Global Restructuring and Insolvency Guide - England & Wales

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# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Company Voluntary Arrangement ("CVA")**

Yes. Prior to the commencement of the procedure, security can be taken over all types of assets, including book debts via a floating charge and/or fixed charge.

**Scheme of Arrangement ("SoA")**

Yes. As per CVA.

**Restructuring Plan ("RP")**

Yes. As per CVA.

**Administration**

Yes. As per CVA.

## What is the nature of the insolvency process?

**Company Voluntary Arrangement ("CVA")**

The Insolvency Act 1986 reorganization process is typically used to compromise unsecured liabilities and effect operational restructurings, e.g., compromising liabilities owed to landlords.

This cannot be used to compromise secured liabilities, unless the consent of the secured creditor is obtained.

**Scheme of Arrangement ("SoA")**

The Part 26 Companies Act 2006 process can be used for solvent or insolvent debt restructurings, which is done by way of a "creditor scheme" (i.e., requires creditor approval).

A SoA can also be used to implement takeovers, which is done by way of a "member scheme" (i.e., requires shareholder approval).

**Restructuring Plan ("RP")**

The Part 26A Companies Act 2006 process, introduced by the Corporate Insolvency and Governance Act 2020, is used for insolvent debt restructurings only. The RP can only be used by a debtor that has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.

**Administration**

Administration is an Insolvency Act 1986 insolvency process that can be used to effect a pre-packaged sale of the business or assets effected by administrators. Administration also allows an insolvent company to continue to trade with protection from its creditors by virtue of an automatic statutory moratorium protecting the company from creditor claims. The administrators may continue to operate the business of a company for a period of time to achieve their objectives. Administrators must, within two months of the commencement of the administration, submit a proposal detailing the administrators' plan for the administration to creditors for approval.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Company Voluntary Arrangement ("CVA")**

This is available for solvent or insolvent entities (or those likely to become insolvent).

**Scheme of Arrangement ("SoA")**

Available for solvent or insolvent entities (or those likely to become insolvent).

**Restructuring Plan ("RP")**

The RP can only be used by a debtor that has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.

**Administration**

Available for insolvent entities (or those likely to become insolvent).

'Insolvency' is not defined in the Insolvency Act 1986. Rather, the act contains the concept of a company being 'unable to pay its debts.'

The key bases on which the Insolvency Act 1986 deems a company to be unable to pay its debts include the following:

If a sum of GBP 750 or more owed to a creditor is not paid within three weeks of being served a statutory demand.

If it is unable to pay its debts as they fall due, including contingent and prospective liabilities ('cash flow insolvency test').

If the value of the company's assets are less than the amount of its liabilities, taking into account contingent and prospective liabilities (the 'balance sheet insolvency test').

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Company Voluntary Arrangement ("CVA")**

Yes.

**Scheme of Arrangement ("SoA")**

No. The debtor must be capable of being wound up in England and must have "sufficient connection" with England or Wales.

The governing law of debt may be changed to English law to provide jurisdiction (where debt documents permit).

**Restructuring Plan ("RP")**

No. As per SoA.

**Administration**

Yes.

## Is restructuring of both secured and unsecured claims possible?

**Company Voluntary Arrangement ("CVA")**

No, secured and preferential creditors cannot be bound nor their rights altered without their express consent.

**Scheme of Arrangement ("SoA")**

Yes.

**Restructuring Plan ("RP")**

Yes.

**Administration**

Yes, if combined with a SoA or RP.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Company Voluntary Arrangement ("CVA")**

No.

**Scheme of Arrangement ("SoA")**

Yes. Creditors are separated into classes.

Classes are made up of creditors whose rights are not too dissimilar so as to allow them to consult together on the proposed plan.

**Restructuring Plan ("RP")**

Yes. As per SoA.

**Administration**

Usually a restructuring within or as part of an administration takes the form of a SoA, RP or CVA. In a SoA, or RP the requirement to put creditor claims into relevant classes will apply.

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Company Voluntary Arrangement ("CVA")**

Yes. Approval requires 50% or more in value of members/shareholders.

**Scheme of Arrangement ("SoA")**

No shareholder approval is not required in a creditor scheme, which is the type of scheme used to effect a debt restructuring.

**Restructuring Plan ("RP")**

No. Shareholder approval is not required unless the members rights are being affected in which case they will placed in a voting class.

**Administration**

Usually a restructuring within or as part of an administration takes the form of a SoA, RP or CVA, which do not require shareholder approval.

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Company Voluntary Arrangement ("CVA")**

Yes. Approval requires 75% in value of those present and voting (excluding secured or part secured claims) and approval is invalid if more than 50% in value of creditors who are not connected to the debtor vote against the CVA proposal ("**CVA Creditor Approvals**"). Provided CVA Creditor Approvals have been obtained, the dissenting creditors will be bound (as well as creditors who didn't vote at all).

**Scheme of Arrangement ("SoA")**

Yes. Dissenting creditors in a particular class may be bound, subject to obtaining required approvals. There is no cross-class cram-down. Those with no economic interest and those whose rights are not affected need not be consulted.

The court must be satisfied that the SoA proposed is substantively fair, which is understood as a scheme that an "intelligent and honest man, a member of the class concerned, and acting in respect of his interests might reasonably approve."

**Restructuring Plan ("RP")**

Yes. Dissenting creditors in a particular class may be bound, subject to obtaining required approvals and a class of creditor who has not approved the RP can be crammed down if:

the court is satisfied that if the RP were sanctioned, none of the members of the dissenting class would be any worse off than they would be in the "relevant alternative". The "relevant alternative" is whatever the court considers to be most likely to occur in relation to the company if the RP were not sanctioned; and

the RP has been approved by at least one class of creditors or members who would receive payment or have a genuine economic interest in the company in the event of the "relevant alternative".

However, the court has a wide discretion regarding the sanction of an RP and there is no presumption in favour of the court sanctioning a RP simply because the above conditions have been met.

**Administration**

An administration initiated by the debtor or its directors does not require creditor consent, unless the creditor holds a qualifying floating charge — a form of English law security — which must (amongst other requirements) be over the whole, or substantially the whole, of the debtor's property.

Usually a restructuring within an administration takes the form of a SoA or CVA, which require (specified majority) consents of creditors. In a SoA, the classing requirements will apply.

# Commencing the Process

## Who can commence?

**Company Voluntary Arrangement ("CVA")**

The following can commence: (1) the debtor; (2) the administrator; or (3) the liquidator.

**Scheme of Arrangement ("SoA")**

Primarily debtor can commence. However, it may also be commented by (1) any creditor (although as a practical matter it is very difficult for them to do so, as they are unlikely to have access to sufficient information) (2) any member of the company (3) a liquidator of the company (4) an administrator of the company.

**Restructuring Plan ("RP")**

As per SoA.

**Administration**

Administration may be commenced by: (1) the debtor; (2) directors; (3) a holder of a qualifying floating charge (see discussion of cramdown in Topic: Initial Considerations); (4) any creditor (including a contingent or prospective creditor); or (5) the supervisor of a CVA.

## Is shareholder's consent required to commence proceeding?

**Company Voluntary Arrangement ("CVA")**

No, but members'/shareholders' consent is required to approve the CVA (see response to "Is shareholder approval needed to commence a case?" under Topic: Initial Considerations).

**Scheme of Arrangement ("SoA")**

No

**Restructuring Plan ("RP")**

No

**Administration**

No

## Is there an ability to consolidate group estates?

**Company Voluntary Arrangement ("CVA")**

No, but can have inter-conditional CVAs, e.g., where approval of a CVA by all entities is a condition precedent to the CVA coming into effect.

**Scheme of Arrangement ("SoA")**

No, but there can be inter-conditional SoAs, e.g., where approval of a SoA by all entities is a condition precedent to the SoA coming into effect.

**Restructuring Plan ("RP")**

No, but there can be inter-conditional RPs, e.g., where approval of a SoA by all entities is a condition precedent to the RP coming into effect.

**Administration**

No, but group insolvencies may be coordinated by appointing the same administrators to several group companies or under protocols.

Simultaneous administrations can be used to effect the sale of the business or its assets across a group with the subsequent apportionment of sale proceeds between estates.

Where a CVA, SoA and RP is proposed within an administration, those processes' requirements must be complied with.

## Is there any court involvement?

**Company Voluntary Arrangement ("CVA")**

There is limited court involvement, unless there is a challenge.

An insolvency practitioner must be appointed as nominee who must report to the court, which then decides whether to convene meetings to vote. Where the administrator or liquidator is the nominee, there is no requirement to report to court. A CVA can be challenged in court for unfair prejudice or material irregularity.

**Scheme of Arrangement ("SoA")**

There is heightened court involvement at class meetings and approval of the scheme.

A court can refuse to convene class meetings or approve the scheme, even if approved by statutory majorities, although this is rare in practice.

The scheme can be challenged in court at the stage at which class meetings are convened (the convening hearing) or sanction stage (the sanction hearing).

**Restructuring Plan ("RP")**

There is heightened court involvement at class meetings and approval of the RP.

A court can refuse to convene class meetings or approve the RP, even if approved by statutory majorities.

The RP can be challenged in court at the stage at which class meetings are convened (the convening hearing) or sanction stage (the sanction hearing).Despite being a relatively new restructuring tool, the courts have already considered a number of contested RPs (e.g. *Re Virgin Active Holdings Ltd*, which the court ultimately sanctioned, and *Re Hurricane Energy Plc*, which the court refused to sanction).

**Administration**

Assuming the administrators are appointed using the "out-of-court" procedure, there is limited court involvement post-appointment, although the administrators may apply to the court for directions throughout administration.

Where a CVA, SoA and RP is proposed within an administration, court involvement will apply in accordance with those processes.

## Who manages the debtor?

**Company Voluntary Arrangement ("CVA")**

The board, under the supervision of the appointed nominee (referred to as the supervisor following approval of the CVA) manages the debtor.

**Scheme of Arrangement ("SoA")**

Debtor retains its management powers. In particularly complex SoAs, a scheme supervisor may be appointed to adjudicate on scheme claims.

**Restructuring Plan ("RP")**

Debtor retains its management powers.

**Administration**

The licensed insolvency practitioner manages the debtor. Powers of management effectively cease upon the commencement of the administration.

## What is level of disclosure of process to voting creditors?

**Company Voluntary Arrangement ("CVA")**

Numerous statutory and insolvency rule requirements apply to the CVA proposal document. The extensive list of other prescribed matters required to be set forth in the proposal document includes the requirement to set out a comparison of the CVA outcome with liquidation outcomes.

**Scheme of Arrangement ("SoA")**

Limited prescribed matters must be set out in the explanatory statement, giving considerable flexibility to those proposing the SoA. Broadly speaking, the explanatory statement must set out information an average creditor would expect to see or would require to make an informed decision on the proposed plan.

**Restructuring Plan ("RP")**

Limited prescribed matters must be set out in the explanatory statement, giving considerable flexibility to those proposing the RP. Broadly speaking, the explanatory statement must set out information an average creditor would expect to see or would require to make an informed decision on the proposed plan.

**Administration**

No statement is required for pre-packaged administration but a disclosure statement must be circulated to creditors (usually immediately) after the sale in compliance with the "Statement of Insolvency Practice 16", being the "SIP 16 statement". A copy of the SIP 16 statement should be included in the administrator's proposals and filed at Companies House.

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Company Voluntary Arrangement ("CVA")**

Generally speaking, English registered companies and companies formed outside England with their COMI in England can be subject to all forms of insolvency proceedings.

There is no restriction on which types of companies can propose a CVA.

**Scheme of Arrangement ("SoA")**

As per CVA. There is no restriction on which types of companies can propose a SoA.

**Restructuring Plan ("RP")**

As per CVA. There is no restriction on which types of companies can propose a RP.

**Administration**

There are special insolvency proceedings in respect of companies belonging to certain key industries, or which are involved in matters of particular public interest, e.g., UK banks, building societies and investment banks and providers of social housing.

The UK has over 30 special or modified insolvency regimes, each with variations in the application of the standard corporate insolvency legislative framework.

With regards to insurance companies or credit institutions, there are certain EU-wide legislative measures (which have been transposed into English law) that regulate the countries in which such an institution ought to be wound up.

## How long does it generally take for a creditor to commence the procedure?

**Company Voluntary Arrangement ("CVA")**

N/A (as creditor cannot apply)

**Scheme of Arrangement ("SoA")**

While it is possible, in theory, for creditors to propose a SoA, as a practical matter it is very difficult for them to do so as they are unlikely to have access to sufficient information.

**Restructuring Plan ("RP")**

While it is possible, in theory, for creditors to propose a RP, as a practical matter it is very difficult for them to do so as they are unlikely to have access to sufficient information.

**Administration**

The quickest way for a creditor, more specifically a "qualifying floating charge holder", to commence administration proceedings is to initiate the process by utilizing the "out of court" route by filing a series of prescribed documents on the public record. The qualifying floating charge must be enforceable in accordance with its terms.

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Company Voluntary Arrangement ("CVA")**

Yes, subject to provisions of CVA and oversight of the CVA supervisor.

**Scheme of Arrangement ("SoA")**

Yes, subject to provisions of SoA.

**Restructuring Plan ("RP")**

Yes, subject to provisions of RP.

**Administration**

No. Directors' powers cease unless permitted by administrators.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Company Voluntary Arrangement ("CVA")**

There is no automatic stay unless (i) the debtor is in an administration process, in which case administration moratorium will apply; or (ii) the debtor benefits from the free-standing moratorium under Part A1 of the Insolvency Act 1986, introduced by the Corporate Insolvency and Governance Act 2020, effective from 26 June 2020.

The Part A1 moratorium allows financially distressed incorporated entities a short breathing space from enforcement by certain types of creditors but is not applicable to financial creditors. Debt owed to such creditors that falls due during the moratorium must continue to be paid for the moratorium to remain in force. The moratorium can be obtained through a court filing without creditor consent but can only endure for a maximum of 40 business days without such consent or a court order.

Only certain companies listed under Corporate Insolvency and Governance Act 2020 are eligible, so it is not a tool available for all debtors.

**Scheme of Arrangement ("SoA")**

There is no automatic stay, unless combined with an administration process, in which case the administration moratorium will apply or the company benefits from the free-standing moratorium under Part A1 of the Insolvency Act 1986.

This is often combined with voluntary bank lender standstill arrangement and (increasingly) with moratorium schemes. Moratorium schemes provide for standstills akin to bank standstill arrangements for bondholders (e.g., Metinvest standstill scheme).

**Restructuring Plan ("RP")**

As per SoA.

**Administration**

Automatic stay upon the appointment of the administrators. The statutory moratorium prevents creditors (including secured creditors) from enforcing their claims against the debtor without the prior consent of the administrators, or the court, and prevents the commencement of alternative insolvency procedures, but does not affect contractual rights (so does not prevent termination of contracts in accordance with their terms and it is typical for contracts to provide for termination when an administration process is commenced against a company).

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Company Voluntary Arrangement ("CVA")**

No

**Scheme of Arrangement ("SoA")**

No, unless approved by creditors as part of the SoA.

**Restructuring Plan ("RP")**

No, unless approved by creditors as part of the RP.

**Administration**

Yes, but only if contractually agreed by creditors. Administrators may borrow after the commencement of the administration on super priority basis, provided they have secured the creditors consent.

## Can procedure be used to implement a debt-to-equity swap?

**Company Voluntary Arrangement ("CVA")**

Yes, but it is rare in practice given the inability of a CVA to compromise secured liabilities and the European market is generally a secured debt market.

**Scheme of Arrangement ("SoA")**

Yes

**Restructuring Plan ("RP")**

Yes

**Administration**

Yes, through pre-packaged sale, CVA , SoA or RP.

## Are third party releases available?

**Company Voluntary Arrangement ("CVA")**

Yes, in principle (subject to any challenges by the creditors of unfair prejudice).

**Scheme of Arrangement ("SoA")**

Yes, in principle e.g., where guarantees are provided under the terms of the facility documentation, the terms of which are being amended and pursuant to which the English court has jurisdiction.

**Restructuring Plan ("RP")**

As per SoA.

**Administration**

No.

## Are the proceedings recognised abroad?

**Company Voluntary Arrangement ("CVA")**

Yes, in accordance with the domestically adopted version of UNCITRAL or other applicable conflict of laws principles and/or treaties.

There are less recognition options available post-Brexit as the EU Insolvency Regulation now only applies to CVAs commenced before 23:00 on 31 January 2020.

**Scheme of Arrangement ("SoA")**

There is recognition under the domestically adopted version of UNCITRAL (e.g., under Chapter 15 in the US) or other applicable conflict of laws principles and/or treaties.

There are less recognition options available post Brexit as the Judgments Regulation (which was the most common way of obtaining recognition in the European Union) can only be relied on in relation to proceedings commenced before 23:00 on 31 January 2020.

Accordingly recognition must be sought on other bases (e.g. local law, UNCITRAL, Rome I Regulation and potentially, the Hague or Lugano Convention).

**Restructuring Plan ("RP")**

The English courts have held that RPs are materially distinguishable from a SoA, due to the requirement for the debtor to encounter or be likely to encounter financial difficulties. As a result, RPs have been held to be insolvency proceedings within the bankruptcy exclusion of the Lugano Convention *(Gategroup)*. Based on this judgment, the Lugano Convention and the Hague Convention will not apply to RPs. Therefore, recognition is more difficult and must be sought on other bases (e.g. local law, UNICTRAL, Rome I Regulation).

**Administration**

There is recognition under the domestically adopted version of UNCITRAL (e.g., under Chapter 15 in the US) or other applicable conflict of laws principles and/or treaties.

There are less recognition options available post-Brexit as, EU Insolvency Regulation now only applies to administrations commenced before 23:00 on 31 January 2020.

## Has the UNCITRAL Model Law been adopted?

**Company Voluntary Arrangement ("CVA")**

Yes, it has been enacted into UK law by the Cross-Border Insolvency Regulations 2006.

**Scheme of Arrangement ("SoA")**

Yes, it has been enacted into UK law by the Cross-Border Insolvency Regulations 2006.

**Restructuring Plan ("RP")**

Yes, it has been enacted into UK law by the Cross-Border Insolvency Regulations 2006.

**Administration**

Yes, it has been enacted into UK law by the Cross-Border Insolvency Regulations 2006.

## Can a debtor continue to carry on business during insolvency proceedings?

**Company Voluntary Arrangement ("CVA")**

The making of a CVA proposal need not impact the day-to-day operations of a company. Existing management remains in place.

**Scheme of Arrangement ("SoA")**

As per CVA.

**Restructuring Plan ("RP")**

As per CVA.

**Administration**

The powers of the company's directors cease upon the appointment of administrators.

In certain circumstances, the administrators may continue to operate the business of a company for a period of time to achieve their objectives (a so-called "trading administration"), e.g., LBIE, Kaupthing and Heritable.

Many administrations are "pre-packaged" or "pre-packs" with a very short period (days) between the commencement of the process and the completion of a sale when control returns to the new owner.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Company Voluntary Arrangement ("CVA")**

Yes, as administration or insolvent winding-up may follow after the implementation of the CVA. For example, the CVA may fail and be terminated in accordance with the terms of the CVA proposal.

**Scheme of Arrangement ("SoA")**

Yes, as administration or insolvent winding-up may follow.

**Restructuring Plan ("RP")**

Yes, as administration or insolvent winding-up may follow.

**Administration**

"Fraudulent trading" claims (where the debtor trades with actual intent to defraud creditors) are punishable by up to 10 years' imprisonment and/or an unlimited fine.

The court can require a director who engages in "wrongful trading" to contribute to the insolvency estate. Wrongful trading occurs when director(s) (including shadow director(s) and de facto director(s)) who conclude, or should have concluded, that there is no reasonable prospect of the debtor avoiding an insolvent administration or liquidation fail to take every step that a reasonably diligent person would take to minimize potential loss to the debtor's creditors.

The court may disqualify a person who engages in fraud or other breaches of duty from acting as a director for a period of up to 15 years.

## What is the order of priority of claims?

**Company Voluntary Arrangement ("CVA")**

Order of priority are determined by proposal, although typically a creditor cannot be offered less than they would otherwise receive in an administration/liquidation. Preferential creditors need to be met in full and kept whole before other unsecured creditors entitled to distribution. Secured creditors retain security and cannot be compromised without consent.

**Scheme of Arrangement ("SoA")**

As per CVA. Preferential and secured creditors will form different classes to unsecured creditors

**Restructuring Plan ("RP")**

As per CVA. Preferential and secured creditors will form different classes to unsecured creditors

**Administration**

Statutory order of priority:

fixed Charges/Creditors with a proprietary interest in assets

moratorium debts and priority moratorium debts subject to a Part A1 moratorium

expenses, including those incurred under contracts entered into by administrators

preferential debts (primarily limited amounts due to employees and for administrations commenced from December 2020 will include certain tax debts owed to Her Majesty's Revenue and Customs).

a "prescribed part" (amount capped at GBP 800,000 for unsecured creditors)

floating charge holders

(balance of) unsecured creditors

deferred creditors (e.g., amounts owed to shareholders regarding declared but unpaid dividends)

shareholders

All property in which the company has a beneficial interest will fall within its insolvent estate and be available for the benefit of its creditors. Assets subject to a fixed charge, supplied under hire purchase agreements, subject to retention of title claims or which the company holds on trust for a third party are not beneficially owned by the company and therefore do not fall within the insolvent estate (although moratorium will apply to them).

## Do pension liabilities have any priority over other unsecured claims?

**Company Voluntary Arrangement ("CVA")**

N/A

**Scheme of Arrangement ("SoA")**

N/A

**Restructuring Plan ("RP")**

N/A

**Administration**

This will automatically trigger a significant unsecured statutory debt under the Pensions Act for defined benefit pension schemes that are in deficit.

This will trigger requirement to enter into government backed Pension Protection Fund.

## Is it possible to challenge prior transactions?

**Company Voluntary Arrangement ("CVA")**

N/A

**Scheme of Arrangement ("SoA")**

N/A

**Restructuring Plan ("RP")**

N/A

**Administration**

**Preferences**: six months before the onset of insolvency but extended to two years before the onset of insolvency for transactions with a person who is "connected" to the debtor.

**Transactions at undervalue:** two years before onset of insolvency and unlimited period if fraud is involved.

**Voidable floating charges:** 12 months before the onset of insolvency (unless new money is provided).

(In the case of a CVA, SoA and RP this is only a concern if administration or insolvent winding-up follow.)

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