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CONTENTS

Editor’s Preface ........................................................................................................vii
Donald S Bernstein

Chapter 1 ‘COMI-MIGRATION’ IN THE CONTEXT OF CHAPTER 15 OF
THE US BANKRUPTCY CODE .................................................. 1
Donald S Bernstein, Timothy Graulich, Darren S Klein and
Christopher S Robertson

Chapter 2 AUSTRIA.................................................................................... 7
Eva Spiegel and Miriam Gschwandtner

Chapter 3 BELGIUM ........................................................................... 25
Bart Lintermans, Wouter Deneyer, William Standaert and
Remco Lemarcq

Chapter 4 BRITISH VIRGIN ISLANDS............................................. 36
Arabella di Iorio and David Welford

Chapter 5 CANADA ........................................................................... 44
Frank Spizzirri, Michael Nowina and Ben Sakamoto

Chapter 6 CAYMAN ISLANDS.......................................................... 54
Aristos Galatopoulos and Caroline Moran

Chapter 7 CHINA............................................................................... 63
Ni Jiahua and Liu Tiecheng

Chapter 8 ENGLAND & WALES......................................................... 84
Ian Johnson

Chapter 9 GERMANY......................................................................... 112
Andreas Dimmling
Chapter 10  GREECE ................................................................. 125
             Athanasia G Tsene

Chapter 11  HONG KONG ...................................................... 140
              Mark Hyde and Joanna Charter

Chapter 12  INDIA ................................................................. 154
              Justin Bharucha and Priya Makhijani

Chapter 13  IRELAND ............................................................. 166
              Robin McDonnell, Saranna Enraght-Moony and Karole Cuddihy

Chapter 14  ISLE OF MAN ...................................................... 180
              Miles Benham and James Peterson

Chapter 15  JERSEY ............................................................... 192
              William Redgrave and Ed Shorrock

Chapter 16  LUXEMBOURG ................................................... 200
              Pierre Beissel and Sébastien Binard

Chapter 17  MEXICO ............................................................... 216
              Dario U Oscós Coria

Chapter 18  NETHERLANDS .................................................. 233
              Sijmen H de Ranitz, Lucas P Kortmann and Abslem Ourbris

Chapter 19  NIGERIA ............................................................. 247
              Folabi Kuti, Ugochukwu Obi and Olatunji Oginni

Chapter 20  PERU ................................................................. 255
              Alfonso Pérez-Bonany López

Chapter 21  POLAND .............................................................. 265
              Krzysztof Zyro

Chapter 22  PORTUGAL .......................................................... 280
              José Carlos Soares Machado and Vasco Correia da Silva
Chapter 23  
RUSSIA................................................................. 292  
Pavel Boulatov

Chapter 24  
SINGAPORE....................................................... 323  
Nish Shetty and Keith Han

Chapter 25  
SLOVENIA............................................................ 335  
Grega Peljhan, Blaž Hrastnik and Uroš Šuštar

Chapter 26  
SOUTH AFRICA..................................................... 347  
Gerhard Rudolph, John Bell and Viren Raja

Chapter 27  
SPAIN................................................................. 361  
Iñigo Villoria and Alexandra Borrallo

Chapter 28  
SWEDEN ............................................................ 371  
Carl Hugo Parment and Nik Åberg

Chapter 29  
THAILAND............................................................ 379  
Suntus Kirdsinsap, Natthida Pranumnoppal and Piyapa Siriveerapoj

Chapter 30  
UNITED STATES..................................................... 390  
Donald S Bernstein, Timothy Graulich, Damon P Meyer and Christopher S Robertson

Appendix 1  
ABOUT THE AUTHORS ............................................. 413

Appendix 2  
CONTRIBUTING LAW FIRMS’ CONTACT DETAILS ...... 431
EDITOR’S PREFACE

This fourth edition of The Insolvency Review once again offers an in-depth review of market conditions and insolvency case developments in key countries around the world. As always, a debt of gratitude is owed to the outstanding professionals in geographically diverse locales who have contributed to this book. Their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws.

The preface to a previous edition of this book touched upon the challenges faced by large multinational enterprises attempting to restructure under these diverse and potentially conflicting insolvency regimes. These challenges have traditionally been particularly acute in large corporate insolvencies because neither UNCITRAL’s Model Law on Cross-Border Insolvency nor other enactments, such as the European Union’s Regulation on Insolvency,1 have provided the tools necessary for consolidated administration of insolvencies involving multiple legal entities in a corporate group, with operations, assets and stakeholders under different corporate umbrellas in different jurisdictions. Insolvent corporate groups have therefore often been obliged to cobble together consensual restructurings with local stakeholders in key jurisdictions or to initiate separate plenary insolvency proceedings for individual companies under multiple local insolvency regimes (as illustrated in the cases of Nortel and Lehman Brothers, among others), with added costs, disbursed control, legal conflicts and inconsistent judgments.

When we last addressed this issue in these pages, UNCITRAL’s Working Group V was continuing its work on cross-border insolvency of multinational enterprise groups,2 and the

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European Commission was likewise considering amending the European Union Regulation on Insolvency to better encompass enterprise groups.\(^3\) Publication of the 2016 edition of this book provides an occasion to mark the progress made in these efforts over the last two years.

On 20 May 2015, the European Parliament and Counsel published the Recast Regulation on Insolvency 2015/848, which will apply to insolvency proceedings initiated after 26 June 2017.\(^4\) The Recast Regulation acknowledges the fact that it would not be practical to introduce an insolvency regime with ‘universal scope’ throughout the European Union in light of the diversity of local insolvency laws.\(^5\) Chapter V of the Recast does, however, specifically address insolvency proceedings of members of a group of companies in different jurisdictions. Section 1 of Chapter V (Articles 56–60) addresses ‘cooperation and communication’ between such proceedings, while section 2 (Articles 61–77) creates a new concept of a ‘group coordination proceeding’ under the auspices of a ‘coordinator’.

Section 1 generally provides that insolvency practitioners (which are defined broadly in the Recast Regulation and include, e.g., liquidators, administrators and trustees) appointed in group members’ proceedings and courts presiding over such proceedings ‘shall’ cooperate with one another so long as cooperation is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest.\(^6\) In addition, Article 60 of the Recast Regulation grants an insolvency practitioner appointed in the insolvency proceeding of one member of a corporate group the power to be heard in the proceedings of any other member and the power to seek a stay with respect to the realisation on assets in such other proceeding in certain circumstances if such a stay, among other things, is necessary to implement a restructuring plan and is in the best interest of creditors in the proceedings in which the stay is requested.\(^7\)

Section 2 sets forth a framework for voluntary, court-supervised ‘group coordination proceedings’.\(^8\) Group coordination proceedings may be requested before any court having jurisdiction over any group member,\(^9\) and the details of the coordination plan would be proposed by the insolvency practitioner appointed to act as ‘coordinator’.\(^10\) The coordinator has a number of rights, including the right to participate in proceedings opened in respect of any group member, the right to mediate disputes between members, the right to present the group coordination plan to parties in interest, the right to request information from insolvency practitioners appointed in any member’s proceedings, and the right to seek a stay of up to six months in the proceedings of any group member if necessary to implement

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\(^5\) Id. at Rec. 22.

\(^6\) Id. at Articles 56-58.

\(^7\) Id. at Article 60.

\(^8\) Id. at Articles 61-72.

\(^9\) Id. at Article 61.

\(^10\) Id. at Article 72.
a plan that benefits creditors in that proceeding. Participation in the group coordination proceedings is voluntary, though insolvency practitioners appointed to act in respect of each member 'shall' consider the coordinator’s recommendations.

In addition to the provisions addressing corporate groups in Chapter V, the Recast Regulation also recognises that ‘[s]econdary insolvency proceedings may also hamper the efficient administration of the insolvency estate’. Accordingly, the Recast Regulation confers upon the insolvency practitioner in main insolvency proceedings the possibility of distributing to local creditors what they would have received had secondary local proceedings been initiated and empowers courts to refuse to initiate secondary proceedings if these so-called ‘synthetic’ or ‘virtual’ proceedings are proposed. These provisions may help facilitate synthetic group restructurings of the sort employed in the *Collins & Aikman* case.

UNCITRAL Working Group V, meanwhile, has continued to develop an addendum to the Model Law to facilitate the effective treatment of cross-border insolvencies of multinational enterprise groups. The Working Group has identified eight key principles of a regime to address insolvency in the context of enterprise groups, which themselves are subject to two fundamental underpinning principles. Those foundational principles are, first, that the jurisdiction of the courts in the state in which the centre of main interest (COMI) of an enterprise group member is located will remain unaffected by a group insolvency solution, and, second, the eight identified principles do not replace or interfere with any process or procedure required by the jurisdiction in which the COMI of a group member is located in respect of that group member’s participation in a group insolvency solution. Against that backdrop, the eight key principles can be summarised as follows:

- There is no obligation to commence insolvency proceedings for individual members of an enterprise group.
- When a group enterprise solution is proposed, that solution will require coordination between group members and may be developed through a coordinating proceeding.

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11 *Id.*

12 *Id.* at 70.

13 *Id.* at Recital 41.

14 *Id.* at Recital 42; *Article 36.*


c Group members might designate one member’s proceeding to function as the coordinating proceeding, the role of which would be procedural. A proviso might be that such proceeding take place in a state that is the COMI of at least one group member that is a necessary and integral part of the enterprise group solution.

d The court located in the COMI of a group member participating in a group insolvency solution can authorise the insolvency representative appointed in proceedings taking place in the COMI to seek (1) to participate in a planning proceeding taking place in another jurisdiction and (2) recognition by the court of the proceeding in the COMI jurisdiction.

e Participation in the coordination process for group members whose COMI is located outside of the jurisdiction of the coordinating proceeding is voluntary. For members whose COMI is located in the same jurisdiction as the coordinating proceeding, the recommendations of part three of the Legislative Guide on Insolvency Law with respect to joint application and procedural coordination could apply.

f Creditors and stakeholders of group members participating in a group solution would vote in their own jurisdictions on the treatment they are to receive according to applicable domestic law.

g Following approval of a group reorganisation plan by creditors and stakeholders, each COMI court would have jurisdiction to implement the plan in accordance with domestic law.

h The insolvency representative appointed in the coordinating proceeding should have a right of access to the proceedings in each COMI court to be heard on issues related to implementation of the group reorganisation plan.

These eight principles are largely consistent with the Recast Regulation’s approach to resolution of enterprise groups within the European Union. Like the Recast Regulation, the UNCITRAL proposal contemplates a voluntary coordination framework that allows for a group solution (including, by not requiring proceedings for all members, a ‘synthetic’ solution) and allows representatives of the group members’ proceedings to participate in the proceedings of other members to facilitate such a solution, but one that ultimately does not attempt to alter the substantive insolvency law in individual jurisdictions. Notably, in commentary to the second principle, the Working Group allows that another approach to coordination between member insolvencies is the approach taken in the Recast Regulation.18

The Recast Regulation will have just come into effect when the next edition of this book is published, and there has been no indication regarding when Working Group V will be in a position to put forward final proposals, whether along the lines described above or otherwise. It therefore remains to be seen how these measures will function in practice, and also whether the voluntary nature of the proposed regimes will limit their utility. It is also possible that there will be resistance in some jurisdictions to ceding sovereignty over local insolvency law even to the limited degree contemplated by the Recast Regulation and the Working Group V principles.

I, once again, want to thank each of the contributors to this book for their efforts to make The Insolvency Review a valuable resource. As each of our authors, both old and new, knows, this book is a significant undertaking because of the current coverage of developments

18 Id.
Editor’s Preface

we seek to provide. As in prior years, my hope is that this year’s volume will help all of us, authors and readers alike, reflect on the larger picture, keeping our eye on likely, as well as necessary developments, both on the near and distant horizons.

Donald S Bernstein
Davis Polk & Wardwell LLP
New York
October 2016
Chapter 8

ENGLAND & WALES

Ian Johnson

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

The legislative framework underpinning UK insolvency law² is principally provided by the Insolvency Act 1986 (IA 1986) and the Insolvency Rules 1986 (IR 1986),³ which apply to both companies and individuals. They also apply in modified form to certain forms of partnership. Elsewhere, ‘special insolvency regimes’ apply to certain regulated entities, including credit institutions, insurance undertakings and utility companies (see Section I.vi, infra).

The IA 1986 and IR 1986 are supplemented by other legislation, such as the Companies Act 2006 (including the statutory provisions relating to schemes of arrangement used in restructurings) (CA 2006), the Company Directors’ Disqualification Act 1986 and the Law of Property Act 1925 (which, in some cases, governs the ability of a secured creditor to enforce its security).

While European Union law has only a limited impact on the domestic insolvency framework,⁴ it governs jurisdiction and recognition in many EU cross-border cases. On 23 June 2016, a referendum was held in which the British public voted to leave the EU. It is not yet clear when the UK will leave, what form that exit will take, and what the legal

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1 Ian Johnson is a partner at Slaughter and May. The author would like to thank Nicky Ellis, a professional support lawyer at Slaughter and May, for her assistance in preparing this chapter.

2 The term ‘UK insolvency law’ is used in this chapter to denote the insolvency laws applicable to England and Wales. Similar laws apply, with modifications, to Scotland and Northern Ireland.

3 The Insolvency Rules 1986 are currently being modernised – see Section V.v, infra.

4 With certain significant exceptions, such as the Financial Collateral Arrangements (No. 2) Regulations 2003 (implementing the EU Directive on Financial Collateral Arrangements, which aims to simplify the process of taking and enforcing financial collateral across the EU).
consequences will be. However, it is clear that agreeing the terms of the exit will take some considerable time. The existing legal framework is expected to remain in place for at least two years and is therefore still discussed in detail in this chapter. The implications for the cross-border insolvency framework are discussed further in Section V.v, infra.

In the restructuring and insolvency context, the most significant piece of EU legislation is the EC Regulation on Insolvency Proceedings (No. 1346/2000) (ECIR), which limits the jurisdiction of the English courts to open main insolvency proceedings. The ECIR is directly applicable in all EU Member States except Denmark, in cases where the debtor's centre of main interests (COMI) is situated in an EU Member State. It imposes a framework of jurisdictional rules governing the opening of all proceedings that fall within its scope and will override the national law of EU Member States where necessary. Certain types of debtor are excluded from the ECIR, the key examples being credit institutions and insurance undertakings that are subject to separate regulations. An extensive review and subsequent revision of the ECIR was completed in spring 2015 and the recast version entered into force on 25 June 2015. Most of its provisions will apply from 26 June 2017, while the original ECIR will continue to govern insolvency proceedings that are opened up to that date. The rest of this chapter describes the position as it is under the original ECIR unless otherwise stated.

Where the ECIR applies, main proceedings may only be opened in the UK if the debtor company has its COMI (which is presumed, in the absence of proof to the contrary, to be where the debtor’s registered office is located) in the UK. The company does not have to have been incorporated in an EU Member State. If the company's COMI is located in another EU Member State, secondary proceedings can be opened in the UK if the company has an establishment in the UK. Secondary proceedings are listed in Annex B to the ECIR and must currently be in the form of winding-up proceedings. Secondary proceedings opened prior to the opening of main proceedings in another EU Member State (known as territorial proceedings) are not limited to winding-up proceedings. Insolvency proceedings

The regulations disapply a number of provisions of the IA 1986, including the moratorium on enforcement of security in insolvency processes such as administration and company voluntary arrangements and the order of priority of claims in floating charge realisations.

References to ‘EU Member State’ in the remainder of this chapter should be taken to mean an EU Member State other than Denmark.

Main proceedings for the purposes of the ECIR are defined as ‘collective insolvency proceedings’ and are listed in Annex A to the ECIR. Those relevant to corporate insolvencies in the UK are: winding up by or subject to the supervision of the court; creditors' voluntary liquidation (with confirmation by the court); administration (including out-of-court appointments) and voluntary arrangements.

The purpose of this limitation is to maintain the primacy of the main proceedings. Note that the recast ECIR extends the scope of secondary proceedings beyond winding-up proceedings to include a range of insolvency processes with the aim of facilitating cross-border restructurings (see Section V.v, infra).

Territorial proceedings may only be opened in two sets of circumstances: either where main proceedings cannot be opened because of the conditions laid down by the law of the EU Member State in which the company's COMI is situated; or where the opening of territorial...
opened in an EU Member State under the ECIR will be automatically recognised without any formality in all EU Member States, including the UK, from the time the judgment opening the proceedings becomes effective in the EU Member State in which the proceedings are opened.

If the company’s COMI is outside the EU, the ECIR will not apply and the UK, in common with other EU Member States, will be free to act in accordance with its existing laws and practice when exercising jurisdiction, opening proceedings and recognising and enforcing proceedings opened within and outside the EU.

ii Policy
Changes to insolvency legislation were introduced under the Enterprise Act 2002 to facilitate corporate rescue. Key amendments included the streamlining of the administration regime and the limiting of the circumstances in which the holder of a qualifying floating charge\(^{10}\) (QFC holder) can appoint an administrative receiver to realise its security. These changes reflect the shift in policy voiced by successive UK governments over recent years in an attempt to make the UK a more debtor-friendly jurisdiction, where entrepreneurship is to be encouraged and where there should be no stigma attached to business failures in the absence of wrongdoing by the directors of the company. However, when compared with certain other jurisdictions, such as the United States, the UK still appears to be a creditor-friendly jurisdiction.

In the UK, the prevailing approach to treatment of businesses in financial difficulties has generally been to attempt to achieve a consensual solution to keep businesses going. However, the complexity of capital structures, diverse views of different stakeholders and the flexibility of tools such as schemes of arrangement, company voluntary arrangements (CVAs) and pre-packaged administrations (discussed in subsection iii, infra) have meant that solutions that are not fully consensual have become more commonplace.

In May 2016, the UK government launched a consultation on options for reform of the corporate insolvency framework; the proposals under consideration are potentially significant and are intended to facilitate restructurings (see Section V.vi, infra).

iii Insolvency procedures

Introduction – insolvency and rescue procedures
Subject to the applicability of any special insolvency regimes (see Section I.vi, infra) or any jurisdictional limitations imposed by the ECIR, the processes described below can be used to wind up or rescue a company in the UK. In brief, a company (including an overseas company if its COMI is in England or if the company is otherwise found to have sufficient

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\(^{10}\) Broadly defined as a floating charge over the whole or substantially the whole of the company's property.
connection with this jurisdiction) may be placed into voluntary or compulsory liquidation, unless it is subject to a special insolvency regime. Alternatively, it may be made subject to any of three alternative statutory procedures: administration, CVA or receivership. In addition, a company may have its debts rescheduled or compromised by way of a creditors’ scheme of arrangement (scheme). Unlike liquidation, administrations, CVAs and schemes can be used to rescue a company and may form part of a restructuring plan. The IA 1986 also provides for receivership (including administrative receivership), which is a self-help remedy enabling a creditor to recover what it is owed through the realisation of charged assets.

**Liquidation**

A company may be wound up by way of a ‘members’ voluntary liquidation’ (MVL), which is a solvent liquidation, or a ‘creditors’ voluntary liquidation’ (CVL), which is an insolvent liquidation. A CVL can also be used as an exit route from administration. In a CVL, the creditors will have a greater say than in an MVL and are also able to appoint a liquidation committee to supervise certain aspects of the winding up. A company can also be wound up by the courts as a compulsory liquidation.

If main proceedings are pending in another EU Member State, and the company’s COMI is located in that Member State, it will still be possible to commence a CVL in the UK, provided the company has an establishment in the UK, as it is a ‘winding-up proceeding’ for the purposes of Annex B to the ECIR. If, however, main proceedings have already been opened in another EU Member State, the English courts must stay the secondary proceedings in whole or in part if requested to do so by the liquidator in the main proceedings. The liquidator in the main proceedings can also request that main proceedings previously opened in another EU Member State as territorial proceedings be converted into winding-up proceedings if it is in the interests of creditors in the main proceedings. The English courts have the power, however, to request the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request may only be rejected if it is manifestly of no interest to the creditors in the main proceedings.

If a company is incorporated outside the UK and the ECIR does not apply (i.e., the company’s COMI is not located in an EU Member State), it may be wound up as an ‘unregistered company’ under the IA 1986 in certain circumstances, including where it is unable to pay its debts or if a court is of the opinion that it is just and equitable to wind it up. There is no statutory guidance as to the criteria that will justify an English court assuming jurisdiction but case law has identified the following further requirements that must be satisfied before the courts will exercise their discretion to make a winding-up order: (1) there must be a sufficient connection with England; (2) there must be a reasonable

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11 See Sections 220 to 221 of the IA 1986, which allow for the winding up of foreign companies as unregistered companies.

12 It is not possible to appoint an administrative receiver in respect of a company incorporated outside the UK.

13 The IA 1986 was amended to enable foreign liquidators to apply to convert administration and voluntary arrangements in English proceedings into winding-up proceedings and for foreign companies to be placed into voluntary liquidation as unregistered companies if their COMIs are located in the UK.
possibility, if a winding-up order is made, of benefit to those applying for the winding-up order; and (3) one or more persons interested in the distribution of assets of the company must be persons over whom the courts can exercise jurisdiction. The sufficient connection test may be satisfied by, for example, the presence of assets within the jurisdiction or finance documents that are governed by English law. The courts may also assume jurisdiction where the insolvency procedures in the relevant foreign jurisdiction have been found to be unsuitable or outmoded.¹⁴

In both a voluntary and a compulsory liquidation, the liquidator is under a duty to collect in and realise the assets of the company for distribution to the creditors. There is no prescribed time limit within which to complete this process. The company will then be dissolved. If the liquidator believes that he or she could achieve a better result for the creditors were the company to be placed in administration, then he or she may apply to the courts for him or herself or another person to be appointed as administrator.

Administration

An administrator can be appointed in cases where a company is, or is likely to become, unable to pay its debts and the purpose of the administration is likely to be achieved. The purpose is set out as a hierarchy of three objectives. The primary objective is to rescue the company as a going concern, failing which the administrator must seek a better result for the company’s creditors as a whole than would be likely in a winding up. If the second objective is not achievable, the third objective is to realise the company’s property for distribution to secured or preferential creditors.

The second objective may be achieved by disposing of the company’s business or its assets by way of a pre-packaged sale (pre-pack), agreed before an administrator is appointed. The sale will then be effected immediately (or soon after) he or she takes the appointment but before the initial creditors’ meeting and without the consent of the unsecured creditors. This has proved to be a useful, if at times controversial, restructuring tool and, in one notable case, has been used by a foreign company, with court approval, after migrating its COMI to England¹⁵ (see Section I.vii, infra). The court held that the industry guidance on the use of pre-packs provided by SIP 16¹⁶ had been complied with and expressly gave the administrators liberty to proceed with the pre-pack as, on the evidence, there was no realistic alternative to realising better value for creditors.¹⁷ Since November 2015, there has been an independent ‘pre-pack pool’ of experienced business people available to scrutinise proposed deals involving connected parties. Use of the pre-pack pool is voluntary but strongly encouraged. It was set up to address concerns about the fairness and transparency of pre-packs involving connected parties, but has not been extensively used to date. Administration is both a ‘collective insolvency proceeding’, for the purposes of Annex A, and a ‘winding-up proceeding’

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15 Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch).
16 A Statement of Insolvency Practice (SIP 16 – Pre-packaged Sales in Administration) was introduced to ensure greater transparency of pre-packs. It sets out the required disclosures that an administrator must make to creditors of the details of any pre-pack agreement and sale.
17 A pre-pack administration can also be combined with a scheme, as seen in the IMO Carwash and McCarthy & Stone restructurings.
(where the company exits administration by way of a CVL) for the purposes of Annex B to the ECIR. If the company’s COMI is located in another EU Member State where main proceedings are pending, the company can be placed into administration (using the out-of-court or court-based procedure) in the UK if it meets the requirements under the ECIR that allow territorial proceedings to be opened. If it is possible to open territorial proceedings, they can be in the form of any of the proceedings listed in Annex A but will be restricted to dealing with the assets of the company situated in the UK. If main proceedings have already been opened in another EU Member State, it will not be possible to seek to achieve the primary objective of rescuing the company as a going concern, as secondary proceedings must currently be a form of winding-up proceedings.

An administrator cannot be appointed to a company whose COMI is located outside the EU unless it is registered under the CA 2006 or is incorporated in an European Economic Area state other than the UK.\(^\text{18}\) In this respect, the English courts’ jurisdiction is narrower than that for liquidations where an overseas company can be wound up if it has sufficient connection with this jurisdiction (see Section I.iii, \textit{supra}).

The administration will end automatically after one year unless extended by court order or with the consent of the creditors. Extensions are often required in complex cases.

\textbf{CVA}

A CVA is an informal but binding agreement between a company and its unsecured creditors to compromise the company’s debts, made with the aim of allowing companies in financial difficulties to avoid liquidation. If the CVA proposal is approved by three-quarters or more (in value) of the company’s creditors, it will bind all creditors who were entitled to vote, regardless of whether they had notice of the creditors’ meeting.\(^\text{19}\) Dissenting creditors and creditors whose votes are required to be left out of account are therefore bound by a resolution of the requisite majority. Secured and preferential creditors will not be bound unless they have given their consent and, therefore, CVAs are less commonly used by companies that have a large amount of secured debt.

A CVA may be used to avoid or supplement other insolvency procedures, such as administration or liquidation, where it can take advantage of the moratorium against creditor action. An optional moratorium is otherwise available for certain small companies. It has the advantage of being a flexible restructuring tool, which can often be swiftly implemented\(^\text{20}\) and requires minimal court involvement. It enjoyed some degree of success in the retail sector at the height of the global financial crisis as a way for a company to reach agreement with its landlords and other unsecured creditors.

\(^{18}\) But note the exception provided by Section 426 of the IA 1986 that permits the English courts to assist courts having insolvency jurisdiction in other ‘relevant countries’: in \textit{Re Dallhold Estates (UK) Pty Ltd} [1992] BCC 394 the court acceded to the request of a Western Australian court to grant an administration order in respect of an Australian company with assets in this jurisdiction.

\(^{19}\) Challenges on the grounds of unfair prejudice are possible in some circumstances.

\(^{20}\) The CVA becomes effective immediately after the resolution to approve it has been passed at the creditors’ meeting (for which 14 days’ notice is required).
A CVA is listed as a collective insolvency proceeding in Annex A to the ECIR, which means that it can be proposed by any company, wherever incorporated, provided its COMI is situated in the UK. If the CVA is approved then it will be binding throughout the EU and will have the same effect in any other EU Member State as it does under English law.

A CVA is not, however, specifically listed as a winding-up proceeding for the purposes of Annex B to the ECIR. Arguably though, if it is not effected within a liquidation or administration, it can be proposed as a means of terminating secondary proceedings on the basis that it amounts to a ‘composition’. The ECIR provides that closure in this way requires the consent of the liquidator in the main proceedings but, in the absence of such consent, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed. This may cease to be an issue when the recast ECIR comes into effect in June 2017 and the scope of secondary proceedings is no longer limited to winding-up proceedings.

Creditors’ scheme of arrangement
A scheme of arrangement is not an insolvency process but falls instead within the ambit of the CA 2006. It is a court-approved compromise or arrangement between a company and its creditors, or any class of them, to reorganise or reschedule the company’s debts. It does not benefit from a moratorium on creditor actions but can be implemented in conjunction with formal insolvency proceedings (administration or liquidation), both of which include a statutory moratorium. In its simplest form, a scheme may be used to vary the rights of a class of creditors and can bind dissentient creditors if the requisite majority or majorities vote in favour of the proposal. More recently, it has been used by companies to amend and extend outstanding loans and implement debt-for-equity swaps, where they have failed to obtain the requisite level of consent under the underlying loan facility. It is also sometimes used to provide a breathing space ahead of a wider restructuring, or strategically as a ‘stick’ or ‘plan B’ in the context of restructuring negotiations to help achieve a consensual deal.

The scheme process takes time, although once the proposal document has been finalised and circulated, it may be possible to complete the procedure in approximately six weeks, subject to court availability. Unlike in a CVA (where the creditors effectively vote as a single class), it may be difficult to achieve a consensus among affected creditors as to the composition of the various creditor classes. Class composition will be considered at the convening hearing if there are outstanding issues as to fairness. The fact, however, that it is binding on all members of the relevant class (or classes) of creditors, once it has been approved by the appropriate majorities, sanctioned by the courts and delivered to the Registrar of Companies, gives it an important advantage over a CVA.

21 See Article 34 of the ECIR.
22 Note that the English courts’ jurisdiction to sanction a scheme hinges on their jurisdiction to wind up the scheme company in question (see Section I.iii, supra).
23 The court has, however, stayed proceedings for summary judgment in a case where steps to implement a scheme were well advanced and it had a reasonable prospect of success: Re Vietnam Shipbuilding Industry Group & Ors [2013] EWHC (Comm) 1146.
24 See, for example, the Cortefiel scheme.
25 For example, the scheme proposed by DTEK Finance plc in April 2016, which provided the group with a moratorium in which to negotiate a restructuring.
Schemes are increasingly being used by overseas companies, often in circumstances where such companies are unable to obtain the requisite level of approval for the compromise in their own jurisdiction. Sufficient connection has been found in a number of cases on the basis of the underlying facility agreement being subject to English governing law and jurisdiction clauses, including in two recent cases, where the relevant clauses had been changed to English law in anticipation of the scheme. The courts will be influenced by whether there is a procedure that is equivalent to a scheme available in the relevant overseas jurisdiction and will also want to be satisfied that the effects of the scheme will be recognised in other jurisdictions. The concern is greater where there are local creditors, opposed to the scheme, who may attempt to ignore its terms and bring claims against the debtor or its assets on the basis of the original (pre-scheme) finance documents (see Section I.vii, infra for further details).

The fact that a scheme is neither a purely informal out-of-court procedure nor a formal court-based procedure, and that it falls outside the scope of the ECIR, has led to some difficulties in relation to its recognition by the courts of certain EU Member States. It is possible that an order sanctioning a scheme might otherwise be recognised under the EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (No. 1215/2012) (Judgments Regulation), (see Section I.vii, infra for further detail). In cases where recognition under the Judgments Regulation is refused by an overseas court (or recognition is sought in jurisdictions where that regulation does not apply), the court may, with the benefit of expert evidence where necessary, recognise a scheme under private international law. The recognition of schemes remains a controversial topic and, usually, it will be necessary for there to be robust expert evidence on recognition if, for example, there are foreign borrowers or guarantors or if some or all of the debt is foreign law governed.

The effectiveness of a scheme may, however, be recognised outside the EU in countries that have implemented the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency in a form that allows for recognition of such processes.

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26 Including those whose COMIs are located in another EU Member State. The English courts’ jurisdiction in relation to schemes of foreign companies has been found not to have been fettered by the ECIR: see Re Drax Holdings; Re Inpower [2003] EWHC 2743 (convening hearing: 17 November 2003) and Re Dap Holding NV [2005] EWHC 2092 (sanction hearing: 26 September 2005).

27 See, for example, the decisions relating to Tele Columbus, Rodenstock, PrimaCom, Seat Pagina, Vivacom, Cortefiel and Zlomrex.

28 See Re Apcoa Parking Holdings GmbH & Ors [2014] EWHC 1867 and DTEK Finance BV, Re [2015] EWHC 1164 (Ch), where the governing law in an indenture relating to high yield bonds was changed from New York law to English law prior to making a scheme application.

29 For example Chapter 15 of the US Bankruptcy Code, which implements the Model Law in the United States, amended the definition of ‘foreign proceedings’ to include ‘adjustment of debt’, which may include certain schemes of arrangement.
iv Starting proceedings

**Liquidation**

A voluntary liquidation, whether an MVL or a CVL, is initiated by the company's members passing a resolution (requiring a three-quarters majority vote) that must state either that they are in favour of a voluntary liquidation, in the case of an MVL, or that the company cannot, by reason of its liabilities, continue its business and that it is advisable to wind it up, in the case of a CVL. The directors of the company must give prior notice to any QFC holder and to the appropriate regulator under the Financial Services and Markets Act 2000, if the company is an authorised deposit taker under the Banking Act 2009, of their intention to propose a resolution for voluntary liquidation. The liquidation will commence on the date the resolution is passed. In an MVL, the members appoint the liquidator, while in a CVL, the creditors appoint him or her. If, during the course of an MVL, the liquidator forms the opinion that the company will be unable to pay its debts in full, together with any interest, the liquidation will be converted to a CVL.

A compulsory liquidation is usually initiated by the presentation of a winding-up petition to the court. This will usually be done by the company, the directors or (more often) a creditor. The grounds on which a court can make a winding-up order include where the company is unable to pay its debts or where a court believes it is just and equitable that the company be wound up. The petition must be advertised, either by publication in the London Gazette or in another manner deemed suitable by the court, at least seven days before the hearing. This will provide notice to creditors and other interested parties who may then attend the hearing and bring to the attention of the court material relevant to whether the winding-up order should be made.

If the relevant court is satisfied that the grounds for winding up are met, it will make a winding-up order. The Official Receiver (an officer of the court) will then automatically assume the role of liquidator until another liquidator is appointed. Receivers and administrators are also able to present petitions and any QFC holder who is entitled to appoint an administrator may apply to the court to have the winding-up order discharged and an administrator appointed.

The court may also appoint a provisional liquidator after the presentation of the winding-up petition but before a winding-up order is made. Provisional liquidation is similar in effect to compulsory liquidation (though the court can limit the provisional liquidator's powers). Provisional liquidation remains relatively uncommon but may be useful in certain circumstances, for instance if there are concerns that the directors will dissipate the company's assets between the presentation of the winding-up petition and the making of the winding-up order.

**Administration**

A company is placed in administration by either filing papers with the court to document an out-of-court appointment or making an application to the court for a court-based appointment. An out-of-court appointment may be made by the company or its directors. It may also be made by a QFC holder although, for reputational reasons, a QFC holder might prefer the application to be made by the directors. This also has the advantage of placing the QFC holder in the position of being able to influence the selection of the administrator. An application for a court-based appointment may be made by the company, its directors or any creditor. This form of application might be the only route available if a creditor has presented a winding-up petition against the company.
In some cases, it may be expedient to seek a court-based appointment: for example, where the proposed administrator wishes to secure court approval for a proposed pre-pack sale of the company or its assets that might otherwise be at risk of being challenged or, in certain circumstances, where there is a cross-border element and there is a concern that the documentation evidencing an out-of-court appointment might not readily be recognised by a foreign court. A court-based application might also be used to avoid the risk of a subsequent challenge as to the validity of an out-of-court appointment on the basis of a procedural irregularity.

A QFC holder is able to seek a court-based or out-of-court appointment if an event has occurred that would allow it to enforce its security. This will typically be a default under a loan agreement or loan notes. This right of appointment may well arise when the company is not insolvent. In all other circumstances, it will be necessary to show that the company is or is likely to become unable to pay its debts and to provide an opinion from the administrator that the purpose of the administration is capable of being achieved.

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

Where a secured creditor retains the right to appoint an administrative receiver, it may use this right to block the appointment of an administrator by appointing an administrative receiver prior to the appointment of an administrator. A person appointing an administrator must give notice of his or her intention to appoint an administrator to certain persons, including a QFC holder. During the notice period, a secured creditor who retains the right to appoint an administrative receiver may do so or may instead substitute his or her choice of insolvency practitioner as administrator. A QFC holder who does not have the power to appoint an administrative receiver may substitute its choice of insolvency practitioner as administrator even though it cannot block the appointment of an administrator.

An interim moratorium on creditor action arises to protect the company where there is a delay between the applicant filing for administration and the order taking effect (where the court-based procedure is used) or where the applicant is required to give advance notice of their notice of intention to appoint an administrator (where the out-of-court procedure is used). A full moratorium will arise when the appointment takes effect. As previously mentioned, in some cases, a pre-pack sale will be agreed prior to an administrator being appointed and will be effected on, or soon after, he or she takes up the appointment.

CVA
To enter into a CVA, the directors (or, if the company is in administration or liquidation, the administrator or liquidator), after proposing the CVA to the members and unsecured creditors, will appoint an insolvency specialist (normally an accountant) to act as the nominee. The nominee will report to the court whether, in his or her opinion, the proposal should be put to members and creditors and, if he or she believes it should, meetings of members and creditors will be called to approve it.

The CVA can be challenged in court by a creditor or member on the grounds of unfair prejudice or material irregularity (or both). This must be done within 28 days of the filing of the notice of approval with the courts or, if the applicant did not receive notice, within
28 days of the day on which he or she became aware that the meeting had taken place. If there is any uncertainty as regards identifying all the company’s creditors, the CVA process is unlikely to be favoured as it may carry the risk of a late challenge from ‘hidden creditors’.

**Creditors’ scheme of arrangement**

The scheme process is usually initiated by the company (or an administrator or liquidator if the company is in administration or liquidation). The company must first apply to the court for an order giving permission for a meeting (or meetings) of the affected creditors to be convened to vote on the scheme, although this is generally preceded by the issuance of a creditors’ issues letter or ‘practice statement’ letter to outline the key terms of the scheme and set out the company’s views on class and other issues. Any creditors unaffected by the scheme (e.g., those that are to be paid in full or whose debts are not required to be compromised) can be excluded from the scheme. Dissenting creditors whose rights are affected by the scheme will be entitled to vote on it along with other creditors in their class, but if the requisite majority has been achieved that class will be bound and the minority view can be disregarded. If the voting majorities are achieved, a further application is made to the court for an order sanctioning the scheme. The scheme will become effective and binding on affected creditors when it is delivered to the Registrar of Companies.

Affected creditors will have an opportunity to challenge the composition of a class and raise other creditor issues at the convening hearing. In the case of a scheme of an overseas company, the court may also give preliminary consideration as to whether it will ultimately have jurisdiction to sanction the scheme. Any jurisdiction issues will then be considered more fully at the sanction hearing.

If objections to the scheme are later raised by a scheme creditor at the sanction hearing, the court may reject them and refuse to grant leave to appeal. If, however, the court considers that an appeal against a decision to sanction the scheme has a reasonable prospect of success, it may grant a short-term stay before making the sanction order (i.e., so that the order cannot be given efficacy by being delivered to the Registrar of Companies for registration). The stay then gives the dissentient creditor time to seek permission to appeal to the Court of Appeal. If the order sanctioning the scheme has already been granted, and has been given statutory effect through registration, it cannot be altered or terminated otherwise than as provided for by the scheme itself or by a further scheme. The court may set aside a sanction order in cases where it was obtained by fraud, although it will not do so if it is satisfied that the result would be the same had the fraud not been perpetrated.

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30 See Practice Statement (Scheme of Arrangements with Creditors) [2002] All ER (D) 57 (Apr), the purpose of which is to enable issues concerning the composition of classes of creditor and the summoning of meetings to be identified and, if appropriate, resolved early in the proceedings.

31 Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345.

v Control of insolvency proceedings

The proceedings will be managed by the insolvency office holder appointed to the company in relation to the insolvency process. In most cases this will be a qualified insolvency practitioner, as required by the IA 1986, who will be subject to the regulatory regime governing their professional conduct.33

As regards the duties of directors in connection with insolvency proceedings, in the UK, while a company is solvent, the duties are owed to the company for the benefit of present and future shareholders and there is no duty to consider creditors’ interests. However, once there is doubt as to the company’s solvency, or it becomes insolvent, the directors must consider the interests of the company’s creditors to minimise the potential loss to them. If a director continues to trade a business after the point at which he or she has realised, or ought to have concluded, that the company had no reasonable prospect of avoiding insolvent liquidation and he or she does not take every step to minimise losses to creditors, he or she may be liable for wrongful trading. Similarly, a director may be liable for fraudulent trading if he or she allowed a company to incur debt when he or she knew there was no good reason for thinking that funds would be available to repay the amount owed at the time, or shortly after, it became due and payable.

Directors of companies that operate overseas may also be required to act in accordance with the laws of the relevant foreign state, particularly if secondary proceedings are opened in that jurisdiction.

The IA 1986 confers on the liquidator or administrator the power to seek a court order against directors for a contribution to the company’s assets if his or her investigations reveal instances of wrongful or fraudulent trading and to set aside transactions at an undervalue, preferences and transactions defrauding creditors. Alternatively, he or she is able to assign certain of these claims to third parties, including creditors. In addition, he or she is required, under the Company Directors’ Disqualification Act 1986, to submit a report to the Secretary of State for Business, Innovation and Skills on the conduct of the directors and former directors of the company that may lead to their disqualification from acting as directors, or being involved in the management of the company, for a specified period. A director who is disqualified may also be required to pay compensation.

As regards the role of the court, its involvement in a voluntary liquidation is minimal, while in a compulsory liquidation it will hear the application for a winding-up order. In an administration, on the other hand, the court’s involvement varies according to whether the process is commenced by way of a court-based or out-of-court application and whether the complexity of the company’s affairs is likely to require the administrator to seek directions. In an out-of-court appointment, the court’s involvement is likely to be limited, in an uncomplicated case, to receiving and stamping the documents that must be filed at court.

In a CVA, court involvement is limited to receiving a report from the nominee whether, in his or her opinion, the proposed CVA has a reasonable prospect of being approved and implemented and whether it should be put to the creditors and members. Notification of the approval (or rejection) of the proposal must then be filed at court within four business days of the meeting.

33 An official receiver (appointed in a compulsory liquidation) is not subject to such a regime. He is an officer of the court and responsible directly to it and to the Secretary of State for Business, Innovation and Skills.
vi Special regimes

Certain entities are excluded from the general insolvency regimes because of the nature of their businesses. They are subject instead to special insolvency regimes that, in some cases, are based on the administration procedure found in Schedule B1 to the IA 1986.

Banks and analogous bodies may be placed into administration without a court order so long as the consent of the appropriate regulator under the Financial Services and Markets Act 2000 (FSMA 2000) is obtained and filed at court. The regulator is also able to participate in the administration proceedings. In addition, the Banking Act 2009 introduced a special administration regime for failing banks and building societies where government intervention is required.\textsuperscript{34} More recently, a special administration regime and certain other resolution tools were introduced for investment banks.\textsuperscript{35} The Financial Services (Banking Reform) Act 2013 amended the Banking Act 2009 and introduced a modified bail-in tool\textsuperscript{36} to the special resolution regime, the Bank Recovery and Resolution Order 2014 (SI 2014 No 3329), which came into force on 1 January 2015. Bail-in enables the Bank of England to recapitalise a failed institution by allocating losses to its shareholders and unsecured creditors by writing down or converting their claims to equity in a manner that respects the hierarchy of claims in liquidation.\textsuperscript{37} It is part of the UK’s response to the Bank Recovery and Resolution Directive (BRRD), which came into force on 2 July 2014. The BRRD is designed to ensure that EU Member States have a harmonised toolkit to effectively deal with an unsound or failing credit institution and requires banks to draw up recovery and resolution plans that set out how they will deal with certain scenarios that could lead to failure. It also gives national authorities additional powers to enable them to intervene when an institution faces financial difficulty. In addition to the bail-in mechanism, these include resolution tools to allow the bank to sell or merge the business with another bank, set up a temporary bridge bank to operate critical functions and to separate good assets from bad ones.

Special regimes also exist for insurance companies, postal services, water or sewerage companies, certain railway companies, air traffic control companies, London Underground

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\textsuperscript{34} The procedure is to be used only where there has been a transfer of part of a failing bank’s business, assets or liabilities to a bridge bank or a private sector purchaser under the special resolution regime, leaving an insolvent residual entity. It is designed to ensure that essential services and facilities that cannot be immediately transferred to the bridge bank or private purchaser continue to be provided for a period of time.

\textsuperscript{35} The Investment Bank Special Administration Regulations 2011 (SI 2011/245). These regulations have been supplemented by the Investment Bank Special Administration (England and Wales) Rules 2011 (SI 2011/1301).

\textsuperscript{36} The bail-in mechanism included in the 2013 Act was closely modelled on the Bank Recovery and Resolution Directive when it was in draft form while the legislation introduced on 1 January 2015 included the amendments that were necessary to ensure that it was fully compliant with that directive.

\textsuperscript{37} Section 17 of and Schedule 2 to the Financial Services (Banking Reform) Act 2013.

public-private partnership companies, building societies, bodies licensed under the Energy Act 2004, and operators of systemically important interbank payment systems and securities settlement systems.39

There are no special insolvency rules in English law relating to corporate groups. Instead, each company is treated as a separate legal entity.40 The ECIR also lacks a framework to deal with the insolvency of corporate groups (although a framework has been included in the revised version – see Section V.v, *infra*). Instead, in cases where the COMIs of some or all of the individual group companies have been found to be located in the same jurisdiction,41 it has been possible to achieve procedural consolidation of the insolvency proceedings of those companies by placing each of them in an insolvency process in the same jurisdiction (usually that of the parent company’s COMI), where the proceedings are managed by the same insolvency office holder.

A broadly similar result may be achieved by opening main proceedings in one jurisdiction and effectively preventing the opening of secondary proceedings in other EU Member States by agreeing to respect local priorities (thereby achieving the same outcome for local creditors)42 or by postponing the opening of secondary proceedings until a global sale has been completed.43 The recast ECIR includes provisions enabling the courts to postpone or refuse the opening of secondary proceedings if this is not necessary to protect the interests of local creditors.

The recast ECIR also provides for the coordination of insolvency proceedings concerning different members of the same group by obliging the liquidators and courts involved in the different main proceedings to cooperate and communicate with each other. In addition, it gives the liquidators involved in such proceedings the procedural tools to request a stay of the various other proceedings and to propose a rescue plan for the members of the group subject to insolvency proceedings.

This provision broadly received the endorsement of UNCITRAL, which has itself produced a framework for legislation in relation to the insolvency of enterprise groups.44 Another initiative encouraged by UNCITRAL is the use of cross-border protocols to facilitate cooperation between courts and practitioners.45 An early example of this approach was seen

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39 The Financial Services (Banking Reform) Act 2013.
40 Note, however, the existence of a number of statutes that provide for company groups to be considered as one entity in non-insolvency situations, for example, the CA 2006 with the concept of group accounting; and taxation legislation with concepts such as ‘controlling interests’ and group taxation and tax relief.
41 Typically, this will be where the COMI of the parent, provided it has ‘command and control’ of the group, is located. See, for example, *Re Daisytek-ISA Ltd* [2003] BCC 562 and *Re MG Rover España SA* [2006] BCC 599.
42 See, for example, *Collins & Aikman* [2006] BCC 861 and *Nortel Networks SA* [2009] BCC 343.
43 See *MPOTEC (EMTEC) GmbH* [2006] BCC 681.
44 Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency adopted by UNCITRAL on 5 July 2010 and published on 21 July 2010. Elsewhere, INSOL Europe has recommended the introduction of group proceedings.
45 See the UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation (adopted 1 July 2009).
in the Maxwell Communications Corporation case, where the UK administrators entered into a protocol with the examiners in the US Chapter 11 proceedings. More recently, attempts have been made to use cross-border protocols (which, rather than being legally enforceable, provide guidelines for cooperation) in certain insolvency situations, such as the Lehmans and Madoff insolvencies, with mixed success.

vii Cross-border issues

This section considers the framework for cross-border cooperation and recognition as at the time of writing. The UK’s exit from the EU, which may have a significant impact on this framework, is discussed in Section V, infra. The English courts’ jurisdiction in cross-border insolvency cases derives mainly from one of four key sources: the ECIR, the Cross-Border Insolvency Regulations 2006 (CBIR), Section 426 of the IA 1986 and the common law.46

As mentioned in Section I.i, supra, their jurisdiction may be fettered by the ECIR if the company’s COMI is situated in an EU Member State, in which case the court of that state will have jurisdiction to open insolvency proceedings. Before the entry into force of the ECIR, if a foreign company was found to have sufficient connection with England, a court could exercise its discretion to wind up that company as an unregistered company under Section 221 of the IA 1986 (see Section I.iii, supra). That jurisdiction is now precluded by the ECIR,47 although the test remains in place for companies that fall outside its scope. In Re Arena Corporation Ltd,48 for example, the English court found that a company incorporated in the Isle of Man but with its COMI in Denmark49 had sufficient connection with England (in the form of assets located in England) to enable it to exercise its jurisdiction under Section 221 of the IA 1986 to wind up the company. Cases such as these, which do not meet the jurisdictional requirements of main or territorial proceedings, will be subject to the relevant national law and will be recognised by EU Member States and non-Member States alike in accordance with the rules of private international law.

If the debtor’s COMI is outside the EU, the ECIR will not apply and the UK, like other EU Member States, will be free to act in accordance with its existing laws and practice when exercising jurisdiction, opening proceedings and recognising and enforcing proceedings opened within and outside the EU. It will not be possible, however, to take advantage of the associated provisions under the ECIR, such as automatic recognition in all EU Member States, which are available where main proceedings are opened. This may prove to be a hurdle in group restructurings if some of the debtor companies have substantial connections with one or more EU Member States but fall outside the scope of the ECIR because their COMIs are not situated in an EU Member State.

The English courts may otherwise be required to recognise foreign main proceedings and foreign non-main proceedings (the equivalent of main and secondary proceedings under the ECIR) under the CBIR. The CBIR implement the UNCITRAL Model Law on

46 Note, too, the Foreign Judgments (Reciprocal Enforcement) Act 1933, which provides for enforcement in England of civil and commercial judgments made in designated jurisdictions, provided that the judgment has been registered under that statute.
47 Article 3(2) of the ECIR.
48 Re Arena Corporation Ltd [2003] All ER (D) 277.
49 Recital (33) of the ECIR confirms that Denmark, which exercised its opt-out in relation to the ECIR, is not to be regarded as a ‘Member State’ for the purposes of the ECIR.
Cross-Border Insolvency, regardless of whether that country has enacted the Model Law.\textsuperscript{50} Upon recognition, relief by way of a moratorium on creditor action is automatically granted while other appropriate relief may be obtained at the court’s discretion. There is also a requirement for judicial cooperation on the part of the English courts ‘to the maximum extent possible’, where recognition is granted.\textsuperscript{51}

Alternatively, the English courts may offer relief and assistance under Section 426 of the IA 1986, which provides for cooperation both between jurisdictions within the UK and between the UK and other designated jurisdictions, which mainly include Commonwealth countries.

In circumstances where the ECIR, the CBIR and Section 426 of the IA 1986 are not applicable, the English courts have an inherent jurisdiction to cooperate with foreign insolvency representatives and recognise foreign proceedings. The granting of recognition will depend on whether the foreign office holder has satisfied the common law principles developed by the English courts. This area was considered in detail by the Supreme Court in \textit{Rubin v. Eurofinance}\textsuperscript{52} where an attempt was made to extend the circumstances in which recognition and assistance would be granted by the English courts.

In a number of cases, foreign companies have migrated their COMIs to the UK in order to take advantage of the UK’s established insolvency and restructuring processes. This kind of forum shopping has received judicial support at EU level,\textsuperscript{53} with a clear distinction being made between its use to ensure that the COMI is located in the best place to reorganise the company and its group for the benefit of creditors and, possibly, other stakeholders (‘good’ forum shopping),\textsuperscript{54} as opposed to its use where the company acts for selfish motives to benefit itself or its shareholders or directors at the expense of creditors (‘bad’ forum shopping).

The decision in \textit{Hellas Telecommunications (Luxembourg) II SCA},\textsuperscript{55} where a Luxembourg entity moved its COMI to England three months before entering administration, is significant for its consideration of what is required to effect a successful migration.\textsuperscript{56} The court heard

\textsuperscript{50} The English courts may also refuse to provide assistance under the CBIR if it would be manifestly contrary to public policy.

\textsuperscript{51} In cases of conflict between the obligations of the UK under the ECIR and the provisions of the CBIR, the ECIR will prevail. In essence, the CBIR provide an alternative basis for judicial cooperation where the ECIR does not apply, for example where the debtor’s COMI is not situated in an EU Member State or where the type of proceeding (or foreign representative) in question is not listed in the relevant annexes to the ECIR, or to the extent that they do not conflict with the ECIR.

\textsuperscript{52} \textit{Rubin \\& Anor v. Eurofinance SA \\& Ors} [2012] UKSC 46 (24 October 2012).


\textsuperscript{54} An early example of ‘good’ forum shopping can be seen in the \textit{Schefenacker} restructuring, where the holding company of a German automotive supplier moved ownership of its assets and liabilities to a new, English-registered holding company so that it could enter into a CVA.

\textsuperscript{55} \textit{Hellas Telecommunications (Luxembourg) II SCA} [2010] BCC 295.

\textsuperscript{56} A key reason for the COMI shift was to facilitate a pre-pack sale of the company’s main asset, its shares in the main trading telecoms company, to a new group company leaving behind subordinated lenders as creditors of a company with no assets.
that, at the same time as moving its head office, the company also informed creditors of the change of address to London, made a press announcement that its activities were moving to London, opened a London bank account, registered at Companies House as a foreign company and appointed UK-resident individuals as directors of the English company that became its general partner. The court found that, on the evidence presented to it, the presumption in the ECIR that the company’s COMI was in Luxembourg was rebutted. It noted that the purpose of the COMI was to enable creditors in particular to know where the company was located and where they would be dealing with it, finding ‘one of the most important features of the evidence’ to be that all negotiations between the company and its creditors had taken place in London.

A cross-border issue also arises in situations where foreign companies, without migrating their COMIs to the UK, make use of an English law scheme of arrangement to compromise or amend the terms of their debt documents. The key issues to be considered include whether the English courts have jurisdiction over the foreign company and whether the scheme will be recognised in the foreign jurisdiction. For example, in such cases, there remains some uncertainty as to the extent to which the EC Judgments Regulation may have an impact on the English courts’ jurisdiction to sanction the scheme. The judges presiding over earlier cases avoided reaching a firm conclusion as to whether that regulation applies to schemes, having been satisfied, on the facts of each case, that even if the regulation were to apply, one or more of the exceptions to the general rule would also apply so that the English courts had jurisdiction. In most cases, the relevant finance documents contained a clause conferring jurisdiction on the English courts (most were one-way exclusive jurisdiction clauses but in one case a non-exclusive jurisdiction clause was found to be sufficient). In a more recent case concerning the Van Gansewinkel Group,57 Snowden J took the view that if the jurisdiction provisions of the Judgments Regulation apply to schemes (a point which was not decided) then, in that particular case, it would not limit the court’s jurisdiction to sanction the scheme. If they did apply, he was entitled to regard all scheme creditors as coming within the jurisdiction of the English court under Article 8(1) of Chapter II, which provides that a party may be made a party to proceedings in another EU Member State if one or more of the co-defendants are domiciled in that Member State and it is expedient to hear the claims against all the defendants in a single court.58 However, he noted that a one-sided exclusive jurisdiction clause for the benefit of the scheme creditors did not amount to submission by those creditors to the jurisdiction of the English court. Therefore, if the jurisdiction provisions of the Judgments Regulation apply to schemes, these schemes could not be brought within the jurisdiction of the English court by virtue of Article 25(1) of Chapter II.

Finally, there is some ongoing debate over the meaning of the term ‘judgment’ in Article 32 of that regulation in relation to schemes. Despite the wide scope that the term is given by Article 32, some commentators have argued that the procedure for implementing an English scheme is not adversarial in nature and that the sanction order is not therefore

58 Snowden J found that the number of scheme creditors domiciled in England (15 of the 106 creditors, spread across the classes) and the size of their claims (€135 million in total) were sufficient to make it expedient for all scheme claims to be determined together.
a judgment and should not be granted recognition under that regulation. There is likely to be further English and European case law on this topic as schemes remain a popular restructuring tool.

II INSOLVENCY METRICS

Before the UK voted to leave the EU on 23 June 2016, the economy was growing, albeit slowly. GDP increased by 0.4 per cent in the first quarter of 2016 and 0.6 per cent in the second quarter of 2016, and was 2.2 per cent higher in the second quarter of 2016 than in the same quarter of 2015. Output in services increased by 0.5 per cent and production by 2.1 per cent in the second quarter of 2016, but output in the two other main industrial groupings within the economy – construction and agriculture – decreased (by 0.4 and 1 per cent respectively).59

Productivity growth has remained weak since the financial crisis, which caused the Office for Budget Responsibility to revise down60 its GDP growth forecasts in March, to an average of 2.1 per cent a year for the rest of the decade. The June average of independent forecasts for GDP growth, as compiled by HM Treasury from forecasts produced before the referendum, was 1.8 per cent for 2016, increasing to 2.1 per cent for 2017. The July average, compiled after the referendum result and reflecting its predicted impact, was 1.6 per cent for 2016 and 0.8 per cent for 2017.61 Inflation rose by 0.3 per cent in the year to May 2016 and 0.5 per cent in the year to June 2016. Despite the increase revealed by the June figures, the rate of inflation remains relatively low by historical standards.62

The latest labour market statistics released by the Office for National Statistics (ONS) indicated that the unemployment rate had fallen to 4.9 per cent, the lowest since 2005.63 These statistics cover March to May, and so do not take into account the effects of the leave vote. No formal labour market data for the post-referendum period is available at the time of writing; informal indices suggest that the vote may have had a negative effect on the labour market, for instance, the Financial Times (FT) reported large falls in the numbers of online job advertisements in the immediate aftermath.64

The Bank of England (BoE) reports that financial market prices have moved sharply following the referendum, indicating the degree of uncertainty and the nature of the adjustment which the leave vote has caused. It notes that the sterling exchange rate index65

60 By about 0.3 percentage points a year.
64 As seen by companies that count online job advertisements. The FT also notes that snapshot data such as this can be fickle (FT, ‘Brexit barometer: Leave vote hits the high street’, 6 July 2016).
65 A weighted average of the movements in cross-exchange rates against a basket of other currencies used to measure the overall change in the exchange value of a currency.
fell by 9 per cent between 23 June and 1 July 2016, and short-term volatility of sterling against the dollar rose to its highest level in the post-Bretton Woods era (which ended in 1971), and that risk premia on UK assets have increased.66

The BoE reports that the availability and cost of credit to companies in general, which has improved in recent years, was largely unchanged in the three months leading up to the referendum. The availability of credit to the commercial real estate sector tightened, however, with lenders concerned about the weak outlook for prices in the sector.67

Following the vote, the spread on investment-grade and high-yield corporate bonds rose, though both remain well below where they were in 2012. The yields on corporate bonds fell, however (as falls in the risk-free rates more than offset the rises in spreads). The BoE reports that most of the major UK lenders have indicated that they expect the availability of corporate credit to remain steady in the near term, with the exception of the commercial real estate sector where they expect it to tighten further. Some lenders suggested that spreads on bank lending to large corporates could see modest increases in the second half of the year.69

Uncertainty before and after the referendum appears to have had a marked impact on the demand for credit, however. The BoE reports that demand from large corporates slowed significantly ahead of the referendum. Lenders reported that factors driving the decrease included significantly lower demand for corporate real estate lending, fewer mergers and acquisitions, and caution ahead of the referendum. Gross syndicated lending facilities granted in the UK market in the second quarter of 2016 were much lower than in the first quarter. Demand for lending from small to medium-sized enterprises (SMEs) increased in the three months to mid-June 2016, however. Following the vote, most UK lenders indicated that they expected to see a slowdown in credit demand in the near term from both large companies and SMEs.70

It is estimated that 3,617 companies entered insolvency in the second quarter of 2016, 4.2 per cent less than in the first quarter of 2016 and 2.7 per cent less than in the second quarter of 2015. 662 were subject to compulsory winding-up orders (an 18.6 per cent decrease on the previous quarter, and a 14 per cent decrease on the same quarter last year, and the main driver of the total decrease). Of the rest, it is estimated that 2,501 entered creditors’ voluntary liquidation, 340 entered administration and 115 entered into a CVA.71

Taking a longer view, in the 12 months ending second quarter 2016, the estimated liquidation rate was 0.42 per cent of all active registered companies. The Insolvency Service notes that the liquidation rate was at its lowest level since comparable records began in 1984.72

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67 BoE Credit Conditions Review, 2016 Q2, p. 11.
68 Over UK government bond yields.
69 BoE Credit Conditions Review, 2016 Q2, pp. 9–10.
70 Ibid, p. 10.
72 Ibid.
In the 12 months ending first quarter 2016, the highest number of new company insolvencies was in the construction sector (2,461, down 0.3 per cent from the 12 months ending fourth quarter 2015).

III PLENARY INSOLVENCY PROCEEDINGS

There have been a small number of high-profile insolvencies in the UK during the past 12 months and most large companies have been able to refinance themselves successfully or agree amendments to their finance arrangements without the need for the protection of an insolvency process. The main sector trends have included oil, gas and steel. The high-street retail environment has also remained challenging, owing mainly to changing customer habits and increased competition from cheaper online outlets.

i BHS Group Limited

BHS Group Limited, a high-street department store, filed for administration on 25 April 2016. Certain other group companies also entered administration. British Home Stores began with a single store in South London and grew to become a highly successful department store and a staple of the British high street. However, BHS had faced difficult trading conditions as a result of increased competition from value retailers and supermarkets in their core offerings of clothing and housewares, cash flow difficulties following the withdrawal of credit insurance in early 2015 and poor trading over Christmas 2015.

The group explored a number of restructuring options. In June 2015, the group obtained an additional £25 million loan and a further short-term loan of £62.4 million in September 2015. In March 2016, the group’s creditors approved a CVA proposal in order to deal with the group’s pension deficit, consisting of an additional loan of £18 million and the Pension Protection Fund (PPF) taking a third of the equity in the group. The turnaround plan was dependent on additional funding of £100 million, which was to be obtained partly through a new facility and partly through the sale of various properties. However, the group was unable to secure enough funding and the sums achieved from the property disposals were lower than expected, owing to the sale of the flagship store in Oxford Street at a much lower value than anticipated and a number of other property sales falling through. In light of this, on 18 April 2016, the BHS board agreed that the group had insufficient funds to continue to trade.

Attempts to sell the business have been unsuccessful, with no credible bids received. The administrators state in their report that the first objective of an administration, namely rescuing the company as a going concern, will not be achieved. However, the group’s principal trading subsidiary, BHS, continues to trade while an orderly wind-down plan is developed, so as to achieve a better result for the creditors as a whole than would be achieved if the group were wound up without first being in administration. In particular, the administrators believe that the value of the group’s key asset, its stock, will be better realised by continuing to trade.

The BHS administration is of particular interest because of the controversy surrounding the sale of the group by Arcadia (the high-street clothing powerhouse owned by Sir Philip Green) for £1 to Retail Acquisitions a year before entering administration and its reported value.

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73 Ibid, p. 10. These are the latest statistics available – the quarter lag allows time for more complete data to be collected.
£571 million pension deficit. The administrators state in their proposals that there are a number of transactions that on the face of it may require investigation. The administrators must also file a report regarding the conduct of the directors. It is likely that the controversy will continue as a number of public investigations have been launched:

- the Insolvency Service is investigating the conduct of the directors and whether and to what extent it led to the administration. Such investigations are normally conducted after the administrators report, but the government has asked the Insolvency Service to fast-track the investigation;
- the Pensions Regulator has opened an anti-avoidance investigation; and
- the Parliamentary Committee for Business, Innovation and Skills (BIS Committee) has considered the sale of BHS in 2015 and, in conjunction with the Work and Pensions Parliamentary Committee, the pension liabilities. The joint committees set out their findings in a report published on 25 July 2016. There was considerable criticism of all those involved. It was suggested that Sir Philip Green has a strong moral obligation to the pension fund and should make a ‘large financial contribution’.

Both the Insolvency Service and the Pensions Regulator have enforcement powers, with the latter having powers to impose unpaid contributions on and prosecute individuals. It is also possible that some of the findings of the joint committees will be pursued by the relevant regulatory or prosecuting body.

The high-profile nature of the case means that it could influence the future direction of policymaking. The BIS Committee has announced a wider inquiry to examine what it considers to be gaps in company law, which will be informed by their findings regarding BHS. The Work and Pensions Parliamentary Committee will launch a similar inquiry to consider pensions regulation. There have also been calls from Lady Barbara Judge, former head of the PPF, for the Pensions Regulator to be given powers to block deals or other transactions that would be detrimental to employees so as to prevent another situation like BHS from arising.

ii Austin Reed

Just a day after BHS announced that it had appointed administrators, menswear chain Austin Reed announced that it too had entered administration. Austin Reed was a pioneer of quality, mass-produced suits, known for dressing icons such as Winston Churchill and the Beatles. However, the group had faced increased competition from brands such as TM Lewin, Moss Bros and Marks & Spencer and had failed to respond to changes in the market. In particular, Austin Reed stores were large with expensive rents and often poorly located for the young professional market. This case is of interest because of its proximity to the BHS administration but also because it demonstrates the pressures on the British high street.

The company had taken steps in the previous year to turn around the business, entering into a CVA in February 2015, by which it reduced its debt and sold 31 of its stores,

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75 Ibid.
promising to restructure the business for the digital age. Four months later, it secured a loan from retail investment fund Alteri Investors. However, these efforts proved insufficient and administrators were appointed on 26 April 2016.

The administrators have continued to trade the business while pursuing sale options and managed to sell five concession stores, as well as the Austin Reed brand, to the Edinburgh Woollen Mill group. Some of the group’s other brands have been purchased by Alteri Investors and the rest of the business will be wound down, resulting in the closure of 120 shops.

### iii Lehman Brothers International (Europe)

The UK courts continue to consider a range of issues arising from the Lehman Brothers International (Europe) (LBIE) administration. The surplus monies available for distribution after payment of ordinary unsecured claims have given rise to a number of novel and difficult legal questions about entitlement and order of priority, which have been examined in the Waterfall cases.

These issues were first considered in what has become known as the ‘Waterfall I Application’, which was brought by the administrators of three companies within the Lehmans group (LB Holdings Intermediate 2 Ltd, Lehman Brothers Holdings Inc and Lehman Brothers Limited). The Waterfall I case deals with the general principles regarding the priority of post-administration interest and the existence or otherwise of foreign currency claims as non-provable debts. The details regarding how such claims might be calculated are examined in the Waterfall II decisions. The Waterfall II, Part A judgment resolves a number of issues in relation to creditors’ entitlement to interest on their debts for the period after the commencement of administration (under Rule 2.88 of the IR 1986), including in relation to currency conversion claims, while the Part B judgment considers the construction and effect of certain post-administration contracts, specifically claim resolution agreements and claim determination deeds.

On 5 November 2015, the UK Supreme Court granted the administrators permission to appeal the Waterfall I decision. The administrators also applied to court on 25 April 2016 (the ‘Waterfall III’ application) seeking guidance on the following:

- **a** clarification as to the scope of any contribution claims LBIE may make against its members;
- **b** the effect of set-off between such a contribution claim and any claims the members may have against LBIE;
- **c** the rights the members may have as against each other in respect of any contribution they might be required to make; and
- **d** matters relating to the relationship between Lehman Brothers Limited and LBIE.

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76 LBIE, a company of unlimited liability, was the Lehman Group’s main European broker-dealer and provided investment banking services on a global basis. It filed for administration on 15 September 2008.

77 Lehman Brothers International (Europe) & Ors, Re [2014] EWHC 704 (Ch) (14 March 2014).

The administrators are now awaiting various appeals to be heard, with the Waterfall I Supreme Court hearing scheduled for October 2016 and the Waterfall II decisions to be heard in the Court of Appeal in April 2017. LBIE’s creditors must therefore wait to learn, among other things, whether the Court of Appeal was correct in finding that, following LBIE’s eventual conversion into a liquidation, the surplus in the LBIE estate should be used to pay statutory interest on unsecured claims that arose during the administration and, if so, how this should be calculated. Proceedings are expected to continue into 2019 and the administrators have limited scope to make distributions to the creditors in this time.

In order to allow creditors to realise the sums likely to be obtained from the surplus in the short term, the administrators announced on 4 April 2016 that they would be holding an auction of the admitted claims. The auction was successfully concluded on 12 May 2016, with £230 million worth of claims being sold. A second auction was announced on 15 June 2016.

Notwithstanding the unusual circumstances of the Waterfall cases, which have led to the examination of several obscure and technical areas of law, the decisions should prove helpful when considering questions that arise in solvent liquidations. It also sounds a warning to those wishing to include a company with unlimited liability in a corporate structure.

IV ANCILLARY INSOLVENCY PROCEEDINGS

There have been no ancillary proceedings of particular note in England and Wales during the past 12 months.

V TRENDS

i EU referendum

On 23 June 2016, the British public voted to leave the EU. As described in Section II, supra, this result, and the uncertainty it has created, has led to some market volatility, which may continue for some time as the exit process progresses. It is difficult to say with any certainty what form the exit will eventually take and what the long-term effects on the economy and the restructuring and insolvency landscape will be.

A number of different exit models have been floated in outline, but they will need to be tested and developed through extensive negotiation.

The timetable and process for exit are also uncertain. The Treaty on European Union allows an EU Member State to decide to withdraw from the EU in accordance with its own constitutional requirements. The formal exit process will be triggered only when the UK delivers a notice to the European Council under Article 50 of that treaty. This triggers the start of a two-year period in which the terms of exit will be negotiated, after which the UK’s membership will end unless the European Council has agreed an extension. Informal negotiations may be held beforehand, to the extent the representatives of other EU Member States are willing to participate.

At the time of writing, it is not clear when the UK will deliver the Article 50 notice (although in any event it is not expected to do so before early 2017). The results of the referendum are not binding on the government and do not oblige it to deliver the notice at any given time (or indeed at all); as such, the timing will be primarily a political rather than a legal decision.
ii Insolvency activity

While it is clear that the vote to exit the EU is causing some market volatility, it is too early to assess how great an impact it will have on the UK economy in the medium to long term. Official economic data is published with a long time lag and is not available as at the time of writing. Unofficial indicators give us some sense of the short-term effects of the vote.

Data from the purchasing managers’ survey (PMI), which tracks market activity across the manufacturing and services sectors, indicated that UK business activity contracted between June and July. The FT notes that the snapshot of July's PMI figures fell to levels associated with recession, and is the lowest reading since spring 2009, although still higher than levels seen in 2008.79

The FT reported a downturn in the retail sector in the immediate aftermath of the referendum, with day-to-day spending bouncing back by July 13 to just slightly below where it was immediately before the referendum. This is based on various indicators such as sales at John Lewis (a popular department store) and footfall on the high street. They also reported that a GfK consumer confidence survey conducted in the first few days of July 2016 showed a greater fall in consumer confidence than in any other month for 21 years. However, the FT is clear that this sort of data can be fickle and unrepresentative of the wider economy.80

The minutes of the BoE’s Monetary Policy Committee from 13 July 2016 note preliminary signs that the result has affected sentiment among households and companies, and early indications that some businesses are beginning to delay investment projects and postpone recruitment decisions.81

The BoE is confident that measures taken since the financial crisis to increase the resilience of the financial system have left the banks in good shape to weather a significant crisis and continue lending to the real economy.82 It has taken significant steps since the vote to support the markets and the credit supply, announcing almost immediately that more than £250 billion of additional funds would be available to support the markets, should the need arise. It has also reduced the UK countercyclical capital buffer rate from 0.5 to zero per cent of banks’ UK exposures, which will reduce the regulatory capital buffers by £5.7 billion, raising banks’ capacity for lending to UK households and business by up to £150 billion.83

On 13 July 2016, the Monetary Policy Committee of the BoE voted to keep the base rate at 0.5 per cent. It is likely that interest rates will remain low for some time to come. However, even if these measures are successful in alleviating credit supply problems, firms and households may still reduce their borrowing while the uncertainty continues. Any decline in house prices is likely to further depress consumer confidence, and higher unemployment and the already high level of UK household indebtedness may exacerbate the effects of the fall in prices. The weaker pound is likely to drive inflation upwards. All of these factors may lead to a reduction in demand in the economy.

81 BoE, Monetary Policy Summary and minutes of the Monetary Policy Committee meeting ending on 13 July 2016, 14 July 2016.
83 Ibid.
Whether and when these drivers translate into increased insolvency activity will depend on a number of factors, including the progress and outcome of exit negotiations, the severity of any downturn, the performance of the EU and global markets, and the extent to which the measures taken by the BoE prove effective. Furthermore, some companies may benefit from the fall in the value of sterling. Companies whose businesses are export-led may see their products becoming more competitive in overseas markets and UK companies that receive payments for goods and services in foreign currency, or carry on most of their business abroad but report in sterling, may also benefit from the weakened pound.

The uncertain conditions and turbulent markets are likely to have an impact in other areas of the economy. The retail sector in particular, which had already experienced some high-profile collapses (as detailed in Section III, supra), is likely to be significantly affected by any sustained decline in consumer confidence and spending power.

The commercial real estate sector is also particularly vulnerable, as it has been buoyed by strong inflows of capital from abroad (foreign investors accounted for around 45 per cent of the value of transactions carried out since 2009),84 and valuations were already looking stretched before the referendum, especially in London. The downturn in this sector may have a knock-on effect on the construction sector and other companies in the supply chain.

The problems in the oil, gas and steel sectors look set to continue in the coming year. The oil price rallied somewhat after hitting a 13-year low in January 2016, but remains significantly lower than it was before prices began to fall in mid-2014. Recent easing in supply side disruptions and concerns about a supply glut following production increases appear to be holding back further rises. Volatility following the exit vote has also been affecting the commodities markets. Global oversupply problems continue to challenge the steel industry. Smaller service companies with exposure to these sectors were the first to be seriously affected, but the underlying price volatility is now translating into some more significant situations as it impacts on bigger companies.

iii Practical trends and legislative developments
When it comes to restructuring, companies with a mixture of English and US law-governed debt in their capital structures continue to weigh up the advantages and disadvantages of US Chapter 11 proceedings and English schemes of arrangement. In general, companies with mixed capital structures may potentially lean more towards Chapter 11 if they need to undergo a significant operational restructuring, particularly in light of the protections available for directors. However, schemes remain very popular for financial restructurings, including those involving both English and US law governed debt.

Schemes of arrangement certainly remain a popular restructuring tool within Europe. However, we are starting to see more interest in the reformed restructuring regimes in certain other European countries such as Spain. In the longer term, we would expect to see more uptake of these processes and a corresponding decrease in the use of schemes (particularly where complex engineering is required to bring the company within jurisdiction of the English courts). However, in the short to medium term, we do not expect these reformed regimes to pose a significant challenge to the scheme’s popularity as it will be some time

84 Ibid.
before they are entrenched and any teething errors and ambiguities addressed, and, in the interim, many creditors are likely to prefer the tried and tested appeal of the established scheme, in the absence of significant pull factors.

iv The future of cross-border restructuring and insolvency

As discussed in Section I.i, supra, the domestic insolvency regime is largely unaffected by EU legislation, and we would not expect significant legal changes to be required when the UK leaves the EU. However, the framework of mutual recognition of proceedings and judgments provided by the ECIR is very significant for insolvencies and restructurings with an EU cross-border element. EU legislation also provides a framework for the recognition of bank resolutions and insolvency proceedings. The government may seek to agree an alternative framework for the recognition of insolvency proceedings and judgments, either with individual EU Member States or with the EU as a whole.

If an alternative framework is not agreed, domestic law will apply to jurisdiction and recognition will need to be determined jurisdiction by jurisdiction. As described in Section I.vii, supra, other bases for bilateral recognition do exist, such as the UNCITRAL Model Law on Cross-Border Insolvency, though not many EU Member States have implemented legislation based on the Model Law. The need to approach each jurisdiction on a case-by-case basis would certainly add complexity to cross-border restructurings, but might also allow the English courts to take a more flexible approach when deciding whether they could take jurisdiction; this ability is one of the aspects of the scheme of arrangement procedure that makes it an attractive restructuring tool.

The direct impact on the scheme of arrangement procedure itself is likely to be less significant. As discussed in Section I.vii, supra, schemes fall outside of the ambit of the ECIR and English law is used to determine jurisdiction. However, it has not been decided whether schemes fall within the EC Judgments Regulation. If alternative arrangements are put in place that closely replicate this regulation, the ambiguity is likely to continue. If not, it would fall away. On the one hand, one route to recognition would have been removed, and recognition and enforcement would need to be considered on a jurisdiction-by-jurisdiction basis; on the other hand, concerns that the regulation might limit the English courts’ jurisdiction to sanction schemes in certain circumstances would also fall away.

It is unlikely that the referendum result will lead to an abrupt change in the status quo; at the very least we would expect the current arrangements to remain in place during the two-year negotiating period once Article 50 is triggered. It is far too early to say whether leaving the EU will have an adverse impact on the restructuring and insolvency market in this jurisdiction in the long term. If the UK does not continue to participate in the ECIR framework, or agree a similar replacement framework, cross-border procedures that were previously within its scope will increase in complexity, which might impact on their attractiveness in a cross-border context. On the other hand, schemes of arrangement are extremely popular despite the need to consider recognition and jurisdiction on a case-by-case basis, and it is possible that if the English courts’ jurisdiction in other proceedings is unfettered, they might in fact increase in popularity in certain circumstances.

v Legislative developments

Modernisation of IR 1986

As mentioned in the previous edition of this book, the insolvency rules (IR 1986) are being modernised. Several consultations have taken place over recent years that have resulted in the
introduction of a number of amendments to the IR 1986 and, more recently, the Insolvency Service has been working to produce a full draft of a new set of rules, generally technical in nature but with some policy changes, to restructure and entirely replace the IR 1986. The Insolvency Service has indicated that, subject to ministerial approval, it expects the new rules to be laid before Parliament in October 2016 and come into force in April 2017.

ECIR
At the European level, the final text of the recast ECIR was published in the Official Journal of the EU on 5 June 2015 and entered into force on 25 June 2015. Most of its provisions will apply from 26 June 2017.

As it is extremely unlikely that the UK will have left the EU by June 2017, we would expect the recast ECIR to apply to this jurisdiction as planned until exit negotiations are concluded, and if the government seeks an alternative arrangement replicating the provisions of the ECIR, it seems likely that the recast ECIR would form the basis of such negotiations.

Key amendments include:

- revising the definition of insolvency proceedings to include hybrid and pre-insolvency proceedings;
- clarifying the jurisdiction rules and improving the procedural framework for determining jurisdiction, including by the addition of new language in relation to the determination of COMI;
- enabling the courts to postpone or refuse the opening of secondary proceedings if this is not necessary to protect the interests of local creditors;
- abolishing the requirement that such proceedings must be winding-up proceedings;
- extending the cooperation requirements by obliging courts of the main and secondary proceedings to cooperate between themselves and by obliging liquidators and courts to cooperate with each other;
- requiring EU Member States to publish court decisions in cross-border insolvency cases in publicly accessible interconnected electronic registers; and
- including specific rules in relation to the insolvency of multinational groups of companies (but maintaining the entity-by-entity approach).

vi Future legislative agenda
In May 2016, the government published a consultation seeking views on whether the UK’s corporate insolvency and restructuring regime needs updating in light of international principles developed by the World Bank and UNCITRAL, recent large corporate failures and an increasing European focus on providing businesses with the tools to facilitate company rescue. The consultation focused on four proposals:

- introducing a restructuring moratorium for distressed businesses to benefit from protection against legal action while considering their options for rescue;
- widening the scope of existing legislation that places restrictions on the termination of contracts for essential supplies, with appropriate safeguards for suppliers, to assist distressed businesses;
- introducing a new restructuring procedure, with the ability to bind creditors to a restructuring plan (including provision for cross-class cramdown), to increase the options available to rescue businesses; and
- increasing the availability of rescue finance.
It remains to be seen whether the government will bring forth legislation based on these proposals (it is worth noting that the consultation was launched before the referendum on EU membership, the consequences of which are likely to take up a lot of government time). If implemented broadly as set out in the consultation, the measures would represent the most significant reforms to the domestic insolvency framework since the Enterprise Act 2002.
Appendix 1

ABOUT THE AUTHORS

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Ian Johnson has a broad restructuring, insolvency and general finance practice. He has advised on a number of high-profile corporate recovery and insolvency matters and has worked on both international and domestic restructurings and refinancings (including the restructuring and refinancing of Vestas, Vion Foods, Punch, Royal Mail, Premier Foods, Thomas Cook, General Motors, Countrywide plc, Towergate and Tata Steel). He also advised the Irish government in connection with a wide range of issues relating to the Irish banking crisis and the Central Bank of Cyprus on aspects of the restructuring of its banking sector. In addition, his practice covers issues relating to the eurozone crisis and he has advised insurance companies, banks, including central banks, on various aspects of the crisis.

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