary kinds of security devices on immovables
	Debenture and charge.
	Customary kinds of security devices on movables
	Floating debenture, chattels mortgage and other securities under the Immovable Properties Act.
	Stays of proceedings in reorganisations/liquidations
	Yes.
	Duties of the insolvency administrator
	Take over day-to-day operations of the company. File periodical reports with the court if court appointed. Chair creditors meetings as and when called. Conduct a sale if need be. Distribute proceeds of sale in order of priority.
	Creditor claims and appeals
	Lodged and considered by the administrator. The decision of the administrator is subject to appeal to the High Court.
	Priority claims
	Liquidators' fees and emoluments. Wages and salaries payable to employees. Statutory payments. Tax payments. Secured creditors.
	Operating and financing during reorganisations
	This is possible and largely is dependent on the path under which the administrator deems fit. The post-liquidation debt is a priority payment.
	International cooperation and communication
Not specifically provided for under the Act.	
Liabilities of directors and officers	
The act sets out duties of directors and officers post the appointment of an administrator. For directors, their authority to transact on behalf of the company is stripped. They have an obligation to support the administrator and provide required documentation. If they fail, court action may be initiated to compel them to do so. Additional strict duties of directors are set out under the Companies Act. Officers are answerable and liable to the appointed administrator. He or she can either retain their services or terminate their employment through redundancy.	
Pending legislation	
None.	

KOREA	Applicable insolvency law, reorganisations: liquidations
	Debtor Rehabilitation and Bankruptcy Act.
	Customary kinds of security devices on immovables
	Mortgage is the customary type of security on immovables.
	Customary kinds of security devices on movables
	Pledge is the customary type of security on movables.
	Stays of proceedings in reorganisations/liquidations
	If the court finds that there are not enough assets to proceed with the insolvency proceeding, it will terminate the proceeding.
	Duties of the insolvency administrator
	The insolvency administrator has authority to manage, dispose of the debtor's assets and run the business.
	Set-off and post-filing credit
	In reorganisation proceedings, creditors are set-off until the claim report period and post-filing credit is allowed before the second interested parties meeting.
	Creditor claims and appeals
	If a creditor's claims are objected in the proceeding, he or she may file a lawsuit to confirm those claims.
	Priority claims
	Usually, the employee's salary, severance pay and taxes are classified into priority claims.
	Major kinds of voidable transactions
	Gifts by a debtor or contract unfavourable to the debtor may be avoided by an administrator or a trustee.
	Operating and financing during reorganisations
	In general, operating and financing during reorganisation requires the court's approval. The creditors are protected as holders of priority claims.
International cooperation and communication	
The DRBA adopted the Model Law and provides cooperation and communication with foreign courts.	
Liabilities of directors and officers	
Administrators and trustees investigate the liabilities of directors and officers of the debtor.	
Pending legislation	
None.	

MALAYSIA	Applicable insolvency law, reorganisations: liquidations
	The Companies Act 2016 provides for winding up and reorganisations through schemes of arrangements, corporate voluntary arrangements and judicial management.
	Customary kinds of security devices on immovables
	Registered fixed and floating charges and liens.
	Customary kinds of security devices on movables
	Registered fixed and floating charges.
	Stays of proceedings in reorganisations/liquidations
	Upon the making of a winding-up order, there is a stay of all legal proceedings against the company unless leave of the court is obtained. There is no automatic moratorium in a scheme of arrangement. A moratorium order called a restraining order will have to be applied for from the court. In a corporate voluntary arrangement, an automatic moratorium will come into place upon the filing of the relevant documents which remains in force for 28 days, during which no legal proceedings can be taken against the company. Upon the filing of an application for judicial management, there will be an automatic moratorium on legal proceedings and on any steps to enforce security over the company's property except with the consent of the judicial manager or leave of the court. Once the order for judicial management is in force, there will be an automatic moratorium on such proceedings except with the consent of the judicial manager or leave of the court.
	Duties of the insolvency administrator
	Primarily, to realise the assets and to then distribute the assets in the order of statutory priority before paying out to the unsecured creditors.
	Set-off and post-filing credit
	Both are allowed for.
	Creditor claims and appeals
	Unsecured creditors would make their claims by filing an affidavit to prove their debt. A creditor aggrieved by the decision of the liquidator in relation to his or her claims may apply to the court under section 517 of the Act. The court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.
	Priority claims
	There is a list of priority claims. Generally, the fees and expenses of winding up, followed by employee-related claims, and federal taxes.
	Major kinds of voidable transactions
There are various transactions liable to be made voidable, from a period ranging from six months to two years before the presentation of the winding-up petition or passing of the resolution for voluntary winding up.	
Operating and financing during reorganisations	
In a scheme of arrangement, with no restraining order in place, the company would continue to operate as usual. With a restraining order, there cannot be any disposition of property outside the ordinary course of business. In a corporate voluntary arrangement, the company will continue to operate subject to the moratorium. Under judicial management, the judicial manager will carry on the business of the company in accordance with the proposal approved by the creditors.	
International cooperation and communication	
Malaysia is not a party to any treaty on cross-border insolvency or reorganisation. The Malaysian courts do not have cross-border insolvency protocols.	
Liabilities of directors and officers	
Directors and officers can be made personally liable for the debts of the wound-up company, if they have been guilty of insolvent trading or fraudulent trading.	
Pending legislation	
Section 241 of the Companies Act 2016, which requires a company secretary to register with the Registrar of Companies before acting as a secretary is the only section of the Act that has yet to come into force.	

MEXICO	Applicable insolvency law, reorganisations: liquidations
	Ley de Concursos Mercantiles.
	Customary kinds of security devices on immovables
	Mortgage and guaranty trust.
	Customary kinds of security devices on movables
	Pledge, aval (securities personal guaranty), personal guaranty, bonding guaranty, letter of credit, guaranty trust.
	Stays of proceedings in reorganisations/liquidations
	Upon adjudication.
	Duties of the insolvency administrator
	In conciliation seek reorganisation plan. In liquidation liquidate assets and pay creditors.
	Set-off and post-filing credit
	Only for financial transactions, as exception of no set-off rule.
	Creditor claims and appeals
	To participate creditors shall file timely proof of claims and held allowed claims. Appeals v adjudication declaration, allow and disallow claims judgment, reorganisation plan approval. No stay in appeal.
	Priority claims
	Labour, tax, management, mortgage, pledge, special privilege, unsecured, subordinated.
	Major kinds of voidable transactions
	Those falling in the suspicious period 270 calendar days prior to adjudication or longer period regarding related parties.
	Operating and financing during reorganisations
	Post-financing is allowed with collateral.
International cooperation and communication	
Uncitral Model Law on Cross-Border Insolvency is fully incorporated in Mexico.	
Liabilities of directors and officers	
Civil and criminal. May be a cause of a voidance actions.	
Pending legislation	
No.	

NETHERLANDS	Applicable insolvency law, reorganisations: liquidations
	Dutch Bankruptcy Act. There are special provisions in the Dutch Financial Supervision Act for financial institutions.
	Customary kinds of security devices on immovables
	Mortgages.
	Customary kinds of security devices on movables
	Pledges.
	Stays of proceedings in reorganisations/liquidations
	In bankruptcy: stay of proceedings with respect to claims against the bankrupt. No enforcement of unsecured claims. In suspension of payment: enforcement measures of unsecured non-preferential claims can be stopped.
	Duties of the insolvency administrator
	In bankruptcy: to manage and liquidate the assets. In suspension of payments: to manage the assets jointly with the managing board. In a pre-pack: an advisory role in which he or she explores and prepares restructuring measures together with the debtor and the most important (secured) creditors.
	Set-off and post-filing credit
	Both in bankruptcy and 'suspension of payments' but not automatic. There is no legal basis for post-filing credit: in practice a post-filing credit is granted and treated as a super senior estate claim.
	Creditor claims and appeals
	In bankruptcy: claims are submitted to the trustee and can be disputed by the trustee and the other creditors in a claims allowance meeting. In 'suspension of payments' creditors will have to file their claims if a reorganisation plan is submitted by the debtor.
	Priority claims
	The most important priorities: <ul style="list-style-type: none"> • claims arising after the commencement of the insolvency proceedings; • tax claims, security premiums; and • wages and pension claims.
	Major kinds of voidable transactions
	The trustee in bankruptcy may void transactions for consideration which have been entered into without obligation to do so if the act was detrimental to the creditors and both the debtor and the other party at that time knew or should have known it to be detrimental to the creditors.
	Operating and financing during reorganisations
	As post-petition debts have priority it may be easier to attain fresh money during the insolvency proceedings. Both in bankruptcy and in a suspension of payment the business may be continued.
International cooperation and communication	
The Recast Regulation provides an obligation for cooperation and information exchange between liquidators. Cooperation and communication is not (yet) dealt with explicitly in the Dutch Bankruptcy Code. In practice, coordination or cooperation does occur and cross-border insolvency agreements (protocols) have been used.	
Liabilities of directors and officers	
Managing directors may be liable to the company in bankruptcy for mismanagement. They may also be liable to the tax authorities, the social security institutions and the pension funds. New legislation has not only introduced the possibility of managing directors being disqualified but has also increased the risk of criminal liability for managing directors.	
Pending legislation	
Various legislative proposals for legislation to amend the Dutch Bankruptcy Act have been published on the Dutch government website for public consultation and/or submitted to the Dutch Lower House for approval. There is a new legislative proposal introducing a fast and efficient procedure to restructure a debtor's business through a scheme. Further, a legislative proposal for a pre-pack procedure is currently awaiting approval by the Dutch Senate.	

NORWAY	Applicable insolvency law, reorganisations: liquidations
	Main statutes: The Bankruptcy Act of 8 June 1984 No. 58. The Satisfaction of Claims Act of 8 June 1984 No. 59.
	Customary kinds of security devices on immovables
	Mortgages and execution liens.
	Customary kinds of security devices on movables
	Pledges, either in each asset or floating charges, and execution liens.
	Stays of proceedings in reorganisations/liquidations
	Yes.
	Duties of the insolvency administrator
	Handle all aspects of the proceedings; more or less functions as the chairman of the board and CEO if compared with a limited liability company.
	Set-off and post-filing credit
	Set-offs may be allowed. Post-filing credit is not allowed.
	Creditor claims and appeals
	Claims may usually be filed in the estate throughout the proceedings; there is no preclusive deadline. Claims are subject to a set order of priorities. Claims are tested by the administrator/creditors' committee, and potentially the court. The court's decisions may in general be appealed within one month from passing.
	Priority claims
	Employees' claims for wages rank first in priority, and certain VAT and tax claims rank second in priority. The next class of priority is unsecured claims.
	Major kinds of voidable transactions
Transactions of a certain size within last three months before proceedings were opened, covering old debt, gifts, transactions beneficial to closely related parties.	
Operating and financing during reorganisations	
Operations continue as usual during debt negotiation proceedings. Financing during debt negotiation proceedings is not allowed unless accepted by the administrator/creditors' committee.	
International cooperation and communication	
Little or no cooperation between Norwegian and foreign courts.	
Liabilities of directors and officers	
May potentially be held criminally or financially liable.	
Pending legislation	
Changes in the Bankruptcy Act, providing new legislation on cross-border cases. It is not yet decided when the changes will enter into force.	

PERU	Applicable insolvency law, reorganisations: liquidations
	Law No. 27809.
	Customary kinds of security devices on immovables
	Mortgages and trusts. Note that trusts do not give claims third priority order within a liquidation proceeding.
	Customary kinds of security devices on movables
	Pledges and trusts. Note that trusts do not give claims third priority order within a liquidation proceeding.
	Stays of proceedings in reorganisations/liquidations
	Yes. With the publication of the debtor's insolvency in the official gazette (bar date). Available in all insolvency proceedings regulated by the Insolvency Law.
	Duties of the insolvency administrator
	Acting with due diligence to preserve the debtor's estate.
	Set-off and post-filing credit
	Set-off is banned from the bar date and during the avoidance period. Credits obtained by the debtor after the bar date will be considered as post-publication claims.
	Creditor claims and appeals
	Creditors must file their proofs of claims before INDECOPI within 30 business days from the bar date. Appeals and reconsideration recourses are available.
	Priority claims
	Labour claims (included pension claims), alimony claims (applicable only when the insolvent is an individual), secured claims (including attachments and seizures), tax claims and non-secured claims.
	Major kinds of voidable transactions
	A wide range of transactions involving assets disposal, which may vary under the clawback and avoidance period.
	Operating and financing during reorganisations
	As post-publication claims they will not be included in the reorganisation proceeding. Therefore, they shall be paid upon maturity, unless the debtor ends up being liquidated.
International cooperation and communication	
None.	
Liabilities of directors and officers	
Applicable for acts against the law, the bylaws or acts of fraud, gross negligence or those resulting from the abuse of their faculties. Directors are joint and severally liable with the companies before the tax authorities when tax debts are not paid due to manager's gross negligence, fraudulent acts with the intent to cause harm or abuse of powers.	
Pending legislation	
None.	

PORTUGAL	Applicable insolvency law, reorganisations: liquidations
	Portuguese Insolvency and Recovery Code (CIRE) and Regulation (EU) 2015/848 of the European Parliament and the Council.
	Customary kinds of security devices on immovables
	Mortgage.
	Customary kinds of security devices on movables
	Pledge; mortgage; general lien over all movable assets.
	Stays of proceedings in reorganisations/liquidations
	Pending enforcement proceedings filed by the creditors against the debtor or other proceedings affecting the debtor's assets are suspended.
	Duties of the insolvency administrator
	Normally, the insolvency administrator is responsible for the administration of the company after the declaration of insolvency, it is responsible for receiving credit claims and ranking them and proposes the liquidation of the company or the presentation of an insolvency plan and the continuation of business.
	Set-off and post-filing credit
	After the declaration of insolvency creditors can only balance their debts to the insolvency estate with their credits if the right of set-off is prior to the declaration of insolvency and the credit is due, and the object of credit and that of the debit are of the same nature.
	Creditor claims and appeals
	Creditors' claims must be filed with the insolvency administrator or court-appointed administrator within the established deadline and producing a list of recognised credits. Any creditor whose claims have not been recognised or have been partially recognised may lodge a challenge to the list of credits recognised and any creditor may challenge the recognition of other creditors' claims.
	Priority claims
	Claims are ranked as follows: claims over the insolvent's estate; secured claims; preferential claims; non-secured claims (unsecured, unprivileged and unsubordinated credits); and subordinated claims.
Major kinds of voidable transactions	
As a rule, the insolvency administrator can decide not to fulfil any contract that is not yet fulfilled. Further, contracts unfairly favour one creditor over the others or reduce, make it more difficult or impossible, jeopardise or delay payment to the creditors, and those which were carried out in bad faith and within the two years prior to the initiation of the proceedings, can be terminated by the administrator.	
Operating and financing during reorganisations	
The debtor in insolvency proceedings can carry out its business if the creditors' general meeting agrees. In PER the debtor will always continue its business and it can obtain loans. The debtor's activity will be supervised by the creditors' general meeting, the creditors' committee, the court-appointed administrator and the court.	
International cooperation and communication	
Within the EU the recognition of foreign proceedings and the cooperation between courts is made according to the terms of Regulation (EU) 2015/848. Other foreign insolvency proceedings are recognised by Portuguese courts as long as the foreign court that declared the insolvency based its competence on the criteria of the location of the residence or headquarters of the debtor or of its centre of main interests and the recognition does not violate public order. Secondary proceedings can be initiated in Portugal and the Portuguese court-appointed administrator will coordinate with the foreign administrator on all relevant matters.	
Liabilities of directors and officers	
Directors can face civil and criminal penalties for breaching their legal duties. When the insolvency is deemed to be caused by directors' actions, the court may impose several sanctions upon them. Directors can also be held personally liable for a company's tax or social security debt.	
Pending legislation	
None. Recent amendment of the Portuguese Insolvency and Recovery Code by Decree-Law No. 79/2017.	

RUSSIA	Applicable insolvency law, reorganisations: liquidations
	Civil Code; Federal Law No. 127-FZ on Insolvency (Bankruptcy), Federal Law No. 83-FZ on Financial Restoration of Agricultural Commodity Produces, Federal Law No. 29-FZ on Enforcement Proceedings.
	Customary kinds of security devices on immovables
	Mortgage (subject to state registration).
	Customary kinds of security devices on movables
	Pledge (may be registered by a notary in the register of pledge notices at the discretion of pledgor or pledgee).
	Stays of proceedings in reorganisations/liquidations
	In general, upon commencement of bankruptcy procedure, no claims against the debtor's assets may be enforced. Ordinary corporate reorganisations/liquidations of companies do not have the said effects.
	Duties of the insolvency administrator
	Supervision: to identify creditors, prepare a report on the debtor's financial status and convene the first creditors' meeting. Financial restoration: to monitor performance of the debtor's obligations in accordance with a plan and payment schedule. External administration: to prepare a reorganisation plan, to deal with the debtor's assets to restore its solvency. Winding up: to evaluate all assets of the debtor and sell them separately or as an entire business to satisfy the creditors' claims.
	Set-off and post-filing credit
	Generally, set-off is permitted provided that it does not affect the priority of claim satisfaction and does not entail preferential claim satisfaction. The debtor is not prevented from obtaining loans or credits, but such loans and credits are subject to the prior consent of an insolvency office holder or the creditors' meeting. Claims that arise from such loans and credits outrank all other claims.
	Creditor claims and appeals
	Creditors are allowed to submit their claims at any time during the bankruptcy proceedings.
	Priority claims
	Generally as follows: current payments (legal costs, insolvency office holder's fees, operating costs and company expenses, as well as debts arising during the bankruptcy proceedings); personal injury and some related claims; employee's and copyright-fees claims; and all other claims (including claims by secured creditors that, however, may in some cases prevail over first and second-ranking creditors). Distributions to creditors may be made at any stage of the bankruptcy procedure.
	Major kinds of voidable transactions
In general, any transactions concluded by the debtor in violation of the Federal Law on Insolvency (Bankruptcy) may be set aside. Major kinds of voidable transactions are: transactions concluded within a particular period that negatively affected the debtor's financial position or the economic interests of creditors (other than those who have entered into such voidable transactions).	
Operating and financing during reorganisations	
During the supervision stage or financial restoration, an insolvency office holder supervises the debtor's management and limits its authority. In external administration or bankruptcy proceedings an insolvency office holder replaces the debtor's management. Any shareholder of an insolvent company or any third party can, at any time before the end of bankruptcy proceedings, offer to pay all of the company's debts to prevent its ultimate liquidation.	
International cooperation and communication	
Russian bankruptcy legislation does not provide any specific rules in respect of cross-border cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings. Foreign court decisions on insolvency (bankruptcy) may be recognised in Russia based on international treaties and the principle of reciprocity.	
Liabilities of directors and officers	
Criminal and administrative liability: providing misleading information in financial and accounting documents of an organisation with the intention to suppress the signs of insolvency, misbehaviour in the course of bankruptcy, fictitious or intentional bankruptcy. Civil liability for the company's debts in case of causing the company's bankruptcy as a person exercising control over the debtor or failure to file a bankruptcy petition when necessary; and for losses caused by breach of duty to act in the interests of the company, reasonably and in good faith.	
Pending legislation	
No significant pending legislation.	

SINGAPORE	Applicable insolvency law, reorganisations: liquidations
	The Singapore Companies Act (Cap 50).
	Customary kinds of security devices on immovables
	Mortgages. Fixed and/or floating charges.
	Customary kinds of security devices on movables
	Pledge. Lien. Fixed and/or floating charges.
	Stays of proceedings in reorganisations/liquidations
	All proceedings against a company in liquidation are stayed unless court approval is sought to commence or continue proceedings. All proceedings against a company undergoing a reorganisation under a JM or Scheme, unless the court orders otherwise. The stay may be extra-territorial in nature.
	Duties of the insolvency administrator
	A liquidator is an officer of the court and must act in the best interests of the company's general body of unsecured creditor.
	Set-off and post-filing credit
	Set-off in insolvency may not be contracted out of. Proofs of debt may be filed with the liquidator who exercises a quasi-judicial function in assessing such proofs.
	Creditor claims and appeals
	A creditor aggrieved with the liquidator's adjudication of its proof may appeal to the Singapore High Court.
	Priority claims
	See Section 328(1) of the Companies Act.
	Major kinds of voidable transactions
	Transactions at undervalue. Unfair preferences. Floating charges created six months prior to liquidation, in certain circumstances.
Operating and financing during reorganisations	
A matter of agreement between the debtor and its creditors.	
International cooperation and communication	
The Singapore courts support cross-border cooperation between courts. See question 56.	
Liabilities of directors and officers	
See questions 17 to 19.	
Pending legislation	
The Omnibus Insolvency Act.	

SLOVENIA	Applicable insolvency law, reorganisations: liquidations
	Slovenian Financial Operations, Insolvency Proceedings and Compulsory Winding-up Act (Official Gazette of the Republic of Slovenia, No.: 126/07, as amended); Slovenian Resolution and Compulsory Dissolution of Credit Institutions Act (Official Gazette of the Republic of Slovenia, No.: 44/16, as amended); Slovenian Insurance Act (Official Gazette of the Republic of Slovenia, No.: 93/15); Slovenian Investment Funds and Management Companies Act (Official Gazette of the Republic of Slovenia, No.: 31/15, as amended); Slovenian Financial Instruments Market Act (Official Gazette of the Republic of Slovenia, No.: 67/07, as amended); and Slovenian Companies Act (Official Gazette of the Republic of Slovenia, No.: 42/06, as amended)
	Customary kinds of security devices on immovables
	Mortgage only (two kinds possible: regular mortgage and directly enforceable mortgage)
	Customary kinds of security devices on movables
	Lien, non-possessory lien, fiduciary assignment of claims, fiduciary assignment, retention of title, retention of possession.
	Stays of proceedings in reorganisations/liquidations
	With initiation of the bankruptcy proceedings, all ongoing litigation procedures are stayed. Under the Insolvency Act, except in some exceptional cases, no new enforcement proceeding can be initiated against an insolvent debtor.
	Duties of the insolvency administrator
	General duties of the administrator are to conduct the operations of the insolvent debtor according to the needs of the procedure, and represent the debtor: in procedural and other legal actions in relation to testing claims, to rights to separate settlement and exclusion rights; in procedural and other acts in relation to challenging the legal actions of the insolvent debtor; in legal transactions and other acts necessary for the realisation of the bankruptcy estate; in realisation of the right to dispose of the claim and other rights acquired by an insolvent debtor as legal consequences of initiation of bankruptcy proceedings; and in other legal transactions which the insolvent debtor may carry out pursuant to the Insolvency Act.
	Set-off and post-filing credit
	Under the Insolvency Act the mutual claims (whereby, please note that as of the date of initiation of the insolvency proceeding, all non-monetary claims are transformed into monetary claims by the law) under the market prices/values at the initiation of the insolvency proceeding are deemed to be set-off by the law. The law does not provide any possibility for the creditors to be deprived of such right. The bankruptcy administrator may enter into loan and other credit facility agreements, however only: (i) to secure the required financial means for continuation of the debtor's business activities; and (ii) on the basis of a special consent of the insolvency court (the latter has to issue a new consent with respect to entering into each new loan or other credit facility agreement). Repayment of such loans is considered to be a cost of bankruptcy proceedings and is thus made prior to the first distribution of bankruptcy estate.
	Creditor claims and appeals
	Following the expiry of the period of lodging of the claims, the administrator shall attest all the lodged claims and associated rights and prepared a list of attested claims which includes the decision whether the claim is accepted and recognised or rejected. The creditor may: (a) object the decision of the administrator with regard to his own claim and/or right of separate settlement or (b) object against the lodged claim or right of separate settlement of another creditor. The administrator has to take position with respect to such objections and prepare an amended list of lodged claims. Creditors may again file an objection against such list of attested claims. Based on the amended list of attested claims and potential objections of creditors, filed against such list, the insolvency court decides by a decision on (i) objections of creditors, filed against the amended list of attested claims; (ii) which claims or rights of separate settlement are finally accepted and recognised or rejected; (iii) (only in case of compulsory settlement proceeding), which claims have been plausibly demonstrated; and (iv) (only in bankruptcy proceeding) who (either the debtor or the creditor) shall, in other procedure, exercise a claim to establish the existence or non-existence of a rejected claim.
	Priority claims
	Under the Insolvency Act the priority claims are the following unsecured claims: (i) salaries and wage compensations for the last three months prior to initiation of insolvency proceedings; (ii) compensations for accidents related to work for the debtor, and occupational diseases; (iii) unpaid compensations for termination of working relationship prior to initiation of bankruptcy proceedings to which the employees are entitled pursuant to the act governing working relationships; however, their amount shall not exceed the amount of compensation fixed for an employee who has his employment contract terminated by the employer due to redundancy; (iv) salaries and wage compensations for employees whose work is no longer necessary due to the initiation of bankruptcy proceedings for the period from the initiation of bankruptcy proceedings until the expiration of the notice period; (v) compensations to employees who had their employment contract terminated by the administrator, since their work became unnecessary due to the initiation of bankruptcy proceedings or during the proceedings; and (vi) taxes and duties which the payer shall charge or pay at the same time as the payments referred to in points (i), (iii), (iv) and (v) above.
Major kinds of voidable transactions	
Any legal action of the debtor in bankruptcy, carried out within the challengeability period (ie, 12 months prior to the introduction of bankruptcy proceedings up to the initiation of bankruptcy proceedings) shall be challengeable: if the consequences of such action are: either a decrease in the net value of assets of the debtor in bankruptcy, so as to enable other creditors to receive payment for their claims in a smaller portion than if the action had not been done, or a person to the benefit of whom the act has been executed, has acquired more favourable payment conditions for a claim against the debtor in bankruptcy, and person to the benefit of whom the act was executed, at the time when such act has been executed, was aware of, or should have been aware of, the fact that the debtor was insolvent. A claw-back lawsuit shall be filed within 12 months following the publication of the notice of initiation of bankruptcy proceedings.	
Operating and financing during reorganisations	
As a general rule under the Insolvency Act, an insolvent debtor is permitted to perform only those payments and to undertake those new obligations, which are vital for performance of regular business activities. Furthermore, in bankruptcy proceedings also the business activities, which started prior to its initiation may be completed solely on the basis of a special permission, issued by the bankruptcy court. Such permission is however issued on the basis of (among other) the consent of the creditor's committee.	
International cooperation and communication	
Assets located outside Slovenia may become subject of the insolvency proceedings in Slovenia. Further, Slovenian courts will recognise and enforce foreign insolvency proceedings insofar as the standards of the foreign insolvency proceeding are comparable to Slovenian insolvency proceedings and provided that the debtor's centre of main interests is located in the country, where such proceedings took place.	
Liabilities of directors and officers	
The management of the insolvent company may be held personally liable by the creditors for the damages incurred due to lower repayment of their claims in the bankruptcy proceedings as a result of the management's failure to timely perform the required actions for the case of insolvency or fail to act in accordance with the prohibition of performing the payments and/or taking of new financial obligations. Such liability under the Insolvency Act is subject to certain limitations. Apart from the liability of the members of the company's management provided for in the Insolvency Act, Companies Act provides further liabilities of a company's management members. Further to the abovementioned civil law liability, officers and directors may also be held liable under the Slovenian Criminal Code.	
Pending legislation	
N/A.	

SOUTH AFRICA	Applicable insolvency law, reorganisations: liquidations
	Sequestration and winding up is governed by the Insolvency Act, the Companies Act 2008, and the Companies Act 1973.
	Customary kinds of security devices on immovables
	Security on immovable property is effected by the registration of a bond in the Deeds Office.
	Customary kinds of security devices on movables
	Security devices on movables are liens, pledges, bonds, retention of title and cession securitatem debiti.
	Stays of proceedings in reorganisations/liquidations
	If the court has made an order for the winding up of a company, all civil proceedings by or against the company are suspended. No legal proceeding, including enforcement action, may either against the company or in relation to any property belonging to the company or lawfully in its possession, be commenced or proceeded with during business rescue proceedings, except with the written consent of the practitioner or with the leave of the court.
	Duties of the insolvency administrator
	It is the function of a liquidator in any winding up to recover and reduce into possession all the assets and property of the company, whether movable or immovable. The liquidator must apply the assets and property of the company in satisfaction of the costs of the winding up and the claims of creditors. The liquidator may carry on or discontinue any part of the business of the company insofar as may be beneficial for the winding up thereof.
	Set-off and post-filing credit
	Certain transactions of set-off can be set aside. Protection for post-commencement financing is limited.
	Creditor claims and appeals
	Creditor claims are submitted to the liquidator. Appeals against the acceptance or rejection of an appeal can be addressed to the court.
	Priority claims
	In liquidation proceedings the secured creditors are ranked first. The characterisation and priority of creditors' claims are established in the Insolvency Act.
	Major kinds of voidable transactions
A disposition of property not made for value, or having had the effect of preferring a creditor or being collusive may be set aside if the company was insolvent at the time the disposition was made or prejudiced any creditor.	
Operating and financing during reorganisations	
The purpose of a reorganisation is to restore the viability of the company.	
International cooperation and communication	
Structured procedures are only partially in place but the courts are receptive to recognising foreign judgment and orders.	
Liabilities of directors and officers	
Directors and officers can be held liable for breach of their fiduciary or skills duties and when any loss, damage or costs arise as a direct or indirect consequence of a director having knowingly acquiesced in the carrying on of the business of the company recklessly, with gross negligence, or with intent to defraud any person or for any fraudulent purpose.	
Pending legislation	
The Cross-Border Insolvency Act has been enacted but not yet been implemented. The Financial Sector Regulation Act will require the concurrence of the Reserve Bank for the commencement of winding-up or business rescue proceedings in respect of systemically important financial institutions or a systemically important financial institution within a financial conglomerate.	

SPAIN	Applicable insolvency law, reorganisations: liquidations
	The main regulation of insolvency proceedings is the Insolvency Law, enacted on 9 July 2003, which came into force on 1 September 2004 and that has been subject to several amendments, the last being in October 2015.
	Customary kinds of security devices on immovables
	The principal security device on immovable property is the mortgage. Mortgages must be granted by public deed and be registered in the Land Registry. No security enforceable against third parties is created until the mortgage registration has been completed.
	Customary kinds of security devices on movables
	The principal security device on movable property is the possessory pledge. To be enforceable against third parties pledges must be generally granted in a public document and possession over the pledged asset must be transferred either to the pledgee or a depositary.
	Stays of proceedings in reorganisations/liquidations
	Declarative proceedings pending at the time of the insolvency declaration will continue but may be consolidated into the insolvency proceedings. New declarative proceedings can be initiated but must be filed with the insolvency court. Unsecured claims for the attachment of assets pending at the time of the insolvency declaration can continue if the assets attached are not required to continue running the business. No new unsecured claims for the attachment of assets can be enforced during the insolvency proceedings. Security over the assets that are used in the debtor's business cannot be initiated until a settlement agreement that does not affect the security/secured claim is approved or a year passes following the insolvency declaration without the liquidation phase being opened. As an exception, this is not applicable to secured claims related to certain financial collateral.
	Duties of the insolvency administrator
	The insolvency receiver's duties may range from mere supervision of the debtor to administration of the debtor's assets and activities. Whether directors are entirely released from their duties or continue in office under the supervision of the receiver will be at the court's discretion in view of the particular circumstances of the case. There is a preference for releasing the directors if the insolvency filing is made by a creditor. The relevant regime and specific insolvency receivers' duties will be decided by the court case by case.
	Set-off and post-filing credit
	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 complying with the requirements set out in Spanish 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 non-Spanish law governing the reciprocal claim allows such set-off in insolvency proceedings. 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 before the insolvency declaration.
	Creditor claims and appeals
	Any claim against the debtor must be filed with the court dealing with the insolvency proceedings. Appeals may be available, under certain circumstances, before the relevant court of appeals.
	Priority claims
The insolvency debts are classified as follows. Debts of the insolvency estate - These include, among others, debts that originated within the insolvency proceedings (eg, judicial expenses, loan agreements that are rehabilitated by the court, 50 per cent of the fresh money granted within the framework of a refinancing agreement which satisfies some conditions), debts that originated 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. Insolvency debts - These debts are classified as: specially privileged debts (among others, debts secured by mortgages 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, 50 per cent of the fresh money granted within the framework of a refinancing agreement which satisfies some conditions and 50 per cent of the debt of the creditor who applied for the insolvency are classified as generally privileged debts); ordinary debts; or subordinate debts. Debts of the insolvency estate will be paid out of the debtor's assets (other than those assets attached to specially privileged debts) with preference to any other debts. Secured debts are generally paid with the proceeds of the enforcement of the security. Generally privileged debts will be paid by segregating from the debtor's estate those assets covering the aggregate amount of such credits.	
Major kinds of voidable transactions	
Acts and contracts entered into by the debtor in the two years before the insolvency declaration may be rescinded by the court on the basis that these acts or contracts are harmful to the insolvency estate. 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 early payments of unmatured debt. The law also presumes (although admitting evidence against such presumption) that certain acts or contracts damage the insolvency estate (eg, the creation of security in favour of pre-existing obligations, or contracts entered into with specially related persons (among others, shareholders owning more than 5 per cent of listed companies (or 10 per cent if not listed) or directors)). Refinancing agreements that meet the requirements provided for in the Insolvency Act are excluded from the general rescission regime and can only be challenged by the receivers on other grounds (eg, fraud).	
Operating and financing during reorganisations	
Depending on the specific regime decided by the court, the debtor might be able to enter into operations within the ordinary course of business. Any other transactions should be agreed by the court. Loan agreements accelerated prior to the insolvency declaration can be rehabilitated by the court.	
International cooperation and communication	
Regulation (EU) 2015/848 (the Recast Regulation) on cross-border insolvency proceedings, as well as the Insolvency Act establish the duty of reciprocal cooperation for domestic and foreign receivers. The Recast Regulation has introduced a completely new voluntary regime for group coordination that encourages members of a group to consider whether possibilities exist for restructuring the group and to coordinate a restructuring plan. A new regime to improve coordination and communication between receivers and courts has also been established by the Recast Regulation.	

SPAIN cont.	Liabilities of directors and officers
	Directors may be liable for the 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. Directors may also be liable if the company ceases to comply with certain subscribed capital-to-equity ratios and such ratios are not re-established within certain periods, in which case directors are under a legal duty to procure the winding up or (if applicable, the insolvency) of the company. The insolvency court may declare the director liable if the insolvency is classified as 'guilty'. The Spanish Criminal Code includes a number of criminal offences that may apply to a director.
	Pending legislation
	Law 9/2015 includes an additional provision which enables the Spanish Government to elaborate a Restated Text of the insolvency legislation. A new Royal Decree on receivers' legal regime is pending approval.

SWITZERLAND	Applicable insolvency law, reorganisations: liquidations
	The Federal Statute on Debt Collection and Bankruptcy governs the enforcement of pecuniary claims and claims for the furnishing of security against private individuals and legal entities of private law. Regulated financial institutions are subject to special rules (BIO-FINMA).
	Customary kinds of security devices on immovables
	Security interests in real property, ships and aircraft by way of a mortgage.
	Customary kinds of security devices on movables
	Pledges, right of retention, retention of title, fiduciary transfer of property title (in particular assignment of claims).
	Stays of proceedings in reorganisations/liquidations
	The commencement of composition and bankruptcy proceeding automatically stays almost all execution proceedings. Except for urgent matters, civil court proceedings will be suspended.
	Duties of the insolvency administrator
	During the composition agreement the administrator supervises the business of the debtor, examines the affairs and submits its recommendation regarding the reorganisation plan to the court. In liquidation the administrator marshals and liquidates the assets for distribution to the creditors according to the creditors' schedule.
	Set-off and post-filing credit
	Set-off is permitted except in cases considered as misuse. The debtor is either prevented (bankruptcy) or restricted (composition) from disposing of its assets. The administrator has to consent to contract new obligations, such as loan or credit, which may touch free assets.
	Creditor claims and appeals
	Creditors must submit their claims within a month after the public announcement of commencement of a composition or a bankruptcy. The disallowance of its claim can be challenged by the creditor by instituting legal proceedings.
	Priority claims
	Three different classes are distinguished: <ul style="list-style-type: none"> • first class: claims of employees that arose during the six months prior to the opening of proceedings and unpaid pension plan contributions; • second class: unpaid social security contributions; and • third class: all other claims (including taxes).
	Major kinds of voidable transactions
Gifts (and equivalent transactions), preferential transactions concluded in over-indebted situation; fraudulent transactions.	
Operating and financing during reorganisations	
Under the supervision of the commissioner the debtor may continue its business operation, however certain transactions will require court approval or approval of the creditors' committee. Transactions approved by the administrator (and the court or creditors' committee when necessary) enjoy privileged treatment.	
International cooperation and communication	
Foreign insolvency administrators require approval by the relevant Swiss authorities to represent the foreign insolvent estate for assets located in Switzerland (application for ancillary ('mini') insolvency proceeding). New provisions improving recognition of foreign bankruptcy orders and simplification on cooperation enter into force on 1 January 2019. No specific rules are established for international cooperation; official secrecy rules will be observed. A language barrier may be encountered. Special rules apply for insolvency proceedings involving regulated financial institutions.	
Liabilities of directors and officers	
Any member of the board of directors or any person entrusted with management (officers) is liable for any damage caused in the corporation, its shareholders or creditors where he or she has intentionally or negligently acted in breach of his or her duties. They may also become liable for unpaid social security or certain taxes.	
Pending legislation	
Switzerland's old international treaties on bankruptcy law, which were concluded in the first half of the nineteenth century by various Swiss Cantons with individual German Principalities, shall be abolished.	

THAILAND	Applicable insolvency law, reorganisations: liquidations
	Bankruptcy Act BE 2483 (AD 1940). Establishment of and Procedures for Bankruptcy Court Act BE 2542 (AD 1999). Regulations for Bankruptcy Cases BE 2549 (AD 2006).
	Customary kinds of security devices on immovables
	Mortgage.
	Customary kinds of security devices on movables
	Pledge and retention.
	stays of proceedings in reorganisations/liquidations
	Automatic stay is available only in reorganisation under section 90/12 of the Bankruptcy Act BE 2483 (AD 1940).
	Duties of the insolvency administrator
	In bankruptcy, the official receiver must gather the assets of the debtor and distribute them among the creditors. In reorganisation, the plan administrator plays the said role in compliance with the reorganisation plan.
	Set-off and post-filing credit
	Creditors can set-off debts, unless the creditor's right of claim against the debtor is accrued after the court's order of receivership or after the court's order of a reorganisation. Upon the issuance of the court's order of receivership, a debtor is prohibited from doing any acts relating to the asset, or the business, except by order or approval of the court, the official receiver, the administrator of the asset, or of a creditors' meeting (as the case may be). Otherwise, the transaction will be void. Once the court orders acceptance of the reorganisation petition, the debtor is prohibited from undertaking certain activities during the term of automatic stay.
	Creditor claims and appeals
	The application for repayment of debt is submitted to the official receiver. In bankruptcy proceedings, the appeal of the court's order with respect of the repayment of debt is made to the Supreme Court, Bankruptcy Division. In reorganisation proceedings, the appeal of the official receiver's order with respect of the repayment of debt is made to the court.
	Priority claims
Bankruptcy: Official receiver's fees, court fees and taxes due for payment within six months prior to the bankruptcy order; secured creditors with regard to secured assets; and employees. Reorganisation: In accordance with the plan, but if a priority creditor is treated other than in accordance with the normal distribution rules, that creditor must give its consent; if the reorganisation order is revoked and the debtor is declared bankrupt, debts incurred by the official receiver, planner and plan administrator have priority equal to the expenses of the official receiver in bankruptcy.	
Major kinds of voidable transactions	
Fraudulent transfer and preferential transfer.	
Operating and financing during reorganisations	
Operating and financing during reorganisation which is conducted in the ordinary course of business can be done under the Bankruptcy Act BE 2483 (AD 1940).	
International cooperation and communication	
None at present.	
Liabilities of directors and officers	
The liability of the directors and officers is separated from the liability of the company.	
Pending legislation	
None at present.	

UNITED ARAB EMIRATES	Applicable insolvency law, reorganisations: liquidations
	Federal Law No. 18 of 1993 (Commercial Code) (Book 5 is repealed). Federal Law No. 9 of 2016 (UAE Bankruptcy Law) Federal Law No. 2 of 2015 (Companies Law). Federal Law No. 5 of 1985 (Civil Code). Federal Law No. 11 of 1992 (Civil Procedures Code). Federal Law No. 10 of 1980 (Central Bank Law).
	Customary kinds of security devices on immovables
	Mortgages.
	Customary kinds of security devices on movables
	Business mortgage (pledge over a commercial business). Pledge.
	Stays of proceedings in reorganisations/liquidations
	A statutory moratorium applies once preventive composition and bankruptcy proceedings have been initiated (secured creditors are not affected by the moratorium and can enforce their security with the permission of the court).
	Duties of the insolvency administrator
	The trustee is responsible for issuing notices providing reports to creditors and the court, managing and continuing the business where relevant.
	Set-off and post-filing credit
	UAE Bankruptcy Law includes a provision that permits insolvency set-off. New finance can be obtained which will have priority over any existing ordinary debts of the debtor.
	Creditor claims and appeals
	Creditor claims to be submitted and appeals to be made in accordance with the appropriate statutory timelines.
	Priority claims
	Judicial fees such as court fees and the fees of the trustee and experts, certain employee claims, judgment debts, amounts due to governmental bodies and fees, costs and expenses which are necessary to continue the business after proceedings have been initiated.
	Major kinds of voidable transactions
	Gifts, early repayments, debts paid with something other than as agreed, providing security for pre-existing debts and transactions that are detrimental to the creditors may be voided.
	Operating and financing during reorganisations
	Debtor to operate and manage the business in a preventive composition subject to supervision of trustee. Trustee takes control of the operation and management of the debtor in bankruptcy proceedings.
International cooperation and communication	
There are no provisions in UAE law that facilitate international cooperation and communication in the context of insolvencies.	
Liabilities of directors and officers	
Directors and offices may be liable for: <ul style="list-style-type: none"> • acts of fraud; • abuse of power; • violation of law or constitutional documents; and • mismanagement of the company; Risk of criminal penalties for fraudulent actions. Financial contributions can be ordered from the directors and officers if the assets of the debtor are insufficient to pay at least 20 per cent of the debt and the director is liable for such loss according to the Companies Law. Directors can also be ordered to make financial contributions for certain detrimental transactions entered into within two years of commencement of bankruptcy proceedings.	
Pending legislation	
Further implementing regulations in relation to the UAE Bankruptcy Law such as the cabinet resolutions of the Minister of Finance regarding the powers of the Financial Restructuring Committee and certain other procedural matters such as the establishment of a table of experts and the insolvency registry remain pending.	

UNITED STATES	Applicable insolvency law, reorganisations: liquidations
	Title 11 of the United States Code (Chapter 7 governs liquidations; Chapter 11 governs reorganisations).
	Customary kinds of security devices on immovables
	The real estate mortgage. Alternative forms include the land sale contract and deed of trust.
	Customary kinds of security devices on movables
	Security interests created under and enforced by article 9 of the UCC. Special security devices exist for certain intangible property, equipment such as automobiles, aeroplanes, etc, and intellectual property.
	Stays of proceedings in reorganisations/liquidations
	The filing of a bankruptcy petition immediately triggers an automatic stay that enjoins most creditor enforcement action against the debtor and its property.
	Duties of the insolvency administrator
	The trustee or debtor-in-possession is an officer of the court and has a fiduciary duty to protect and preserve assets of the estate, and to administer such assets in the best interests of creditors.
	Set-off and post-filing credit
	Bankruptcy generally does not affect set-off rights existing under non-bankruptcy law, but relief from stay must be obtained. Unsecured and secured post-petition credit may be obtained with court approval.
	Creditor claims and appeals
	Creditors generally file proofs of claim. Disputes are litigated in the bankruptcy court (or other court of competent jurisdiction) and may be appealed.
	Priority claims
	Expenses of administering the estate and other specified claims such as wages, pension benefits, and certain taxes enjoy priority.
	Major kinds of voidable transactions
Fraudulent and preferential transfers may be avoided.	
Operating and financing during reorganisations	
The debtor-in-possession may operate its business in the ordinary course. Court approval must be obtained for transactions outside the ordinary course of business.	
International cooperation and communication	
Chapter 15 of the Bankruptcy Code codifies the UNCITRAL Model Law on Cross-Border Insolvency, with some modifications. Chapter 15 enables a foreign representative of a foreign estate to obtain US bankruptcy court recognition of a foreign proceeding and thereby access a panoply of relief with respect to the foreign debtor's assets and operations in the US, including the imposition of the automatic stay, administration of the foreign debtor's US assets and operation of the foreign debtor's US business. The statute authorises and encourages communication between and among US and non-US courts.	
Liabilities of directors and officers	
Corporate directors and officers generally have no personal liability unless they have breached their fiduciary duties. Such duties expand to include the interests of creditors upon or near insolvency.	
Pending legislation	
Congress has considered various legislation affecting the Bankruptcy Code, including acts that would have elevated to administrative expense priority funded vested benefits in a defined pension plan and withdrawal liability determined under ERISA. None have been enacted into law.	

VIETNAM	Applicable insolvency law, reorganisations: liquidations
	Bankruptcy Law 2014. Enterprise Law 2014, applied to voluntary liquidation out of the court-driven insolvency proceedings.
	Customary kinds of security devices on immovables
	A mortgage.
	Customary kinds of security devices on movables
	A mortgage or a pledge.
	Stays of proceedings in reorganisations/liquidations
	After the court's acceptance of the bankruptcy petition, except for limited exceptions, the following are suspended: (i) civil, business, commercial or labour legal proceedings; (ii) enforcement a court/arbitral judgment, award or decision; (iii) enforcement of security over assets.
	Duties of the insolvency administrator
	An asset management officer or firm (the receiver) appointed by court to play a role similar to that of a receiver in bankruptcy proceedings or liquidator in case of liquidation.
	Set-off and post-filing credit
	A set-off is generally permitted and, subject to certain limitations, a debtor may incur debts after the filing of the bankruptcy petition.
	Creditor claims and appeals
	Claims of creditors must be sent to the receiver, and the list of creditors must be finalised thereafter, within a fixed time frame.
	Priority claims
	Priority claims include (i) bankruptcy costs and expenses; (ii) payment to employees; and (iii) post-filing debts for the purpose of business recovery.
	Major kinds of voidable transactions
	Voidable transactions include: (i) transfer of property not at market price; (ii) conversion of an unsecured debt into a secured debt; (iii) making payments or setting off an obligations under terms in favour of a creditor; (iv) donation of assets; (v) transaction outside the scope of business; and (v) transactions for the purpose of 'dispensing' assets.
	Operating and financing during reorganisations
	Subject to the approved recovery plan.
International cooperation and communication	
Orders, decisions and judgments of most of the courts of developed jurisdictions are generally not recognised in Vietnam.	
Liabilities of directors and officers	
Officers and directors will not generally be personally liable for obligations of their company, except that they act ultra vires or breach fiduciary duties.	
Pending legislation	
N/A.	

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