INSOL INTERNATIONAL

ESG IN RESTRUCTURING

INSOL International, 6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

ISBN: 978-1-907764-36-3

Copyright © No part of this document may be reproduced or transmitted in any form or by any means without the prior permission of **INSOL INTERNATIONAL**. The publishers and authors accept no responsibility for any loss occasioned to any person acting or refraining from acting as a result of any view expressed herein.

The views expressed in each chapter are those of its authors and do not necessarily represent the views of the publisher or editor. The publishers and authors accept no responsibility for any loss occasioned to any person acting or refraining from acting as a result of any view expressed herein.

Copyright © INSOL INTERNATIONAL 2023. All Rights Reserved. Registered in England and Wales, No. 0307353.

INSOL, INSOL INTERNATIONAL, INSOL Globe are trademarks of INSOL INTERNATIONAL.

CONTENTS

Contributors	iv
President's Introduction	vii
Synopsis and Policy Roadmap	1
Argentina	47
Australia	61
Bermuda	77
Brazil	88
British Virgin Islands	100
Canada	112
France	133
Germany	149
Guernsey	156
Hong Kong	163
India	175
Indonesia	187
Japan	115
Kenya	215
Malaysia	232
Mexico	247
New Zealand	258
Nigeria	277
People's Republic of China	287
Poland	298
Russia	310

CONTENTS

Singapore	320
South Africa	336
Spain	355
Switzerland	370
Thailand	380
The Netherlands	391
Uganda	402
United Arab Emirates	410
United Kingdom	421
United States of America	449

CONTRIBUTORS

Argentina	Sebastian Borthwick Richards, Cardinal, Tutzer, Zabala & Zaefferer
Australia	Stewart Maiden KC, INSOL Fellow List G Barristers
Bermuda	Kyer Cooper Edward Willmott Deloitte
Brazil	Flávia Cristina M. De C. Andrade, INSOL Fellow Diana Freire De Queiroz Barros Adriana Mathias Baptista Gabriela Lima Marcus Fonseca Tozzini, Freire, Teixeira E Silva Advogados
British Virgin Islands	Marcia Mcfarlane Jhneil Stewart Peter Ferrer Harney Westwood & Riegels
Canada	Vicki Tickle Jared Enns Forrest Finn Stephanie Fernandes Layne Hellrung Cassels Brock & Blackwell LLP
France	Nicolas Partouche, INSOL Fellow Julie Cavelier Peltier Juvigny Marpeau & Associes
Germany	Thorben Schmidt, INSOL Fellow Winkler Rechtsanwaltsgesellschaft Mbh
Guernsey	Ben Rhodes, INSOL Fellow Dipak Vashi Grant Thornton
Hong Kong	Alexander Tang, INSOL Fellow Stephenson Harwood
India	Ashwin Bishnoi Khaitan & Co
Indonesia	Dr. Julius Singara Maramis, Purba, Santi, Singara Law Firm

CONTRIBUTORS

Japan	Hajime Ueno, INSOL Fellow Tatsuaki Murakami Yuki Yasumoto Nishimura & Asahi
Kenya	Mungai James Njenga Anjarwalla & Khanna LLP
Malaysia	To' Puan Janet Looi Selvamalar Alagaratnam Sharon Chong Tze Ying Shannon Rajan Sharifah Shafika Alsagoff Janice Ooi Skrine
Mexico	Zulima González Pérez Correa, González Y Asociados, S.C.
New Zealand	Bryan Williams, INSOL Fellow Bwa Insolvency Ltd
Nigeria	Okorie Kalu Esq, INSOL Fellow Punuka Attorneys & Solicitors
People's Republic of China	Lingqi Wang Yi Su Juehan (Sylvia) Zhang Yuanyuan (Morgan) Huang Fangda Partners
Poland	Lech Giliciński Joanna Gąsowski Agnieszka Nowak-Błaszczak Wolf Theiss
Russia	Pavel Novikov, INSOL Fellow Roman Ishmukhametov Semen Kitikov Melling, Voitishkin and Partners
Singapore	Clayton Chong WongPartnership LLP
South Africa	Ricky Klopper Klopper Attorneys Inc. Christopher Rey BDO

CONTRIBUTORS

Spain	José Carles Delgado, INSOL Fellow Carles Cuesta Abogados Y Economistas SLP
Switzerland	Dr. Roger Bischof, INSOL Fellow Lenz & Staehelin Georg Wohl Baur Hürlimann AG
Thailand	Pathorn Towongchuen Nantinee Sunthonpimol TTT and Partners Thanawan Kirdsinsap Weerawong C&P
The Netherlands	Prof. Dr. Omar Salah Tamara Ubink Norton Rose Fulbright LLP
Uganda	Andrew K Munanura, INSOL Fellow S&L Advocates
United Arab Emirate	Adam Banks, INSOL Fellow Abdelhak El Kinany Paridhi Poddar Linda El Halabi Allen & Overy LLP
United Kingdom	Andrew Probert ERM Sarah Rayment William Innes Haroon Ansary Mark Blackman Matthew Mills Sarah College Kroll Richard Hughes Rupert Cheetham Kevin Mulligan John Houghton Megan Gray Hannah Blom-Cooper Tim Dolan Halimah Sattar Naomi Feinstein Greenberg Traurig
United States of America	Stephen Astringer Kobre & Kim LLP

PRESIDENT'S INTRODUCTION

Environmental, social and governance (ESG) issues are rapidly changing the way that business is conducted across the world. We are witnessing new regulations on climate change, biodiversity and environmental conservation, modern slavery and workers' rights and board accountability, conflicts and stakeholder engagement.

More broadly, we are also seeing a change in social attitudes, and a growing expectation from financiers, insurers, investors and customers that the businesses they deal with must behave in a responsible and ethical manner.

These dynamic regulatory, social and economic changes will inevitably drive future restructuring activity, as companies seek to align their operational structures and business models with improved governance, labour protection, social justice goals and the reality of a net zero emissions economy and the necessity of a greener footprint.

At the same time, however, the evolution of social and economic settings – and the dominant focus on ESG – raises the question as to whether existing restructuring and insolvency laws adequately protect and uphold environmental obligations, employee entitlements and workplace health and safety obligations, and hold directors and other officers to account in relation to their responsibilities to the company and its stakeholders.

There is a delicate balancing act between the protection of these interests and the underlying assumption that restructuring and insolvency processes ought to maximise value for the collective body of creditors – and in some cases, the respective policy concerns of ESG issues and restructuring and insolvency law and practice may conflict.

This has been apparent in the controversial "Texas Two-Step" option canvassed in recent United States case law (under which it has been proposed for tort liabilities to be spun off to a new corporate entity that undergoes a restructure), as well as non-consensual third party releases and, in some jurisdictions, the potential for an insolvent entity to disclaim or otherwise evade liability for its environmental obligations.

This new publication from INSOL International – *ESG in Restructuring* – therefore comes at an important time. Project Leaders Clayton Chong and Smitha Menon, from WongPartnership, canvass the policy motivations of ESG and insolvency and restructuring law and practice, and consider the regulatory standards, soft law frameworks and practices concerning key ESG issues outlined by esteemed practitioners and academics in 31 jurisdictions.

The Project Leaders consider the manner in which restructuring law and practice may be shaped to deal with incredibly complex and emerging ESG issues – particularly environmental responsibilities, labour protection and board accountability – that can have far-reaching impacts on vulnerable claimants and broader society. They provide a "roadmap" of issues that regulators and policy makers may consider in shaping future law reform.

This book is an invaluable contribution to law reform and regulatory and policy development as we strive to ensure that restructuring and insolvency laws are modern, progressive and "fit for purpose" in relation to the underlying economic and social circumstances in which they operate.

PRESIDENT'S INTRODUCTION cont.

The book also highlights important practical issues for our members to be aware of in addressing a multitude of ESG issues in the course of an insolvency appointment. Uniquely, the book also analyses recent market developments and trends in the ESG refinancing sphere, with the aim of serving as a useful "one stop" resource for financial institutions considering the provision of finance to entities (in good times and in the event of financial distress) in the context of complex and evolving ESG obligations and liabilities.

I express my sincere thank you to the Project Leaders, and each of the jurisdictional contributors, for their significant expertise, time and commitment in completing this project over the last 12 months, as well as to our team of INSOL International technical and administrative staff for their efforts in bringing the project to fruition.

I hope you enjoy reading this publication and will find it useful in your future pursuits.

Scott Atkins
President & INSOL Fellow
INSOL International

September 2023

UNITED KINGDOM

1. General overview of the restructuring regime

1.1 Formal restructuring procedures

1.1.1 Schemes of arrangement (Schemes) and restructuring plans (RPs)

Schemes and RPs are restructuring procedures set out in the UK Companies Act 2006. They are tools for UK-incorporated companies, and certain foreign companies with a "sufficient connection" to the United Kingdom, to propose a compromise or arrangement with their creditors or members (or any class of them).

Both Schemes and RPs are court-supervised procedures but, provided the relevant company is not also in an insolvency procedure such as administration or liquidation, the management of the company remains in the control of its directors.

Schemes and RPs can be used for both solvent and insolvent companies and, provided the necessary statutory voting majorities are met (see below) and the Scheme or RP is sanctioned by the court, the Scheme or RP is binding on all of the stakeholders subject to it – whether or not they voted in favour (or voted at all) in relation to the Scheme or RP.

A RP is available to a company which has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, the ability of the company to carry on business as a going concern. The purpose of the RP must be to eliminate, reduce or prevent, or mitigate the effect of, any of those financial difficulties. Insolvency is not a prerequisite for a RP, but given the requirement for financial difficulties, companies that propose a RP are often insolvent on either a balance sheet basis or a cash flow basis.

Schemes have been part of the English restructuring toolkit for decades, whereas RPs are a relatively new restructuring procedure introduced as part of the Corporate Insolvency and Governance Act 2020 (CIGA), which was given Royal Assent in June 2020. Schemes were routinely used to restructure companies in England but a perceived shortcoming of Schemes was an inability to implement a "cross-class" cram down. This could sometimes be addressed by combining a Scheme with a formal insolvency procedure such as a pre-packaged administration sale (see below).

While a Scheme can be used to compromise stakeholders within a particular class, if a class of stakeholders fails to approve the Scheme, that class may in effect have a veto on the implementation of the restructuring. A RP on the other hand can be imposed on an entire class of creditors provided certain safeguard protections are met, including:

- the court must be satisfied that, if the RP was to be sanctioned, none of the members of the dissenting class would be any worse off than they would in the "relevant alternative". The "relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the RP was not sanctioned; and
- the RP has been agreed to by at least 75% in value of a class of creditors or members who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative.

Even if the voting thresholds have been satisfied, the court ultimately has the discretion as to whether to sanction the Scheme or RP. Among other matters, the court will look closely at whether procedural formalities were satisfied (for example, the convening of stakeholder meetings and the conduct of those meetings) as well as jurisdictional issues, foreign recognition and the overall fairness of the Scheme or RP.

If a particular class of stakeholder has no genuine economic interest in the company (for example, if it can be demonstrated to be completely "out-of-the-money") then it is possible for that class to be completely excluded from the RP voting process but still be bound by it. This is not possible in a Scheme unless it is used in conjunction with a formal insolvency process like administration (see below).

All types of creditors and members can be subject to a RP or a Scheme. Both procedures can apply to any shareholder or secured and unsecured creditor class, including financial creditors, operational / trade creditors and preferential creditors. Both procedures can be used in isolation or in tandem with other restructuring tools, such as an administration or a Part A1 moratorium. The latter was also introduced by the CIGA.

In both Schemes and RPs, valuations of a company's business and assets are critical in order to demonstrate the level of return to stakeholders through the Scheme or RP compared to other outcomes and to demonstrate that the stakeholders being compromised are not financially worse off than in the "relevant alternative". This is particularly important in the context of a cross-class cram down of a dissenting class of stakeholder in a RP and demonstrating that they are no worse off under the RP than in the "relevant alternative".

Stakeholders opposing a Scheme or a RP often bring challenges disputing the valuations obtained by the company and presented in evidence at the court hearings in relation to the Scheme or RP.

In both Schemes and RPs, the restructuring proposals can be made by the company via its directors or, if the company is in an insolvency procedure such as administration (see below), by the relevant insolvency officeholder. If the Scheme or RP is proposed by the relevant company itself outside of an insolvency procedure, the management and control of the company's business during the restructuring remains with the directors of the company. The supervision by the English court in relation to both a Scheme and a RP is solely in relation to the legal mechanics and implementation of the procedure and does not extend to the management of the company's business.

The procedure for both a Scheme and a RP are broadly similar, with each including the following steps:

- the first step is to send a "Practice Statement Letter" setting out certain information in relation to the restructuring proposal, including high level commercial terms and details of the first court hearing, during which the company will apply for an order to convene shareholder and creditor class meetings (the "Convening Hearing" – see below);

- at the Convening Hearing, the court may order that the company convenes stakeholder meetings;

- the notice of stakeholder meetings and explanatory statement are then issued to stakeholders;

- the stakeholders then vote on the terms of the Scheme or RP;

- if the class meetings are successful and the terms of the Scheme or RP are approved by the required majorities (detailed further below), the company will apply to the court for a sanction hearing, during which the court has a discretion as to whether or not to sanction the scheme (the "Sanction Hearing" – see below); and

- if sanctioned by the court, the Scheme or RP binding on all affected creditors and members once notice has been delivered to the Registrar of Companies.

The timeline from the Convening Hearing to the Sanction Hearing is likely to be six to eight weeks to ensure adequate notice is given to stakeholders of the meetings.

Prior to proposing a Scheme or a RP, the company typically engages in extensive negotiations with its creditors and other stakeholders to seek to ensure, as far as possible, the implementation of the restructuring when it is formally launched. In many cases, the company will agree "lock-up" arrangements with its creditors and stakeholders, or certain classes of them.

As noted above, in the event that stakeholders are being crammed down (whether intra-class in the case of a Scheme or intra-class or cross-class in the case of a RP), detailed valuation evidence will

usually need to be obtained by the company to justify the treatment of the stakeholders in the restructuring. The company may also consider that it needs to undertake a distressed M&A marketing exercise to properly demonstrate value, the results of which would be submitted in evidence to the court.

The voting threshold for a Scheme is a majority in number and at least 75% in value of the creditors or members (or each class of them) present and voting at the relevant meeting. If one class meeting does not approve the Scheme, the Scheme cannot be implemented.

The voting threshold for a RP is at least 75% in value of the creditors or members (or each class of them) present and voting at the relevant meeting (i.e. unlike in a Scheme, there is no numerosity test). Also, in the event that a class of stakeholders does not approve the RP, the court can still potentially sanction the scheme if it is satisfied the class is no worse off than in the relevant alternative (see above) and if the RP has been approved by at least one class of stakeholders who have a genuine economic interest in the company. As noted above, it is also possible to exclude a class of stakeholders entirely from voting on an RP but still be bound by it if the court is satisfied that that class does not have a genuine economic interest in the company.

For both Schemes and RPs, there are two court hearings to be held, being the Convening Hearing and the Sanction Hearing. In the event the Scheme or RP is challenged, there may be additional court hearings dealing with the challenge.

At the Convening Hearing, the court will consider, among other matters, the proper composition of the classes of creditors and members who will be asked to vote in separate class meetings (see above). The court will also be asked to approve the distribution of an explanatory statement prepared by the company, containing detailed information on the restructuring terms. At the Convening Hearing, the court can also consider whether it has jurisdiction to sanction the Scheme or RP, but the final determination as to jurisdiction is reserved for the Sanction Hearing.

At the Sanction Hearing, the court has a discretion as to whether it will sanction the Scheme or RP, notwithstanding that it may have been approved by the relevant classes voting. The court will consider a number of factors, including (but not limited to): (i) jurisdictional issues; (ii) whether the class meetings were properly represented; (iii) whether a member or creditor of the company could reasonably have approved the Scheme or RP; (iv) whether the Scheme or RP (as applicable) provides a fair distribution of the benefits generated by the restructuring; and (v) whether the procedural requirements of the Companies Act were complied with.

Schemes and RPs are typically used for the restructuring of the interests of financial creditors and the company's members, although Schemes have also been used to compromise other types of claims, such as retail customers of insurance companies and mis-selling claims against financial institutions.

In relation to RPs, the Companies Act 2006 does provide for regulations to be made in the future excluding companies which provide financial services from proposing a RP, although as of June 2023 no such regulations have been made.

1.1.2 Administration

Administration is a procedure designed to give a company "breathing space" and to enable it to be rescued or restructured, or for its business and assets to be sold under the protection of a statutory moratorium.

Administration places a company under the control of an insolvency practitioner, who must achieve one of the statutory objectives, which are, in order of priority:

- to rescue the company as a going concern;
- to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up; and

- realising property in order to make a distribution to one or more secured or preferential creditors.

In practice, the rescue of the company as a going concern is unlikely. In most cases, the administrator will pursue a going concern sale of the business and assets in order to preserve enterprise value and in pursuance of the objective to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up.

An administrator can be appointed by:

- a court order following the filing of an application by stakeholders including:
  - one or more creditors of the company;
  - the company itself;
  - its directors; or
  - a supervisor of a company voluntary arrangement; or
- an "out of court" appointment, being the filing of certain appointment documents at court by:
  - the company;
  - its directors; or
  - a holder of a qualifying floating charge over the company's assets (QFC / QFCH).

In an out of court appointment process, if there is another person or entity entitled to appoint an administrator (for example, the holder of a prior ranking QFC over all or substantially all of the floating charge assets of the business), a notice of intention to appoint (NoIA) must first be served on them prior to a notice of appointment being filed at court. Where a NoIA is given by the company or its directors, such a NoIA may only be given and filed at court if they have a settled intention to appoint an administrator. The NoIA provides those entitled to appoint an administrator with an opportunity to pursue their own appointment, should they wish to do so. However, they may instead choose to consent to the current out of court process. If no action is taken by the QFCH, the appointor may proceed to file a notice of appointment upon the expiry of five business days after service of the NoIA. The NoIA expires after a period of 10 business days – at that point, if the NoA has not been filed, the process of filing the NoIA must begin again or it will lapse.

Although a company or its directors can appoint an administrator using the out of court process, there are certain circumstances where they can only appoint an administrator by court order, including when the company is subject to an outstanding winding up petition. However, an outstanding winding up petition does not prevent a QFCH appointing an administrator using the out of court route.

Upon appointment, an administrator is an officer of the court and acts as agent of the company. He or she has wide-reaching powers to help achieve the purpose of the administration. This includes doing anything "necessary or expedient for the management of the affairs, business and property of the company".

When a company enters administration, it also benefits from a statutory moratorium that prevents creditors from enforcing their rights against the company without the prior consent of the administrator or the court. Where a NoIA has been filed or an administration application has been made to the court, the company will benefit from an interim moratorium pending the determination of the administration appointment. The scope of the interim moratorium is the same as the statutory moratorium in administration. However, if a creditor wishes to enforce its rights subject to the moratorium, it can only apply to the court for permission as no administrator has yet been appointed.

In many cases, an administrator will look to secure the sale of the company's business and assets as a going concern as one of the main ways to achieve the purpose of the administration. This may be after a period of "trading" the company in administration or by way of a "pre-packaged" sale.

A pre-packaged administration sale is a sale where the company enters administration and its business and / or assets are immediately sold by the administrator on terms that have been negotiated and agreed with the proposed purchaser and other stakeholders in advance of the company entering administration.

As noted above, a pre-packaged administration sale may also form part of a wider restructuring and be combined with a scheme of arrangement to cram down the claims of a dissenting class of stakeholders.

It should be noted that there are a number of exit routes from administration, some of which, including company voluntary arrangement, a RP or a Scheme, could result in handing back control of the business to the directors. Other exit options include creditors' voluntary liquidation and dissolution of the company.

Upon the appointment of administrators to the company, the administrators take over control of the company's business and assets from the existing management and all of the directors' executive powers cease. The administrators will act as agents of the company.

The directors and existing management are still obliged to provide the administrators with whatever assistance the administrators require to fulfil their responsibilities. However, the directors and existing management will retain control of the company during the "interim moratorium" period triggered by the filing of an NoIA pending the determination of the administration appointment.

Following the appointment, the administrator must prepare a statement of how he or she proposes to conduct the administration, and distribute that statement to the company's members, creditors and the Registrar of Companies. This statement is known as the administrator's proposals. The administrator's proposals will include, among other things: (i) the current financial position of the company; (ii) what statutory purpose of administration the administrator intends to achieve; (iii) information regarding any asset disposals since the date of administration and the reasons for such disposals; (iv) expected distributions to creditors; and (v) the administrator's remuneration and pre-administration costs. Where an administrator has completed a sale of the business by pre-packaged administration, the administrator is also required to send information regarding the sale to creditors in accordance with the Statement of Insolvency Practice (SIP) 16. If there was no sale of the business by pre-packaged administration, the administrator will need to decide whether he or she should trade the company in administration in order to preserve value of the business and assets and to achieve the intended purpose of the administration.

The administrator must then seek approval of his or her proposals from the company's creditors using either a creditors' decision procedure or by deemed consent. In practice, administrators will typically seek approval of their proposals by deemed consent. However, if the company's creditors do not approve the proposals (with or without modifications), the administrator must then apply to court for approval. An administrator must return to the creditors for approval at various other stages of the administration, including the extension of the administration period or in relation to any increase to the administrators' remuneration.

There are no creditor approvals required. Typically, the company, a creditor, the directors or a QFCH can appoint administrators. However, the interim moratorium period may be disposed of if a QFCH who is on notice of the associated appointment of administrators consents to that appointment.

If the company is authorised or carried on a regulated activity under the Financial Services and Markets Act 2000, the written consent of the Financial Conduct Authority or Prudential Regulation Authority (whichever applies to the company) is required prior to filing an NoIA or notice of appointment (as applicable).

There are also a number of special administration regimes which are available to entities that operate in certain industries and modify the typical administration procedure. For example, companies that carry out a statutory function of a public nature such as water or energy companies or operate in sectors where there is a significant public interest such as financial services institutions will be subject to a special administration regime. The purpose of these modified administration regimes is to ensure that an administrator has the appropriate objectives and powers to achieve those objectives.

There are no restrictions on which debts can be included in an administration.

1.1.3 Part A1 moratorium (Moratorium)

The CIGA introduced a standalone moratorium procedure designed to allow financially distressed companies time to restructure or seek fresh investment free from enforcement action by certain types of creditors.

The Moratorium will last for an initial 20 business day period but can potentially be extended for longer periods with the relevant consents. During the Moratorium, the company enjoys a payment holiday from most of its non-financial services-related pre-Moratorium debts and is broadly protected from legal or enforcement action by unsecured and preferential creditors, including forfeiture proceedings by its landlords, without the court's permission. However, any "Moratorium debt", being a debt that falls due during or after the commencement of the Moratorium by reason of an obligation incurred during the Moratorium, remains payable during the Moratorium.

The Moratorium is a "debtor in possession" process that allows a company's directors and management to remain in control. However, creditor safeguards are provided in the form of the appointment of a "monitor", who is a licensed insolvency practitioner responsible for supervising the process. The monitor will monitor the company's affairs during the Moratorium period but will not have any direct power to control the conduct of the company during the Moratorium period. Where there is any uncertainty as to how the monitor should act, he or she can apply to the court for directions.

Companies (including overseas companies with a sufficient connection to the United Kingdom) and LLPs are eligible to apply for a Moratorium. However, there are some important financial services entities excluded from using the Moratorium, including insurers, banks, investment banks, investment firms, parties to capital markets arrangements and other financial services-related entities.

The Moratorium is similar to the moratorium that arises upon the appointment of an administrator, whereby, broadly: (i) no insolvency proceedings may be commenced; and (ii) no steps may be taken in relation to forfeiture, enforcement of security (other than in relation to financial collateral) or to commence or continue legal proceedings without court permission (other than certain employment-related claims).

Creditors with pre-Moratorium debts subject to a payment holiday are prevented from applying to the court for permission to take enforcement action. In addition, the Moratorium will not crystallise a floating charge and any chargee is prevented from causing the floating charge to crystallise. This correlates with the purpose of the Moratorium primarily as a rescue tool, and so has the effect of preserving a company's ability to dispose of its floating charge assets in the ordinary course of business during the Moratorium (or if the monitor consents and such disposal will support the rescue of the company as a going concern). However, the company will not be entitled to dispose of other charged property (including hire purchase property) unless the court sanctions the disposal, and any net proceeds of the disposal must be used to discharge the secured debt.

While the company is entitled to a payment holiday in respect of its pre-Moratorium debts, this excludes any debts falling due in relation to the following:

- the monitor's fees and expenses for the Moratorium period;
- any goods and services supplied during the Moratorium;

- rent payments for the Moratorium period;
- wages and salaries;
- redundancy payments; and
- debts or other liabilities arising under a contract or other instrument involving financial services.

The inclusion of the final category above is significant because it means that the company must continue to pay its banks and other lenders throughout the Moratorium, while trade creditors and landlords remain unpaid in respect of any arrears. While this may make sense in a small and medium sized enterprise (SME) context, where it is usually necessary to keep paying the lenders whose support is vital to any anticipated rescue plan, it is less obviously helpful in a large company scenario where, typically, the first step in most restructurings is to put in place a standstill among the financial creditors.

There are two qualifying conditions for a Moratorium, namely: (i) a directors' statement needs to be made that the company is or is likely to become unable to pay its debts as they fall due; and (ii) the monitor must confirm that it is likely the Moratorium would result in the rescue of the company as a going concern.

The initial period of the Moratorium is 20 business days, and may be extended without creditor consent once for a further 20 business days. Where creditor consent has been obtained, a Moratorium may be extended for a period of up to a year in total. For each extension, the two qualifying conditions mentioned above still need to be met. A Moratorium which is already in place can also be extended where a creditors’ voluntary arrangement (CVA) has been proposed or similarly at the convening hearing for a Scheme or RP to provide protection until the Scheme or RP is approved and sanctioned.

The monitor must bring the Moratorium to an end if he or she thinks that, among other things:

- the Moratorium is no longer likely to result in the rescue of the company as a going concern;
- the objective of the Moratorium has been achieved;
- he or she cannot carry out the relevant statutory functions because the directors have not provided the necessary information.

Where administration or liquidation occurs within 12 weeks of the end of a Moratorium, any unpaid Moratorium or pre-Moratorium debts not subject to a payment holiday are paid in priority to all other claims, except those subject to a fixed charge.

There are no creditor approvals required to implement a Moratorium. However, to the extent creditor consent is required and / or sought to extend a Moratorium, an amended form of qualifying decision procedure is required, whereby: (i) a majority (in value) of those voting is required to vote in favour of the proposed decision; and (ii) a majority (in number) of pre-moratorium unconnected creditors vote in favour of the proposed decision.

Where a Moratorium is commenced out of court, there is no express court approval required, and the Moratorium will commence at the time the relevant documents are filed at court. However, where an application is made to court to commence a Moratorium, the Moratorium will commence at the time the court order is granted. There are two qualifying conditions, namely: (i) a directors' statement needs to be made that the company is or is likely to become unable to pay its debts as they fall due; and (ii) the monitor must confirm that it is likely that the Moratorium would result in a rescue of the company as a going concern.

1.2 Informal restructuring procedures

1.2.1 Creditors' voluntary liquidation (CVL)

A CVL is a voluntarily procedure whereby an insolvent company takes steps to enter liquidation, usually as an alternative to the company being wound up by the court based on a winding up petition served by a creditor.

A CVL may be appropriate if the company has exhausted all alternative forms of informal or formal restructuring without success and is unlikely to be rescued. The business of the company will cease upon the appointment of a liquidator except as may be required for its beneficial winding up. In addition, all contracts of employment are typically terminated, except where a liquidator wishes to retain any employee during a period of post-appointment trading.

The CVL process is instigated by the company's board of directors. The directors are required to resolve to convene a meeting of the company's members, who will then vote to pass a special resolution for the company's winding up and appoint a liquidator. The liquidation is deemed to commence from the passing of the resolution.

Upon appointment, a liquidator is required to collect and realise the company's assets before distributing the proceeds to the company's creditors. In the event of a surplus being available, a distribution is then made to the company's members.

Similar to an administration, a liquidator has wide-reaching powers to fulfil his or functions and duties, including the power to do all such "things as may be necessary for winding up the company's affairs and distributing its assets".

However, unlike in an administration, there is no automatic moratorium on existing proceedings continuing or new proceedings being commenced when a company enters CVL. However, the court may exercise its discretion and order that any particular proceedings are stayed – typically following an application from the liquidator or a stakeholder.

The company's directors and management remain in control of the company until the resolution of the company's members is passed to appoint a liquidator, at which point all their powers cease. However, the directors and management will have a continuing responsibility to assist the liquidator with their enquiries.

As noted above, a CVL process is instigated by the company's board of directors. The directors are required to resolve to convene a general meeting of the company's members. A notice of general meeting is then sent to the company's members. The general meeting is held in accordance with the company's constitution. Typically, at least 14 days' notice must be given to members, but if more than 90% of members consent to short notice, the meeting may be held sooner.

The members are then required to vote to pass a special resolution for the company's winding up and nominate an insolvency practitioner to act as liquidator. The liquidation is deemed to commence from the passing of the resolution.

Where there are perishable assets, assets at risk or it is in the public interest, there is also the ability to appoint a provisional liquidator with limited powers to protect and preserve value in those assets.

However, in the intervening period between the directors' resolution to convene a general meeting and the general meeting taking place, notice is required to be given to any QFCH. Upon giving notice to the QFCH, the special resolution may be passed following the expiry of five business days (beginning on the day the notice was issued) or earlier if the QFCH has consented in writing to the passing of the resolution.

Upon the members passing the resolution for a voluntary winding up, the directors must produce a statement of affairs which outlines the assets available for realisation and available for distribution and provide a notice to the creditors of the company seeking their decision on the nomination of a liquidator. The statement of affairs may accompany the notice or follow separately but, in any event,

it must be sent to creditors within seven days of the passing of the resolution to wind up the company and be received no later than the business day before the "decision date". The decision date must be no earlier than three business days after the notice is delivered and no later than 14 days after the resolution to wind up the company was passed.

This decision on the nomination of a liquidator may be made by the deemed consent procedure or by a virtual meeting. If a deemed consent route is used, then creditors do not need to provide any form of acknowledgement that the person nominated by the company's members takes office as liquidator.

The CVL process and liquidator appointment is effectively approved by the company's members and ratified by the creditors save for any formal meeting request (see above).

On the basis that a CVL is typically a terminal process, there are no restrictions on the types of debts, liabilities or claims that can be captured under the CVL process.

1.2.2 Company voluntary arrangement (CVA)

A CVA is a formal procedure that aims to help a company address its financial difficulties by entering into a binding arrangement with its creditors.

A CVA is an arrangement between the company proposing the CVA and its non-preferential unsecured creditors to repay them over a period of time (typically three to five years). While relatively uncommon, secured and preferential creditors can also be compromised during a CVA, but they must provide their express consent.

The company can continue to trade during the CVA and the directors are subject to their usual duties throughout this period, but the company must meet its ongoing trading liabilities as they fall due. This is an obligation on the directors and not the insolvency practitioner acting as supervisor (the CVA Supervisor), who is only responsible for overseeing the implementation of the CVA.

The procedure is available to any company registered in England or Wales. It enables the company to reduce its debt levels and improve its cashflows by coming to an arrangement with its creditors.

Usually, the company will make an agreed, affordable monthly payment to the CVA Supervisor from future profits and / or asset sales. The CVA can also involve a one-off introduction of funding from an external source, such as a shareholder or lender. The CVA Supervisor will distribute the money on a *pari passu* basis among the creditors bound by the arrangement.

The amount paid over the agreed term can vary, from repayment in full to a percentage of the debt. Upon successful completion of the CVA, any shortfall in the amounts owed to those creditors bound by the arrangement will be written off.

With the flexibility of CVAs, they are commonly used to modify or terminate existing contractual obligations. This is often seen with rental obligations, particularly in the retail sector, including a reduction in future rent payments or even closure of certain unprofitable premises. However, a CVA cannot vary or remove a landlord's right to forfeit a lease or other proprietary remedies.

With any CVA proposal, if: (i) approved by 75% in value of unsecured creditors who respond to the decision procedure; and (ii) it is not opposed by more than 50% of unconnected creditors, the CVA will be binding upon the entire body of "non-preferential unsecured" creditors. The CVA does not, however, bind secured or preferential creditors, who retain the same rights as before the CVA was approved. Secured creditors can, if appropriate, seek to enforce their security, albeit typically conversations will have been held with the secured creditor before the proposal is issued.

The process from commencement to approval of the CVA can take between six to eight weeks to complete, during which the company has no protection from its creditors. There is no automatic statutory moratorium in a CVA but an application for a Moratorium can be made, if necessary, under the CIGA (although this is rarely utilised in practice).

The existing management team retains control of the company throughout the CVA and is responsible for ensuring that the company adheres to the terms of the CVA. However, a proposal for a CVA should nominate an insolvency practitioner to supervise its implementation and report to creditors.

To implement a CVA, the directors (often with legal and / or professional assistance) are required to put forward a proposal to the proposed CVA Supervisor (in their capacity as Nominee).

The Nominee, who must be an insolvency practitioner, then has an obligation to conduct an independent review of the proposal and report to the court on: (i) the suitability and viability of the proposal, giving consideration to whether any solvent options are available; (ii) whether a CVA provides a better outcome to the company's creditors than other insolvency options; and (iii) whether it is fair and reasonable.

Ultimately, the Nominee must give an opinion as to whether he or she believes the CVA has a reasonable prospect of being approved and being implemented.

If the Nominee considers that the proposal has a reasonable prospect of approval and implementation, he or she provides a copy of the proposal to the creditors and members of the company and seeks their approval of the CVA.

A CVA proposal can also be put forward by an administrator as an exit route from administration, or by a liquidator (though unlikely in practice), and in these scenarios the officeholder (if acting as Nominee) would seek a decision of the creditors and members without the need to seek an independent review of a Nominee and report to the court.

A decision of the creditors must be conducted via an appropriate decision procedure, being either a virtual meeting or decision by correspondence and the Nominee would generally conduct and / or chair this decision process.

The decision date for the decision procedure of creditors must be no later than 28 days after the filing of the Nominee's report at court. A decision of the company's creditors must be made prior to a decision of the members but can be (and often is) on the same day.

Modifications can be put forward by creditors when considering the proposal. These proposed modifications are then voted upon by creditors. It is not a statutory requirement for directors to consent to the modifications, but under SIP 3.2, the Nominee should report his or her view of any proposed modifications, which the directors may be required to implement if approved.

Upon approval by creditors, the Nominee becomes the CVA Supervisor and the terms of the CVA become legally binding.

A simple majority of shareholders need to agree the proposal at the shareholders' meeting for the CVA to go ahead.

As noted, there must be a vote of creditors of at least 75% in favour of the CVA (by value of debt), and this includes any votes by proxy or post. A second vote is then taken without "connected" creditor participation, and as long as 50% or more vote for acceptance of the CVA, it will be passed.

Secured creditors cannot vote on a CVA, save to the extent their debt is unsecured or where a secured creditor values their security and participates with the residual unsecured balance. This effectively means that debt owed to secured creditors cannot be compromised by a CVA and must be dealt with by direct negotiation between the company and the secured creditor or remain whole. Likewise with preferential creditors, their debt must not be compromised and must be paid in accordance with the ordinary waterfall, unless their expressly consent to an alternative (which would be unusual). All other company debts can be compromised under a CVA.

Once approved, the CVA binds all the non-preferential unsecured creditors of a company who were entitled to vote on the CVA proposal. This means that a CVA binds:

- creditors who voted against the CVA;
- creditors who received notice of the CVA proposal but who did not vote; and
- creditors who would have been entitled to vote but did not receive notice of the CVA proposal, despite being entitled to be notified of it.

2. Restructuring of ESG-related liabilities

There is no single, overarching piece of ESG legislation or regulation in the United Kingdom. The ESG regime comprises an array of domestic and EU-derived laws and regulations, including:

- the UK Corporate Governance Code 2018;
- the directors' duties set out in the Companies Act 2006;
- the Listing Rules, the Disclosure Guidance and the Transparency Rules;
- the UK Stewardship Code 2020;
- the Large and Medium-Sized Companies and Groups (Accounts and Reports) Regulations 2008;
- the Climate Change Act 2008;
- the Bribery Act 2010;
- the Corporate Manslaughter and Corporate Homicide Act 2007;
- the Equality Act 2010; and
- the Modern Slavery Act 2015.

It can therefore be difficult for United Kingdom companies to understand precisely how to interpret the term "ESG".

The term was originally coined in a 2004 report titled "Who Cares Wins" by then UN Secretary General Kofi Annan. This report was the product of a UN initiative to integrate sustainability into capital markets. Under the mandate of the UN Global Compact (UNGC) and with support from the International Finance Corporation (IFC), Mr Annan brought together the CEOs of several important financial institutions to essentially deliberate and conceptualise a common baseline for ESG investing. The report argued that embedding ESG factors into capital markets was not only sensible business but would also enable better outcomes for society and create more sustainable markets.

Concurrently with the production of the Who Cares Wins report, the UN Environment Programme's Finance Initiative (UNEP FI) published the Freshfields report. The Freshfields report made the case that because ESG issues are relevant to financial valuation, they fall within core fiduciary duties. These two reports formed the backbone for the launch of the Principles for Responsible Investment (PRI) at the New York Stock Exchange in 2006 and the launch of the Sustainable Stock Exchange Initiative (SSEI) the following year (2007).

More recently, the Task Force on Climate-Related Financial Disclosure (TCFD) was established in 2015 by G20 Finance Ministers and Central Bank Governors within the Financial Stability Board (FSB) and its chair at the time, Mark Carney, then Governor of the Bank of England. The FSB is an international body that monitors and makes recommendations about the global financial system. The TCFD is a framework to operationalise the Paris Agreement's 1.5°C target for the business

world. It is expected to propel development in disclosures by enabling transparency about realistic scenario planning, particularly on the physical impacts of climate change, including for investors.

Specifically in the United Kingdom, the Government confirmed in October 2021, in the run-up to COP 26 in Glasgow, that it would introduce the first mandatory TCFD-aligned reporting requirements for the private sector from 6 April 2022. The United Kingdom Government also produced an updated roadmap for sustainability in 2021, entitled "Greening Finance: A Roadmap to Sustainable Investing".

The Financial Conduct Authority (FCA) and the Prudential Regulatory Authority (PRA) have built on the themes of the roadmap to develop the Sustainability Disclosure Requirements (SDR) and investment labels. The SDR presents the United Kingdom with an "opportunity to build a robust regulatory framework to empower consumers, minimise greenwashing and promote sustainable finance". The SDR will mandate the information that sustainable funds will have to disclose in the United Kingdom and also includes three labels to represent different types of ESG / sustainability execution: Sustainable Focus, Sustainable Improvers, and Sustainable Impact. It is similar to what the Sustainable Finance Disclosure Regulation (SFDR) is already doing in the European Union. In December 2022, the FCA opened consultation on the SDR to allow stakeholders to shape a common agreement on the pertinent ESG issues for United Kingdom businesses.

In general, there may be overlap between some ESG issues. However, the categorisation of these issues under E, S, or G is largely dependant on the specific properties of the business and its key stakeholders, including investors and respective regulatory authority. In most cases it is understood that:

- environmental factors are those that pertain to the natural world and the conservation of it. These include the use of, and interaction with, renewable and non-renewable resources;
- social factors are those that affect human life and relationships. This includes the management of human capital, non-human animals, local communities and clients; and
- governance factors refer to the norms and principles for running a company. They have to do with issues linked to countries and / or jurisdictions, or that are common practice in an industry, as well as in the interest of broader stakeholder groups.

Below is an example of more specific ESG factors:

Environmental	Social	Governance
▪ Climate change and carbon emissions	▪ Customer satisfaction	▪ Board composition
▪ Air and water pollution	▪ Data protection and privacy	▪ Audit committee structure
▪ Biodiversity	▪ Gender and diversity	▪ Accounting standards compliance
▪ Deforestation	▪ Employee engagement	▪ Bribery and corruption
▪ Energy efficiency	▪ Community relations	▪ Executive compensation
▪ Waste management	▪ Human rights	▪ Lobbying
▪ Water scarcity	▪ Labour standards	▪ Political contributions
		▪ Whistle blower schemes
		▪ Litigation risk

ESG factors can often be measured (e.g. what the employee turnover for a company is), but it can be difficult to directly assign them a monetary value (e.g. what the cost of employee turnover for a company is). All in all, ESG acknowledges the versatile inter-relationship between environmental, social and governance issues and investment.

2.1 Environmental (E): restructuring environmental liabilities

2.1.1 Types of environmental liabilities

With climate change finally being afforded critical consideration on the global agenda, in 2019 the United Kingdom became the first G7 nation to enact legislation aimed at reducing its emissions to

net zero by 2050. The United Kingdom continues to develop a reactive and proactive framework designed to ensure that environmental measures, accountability and governance are interweaved into the mindsets and operations of businesses across the economy. This includes, for example, very detailed rules for listed businesses and some FCA regulated businesses around environmental disclosures and forthcoming rules on financial product labelling to tackle "greenwashing".

A range of liabilities can arise as a result of damage to the environment. Such damage will typically encompass air pollution, water pollution and /or land contamination.

The liabilities that may arise as a result of such damage include: (i) contractual liabilities; (ii) civil liabilities; (iii) regulatory liabilities; and (iv) remedial liabilities. However, the specific types of environmental liabilities and the level of regulation a company may be subject to in the United Kingdom is determined by a number of factors including:

- the sector which the company operates in;
- the company's business operations and underlying activities;
- the assets it holds; and
- its key stakeholders (i.e., its shareholders, investors, lenders, employees, counterparties and customers).

Each of these factors contributes to the regulatory and legal regimes in which the business operates and the impact a company has on the environment and thereby the types of liability a company may be exposed to. The rules are often complex – making the cost of compliance considerable and increasing the risk of (inadvertent) breach. For example, a company in the real estate sector which owns and operates numerous mixed-use buildings will need to consider (among other things): energy efficiency and consumption, sustainable materials, waste management, tenants' business operations, water pollution, land contamination and nuisance. Turning to its key stakeholders, it will also need to take into consideration any environmental-related performance indicators put in place by its own management together with investors and lenders. Companies operating within energy intensive industries, aviation or the power generation sector will be subject to the obligations set out in the UK Emissions Trading Scheme (UK ETS), which regulates greenhouse gas emissions-related activities.

Where a breach has occurred, many environmental offences in England and Wales are prosecuted by the appropriate regulator in the criminal courts with penalties normally comprising fines and / or imprisonment. Depending on the nature and underlying causes of the breaches which have occurred, in addition to taking action against the company, regulators such as the Environment Agency or the FCA have scope to take action against the company's directors (for example, when there has been a breach of fiduciary obligations owed towards the company). Civil sanctions may also be imposed in respect of certain environmental offences and include monetary penalties, stop notices, discretionary requirements and enforcement undertakings (the latter being the most often used and as an alternative to criminal proceedings). Environmental regime breaches can trigger remediation obligations such as clean-up (in the pollution or contamination context) or rectification following the issuance of an enforcement notice. Private environmental damages claims may be brought, such as claims for nuisance, negligence and fraudulent misrepresentation.

For example, May 2022 marked the settlement of the long-standing UK Volkswagen NOx Emissions Group Litigation, in which Volkswagen is set to pay out £193m to circa 90,000 drivers across England and Wales. Settlement was reached ahead of a six month trial anticipated to take place in early 2023 and follows a High Court preliminary issues decision in which it was found that Volkswagen had used so-called defeat devices in certain diesel car models in an attempt to circumvent clean air regulations. This case highlights the vast scope for claims to be brought and for companies to be called into question.

2.1.2 *Priority given to environmental liabilities*

Environmental liabilities will typically rank as an unsecured claim in an administration or liquidation. However, it is possible that certain environmental liabilities may rank as an expense in the administration or liquidation.

There have been two decisions[1] of the Scottish courts concerning compliance with a notice served under section 59 of the Environmental Protection Act 1990 which required the removal of waste. In each case, the court held that the costs of complying with the section 59 notices were an expense of the liquidation, which would be priority claims. While the outcome of these decisions would not apply directly to insolvency practitioners appointed over English companies, the English courts would likely consider the arguments raised in these cases if required to do so.

2.1.3 *Disclaimer of environmental obligations*

In an insolvency, any officeholder will seek to limit their exposure to risk of environmental liabilities. This may include placing the relevant company into liquidation as soon as possible to allow the liquidation the option to disclaim any onerous contracts or property pursuant to section 178 of the Insolvency Act 1986. There has been case law[2] which has determined that waste management licences (which are now a form of environmental permit following the current environmental permitting regime coming into force on 6 April 2008) can be disclaimed as onerous property.

However, the ability to disclaim environmental contracts is limited – as certain categories of contract are expressly excluded from the regime by statute.

2.2 Social (S): restructuring health or safety-related liabilities

2.2.1 *Types of health and safety-related liabilities*

Health and safety legislation in the United Kingdom is primarily dictated by the Health and Safety at Work etc Act 1974 together with various other pieces of legislation, and forms just one of the key considerations in the multifaceted "social" compendium of ESG. While health and safety legislation is well-established in the United Kingdom, the promotion of social awareness and the establishment of healthy social constructs within business environments is an evolving area, from the introduction of the Modern Slavery Act in 2015 to gender pay gap reporting and businesses taking real action to ensure diversity within workplaces.

In relation to health and safety, it is the nature of a company's business and the activities it, its directors and employees engage in, the severity of the risks imposed in conducting such activities and other indicators including the number of employees – which are all key determinative factors when assessing which health and safety obligations a company, director or employee owes. Workplace health and safety requirements require employers to:

- conduct risk assessments;
- provide an adequate working environment (covering ventilation, heating, lighting, workstations, seating and welfare facilities); and
- provide protective clothing and equipment.

Further, there are specific regulations in place which deal with hazardous materials, including the Controls of Asbestos Regulations 2012, which deals with exposure to asbestos.

Certain health and safety breaches (including failing to produce a written health and safety policy and properly recording significant findings in risk assessments) constitute criminal offences and expose a company to a range of sanctions, including improvement notices, prohibition notices or criminal prosecution under the Health and Safety (Offences) Act 2008. Further, directors, managers

[1] *Doonin Plant Limited (in Liquidation)* [2018] CSOH 89 and *Dawson International plc* [2018] CSOH 52.

[2] *Re Celtic Extraction Ltd (in liquidation)* [2001] Ch 475.

or company secretaries may also be held individually liable in instances where the affiliated company is guilty of a health and safety offence or where its commission is in some way attributable to the individual's own actions, consent, connivance or negligence.

While prosecutions are rare, companies can also be convicted of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007, as was the case in January 2022, when Deco-Pak (a garden supplies company) was found guilty of the same following a fatal incident caused by machinery used to bag up stones and other gardening paraphernalia.

2.2.2 Treatment of health and safety-related liabilities

There is a statutory order of priority in English insolvencies which gives preferential treatment to some types of unsecured liabilities (for example, certain unpaid wages of employees and certain taxes). However, there is no specific priority afforded to health and safety-related liabilities. If the relevant claimant of such liability was granted a valid security interest in the assets of the debtor company, this secured interest would rank in priority to unsecured claims depending on the nature of the assets secured and whether the security was fixed or floating. Otherwise, health and safety-related liabilities of an insolvent company will rank as an unsecured claim.

The treatment of health and safety-related liabilities, although fully considered by the insolvency practitioners in the lead up to and immediately after their appointment, may present fewer issues if, for example, the business and assets are sold by way of pre-packaged administration. However, particular care should be taken when there is an intention to trade or otherwise retain the business and assets for a period post-appointment given the insolvency practitioner's role as agent of the company.

2.3 Governance (G): third party releases in favour of directors and officers of the company

Releases of third party liabilities are common in English restructurings, in particular Schemes and RPs. A common example is the release of liabilities owed by a guarantor of the principal debtor which has proposed a Scheme or a RP. If the guarantee liability was not released, this would jeopardise the implementation of the debtor company's restructuring, as the guarantor would have a cross-claim against the debtor company if a demand was subsequently made by a creditor under the guarantee.

It is also common for directors, officers and advisers of a company launching a Scheme or a RP to obtain a release of liabilities in relation to preparation and negotiation of the Scheme or RP and the wider restructuring implemented by the Scheme or RP. It would be unusual for such releases to extend to liabilities unrelated to the restructuring and, even if included, the release would only be binding on those stakeholders which were bound by the Scheme or RP (which may not necessarily include all such stakeholders).

However, there is no mechanism available to release directors and officers of a company from any claims by an insolvency practitioner arising as a result of:

- an antecedent transaction (e.g. a transaction at an undervalue or preference);
- misfeasance;
- fraudulent trading; or
- wrongful trading following the administration or liquidation of a company.

3. Protection of stakeholders' interests

3.1 Environmental (E): influence by environmental protection authorities or environmental advocacy groups in a restructuring

In a restructuring or insolvency of a company where environmental liabilities are a possible factor, early contact should be made with the Environment Agency, Natural England, the Marine

Management Organisation, the Health and Safety Executive and / or the relevant the local planning authority, as applicable.

Where a sale of the business and assets of the company is envisaged by an insolvency practitioner, they will be required to liaise with the Environment Agency to ensure the application to transfer any environmental permits is completed property and promptly. The insolvency practitioner will also be required to liaise with the Environment Agency if: (i) an environmental permit is required to continue to trade the business; or (ii) a surrender of any environmental permits is envisaged to ensure that any surrender reports are completed properly and that any improvement conditions stipulated as a condition of the surrender are satisfied.

3.1.1 Approving a restructuring plan

This is addressed in section 1 above.

3.1.2 Discretion to consider wider public interest concerns

It is conceivable that, to the extent any environmental liabilities are proposed to be compromised by a RP or Scheme, the relevant environmental agency or authority may appear at the Convening Hearing or Sanction Hearing of a RP or Scheme to argue that the terms of such RP or Scheme are unfair.

3.1.3 Influence of environmental protection authorities or environmental advocacy groups in a restructuring

Any influence by an environmental protection authority or environmental advocacy group in a RP or Scheme is limited to the extent that it is expressly raised by a stakeholder in such proceedings. In a RP or Scheme, the judges will look at the merits and fairness of the proposed RP or Scheme but not the commercial aspects of it (and therefore, by extension, any public policy considerations).

3.2 Social (S): influence by labour authorities, unions or employee / worker advocacy groups in a restructuring

3.2.1 Approving a restructuring plan

This is addressed in section 1 above.

3.2.2 Discretion to consider wider public interest concerns

It is conceivable that, to the extent any employee liabilities are proposed to be compromised by a RP or Scheme, the relevant labour authority, union or employee / worker advocacy group may appear at the Convening Hearing or Sanction Hearing of a RP or Scheme to argue that the terms of such RP or Scheme are unfair.

3.2.3 Protection of employee rights

In the context of employment, the “S” in ESG generally refers to how employers interact with their employees, customers, supply chain and the community. This includes how employers include employees in their decision-making processes. The potential damage to a company’s reputation by not engaging properly with employees was highlighted clearly when P&O Ferries dismissed nearly 800 employees during an on-line meeting and then replaced them with temporary agency staff. The backlash from employees, trade unions, the general public and the United Kingdom Government dominated the news cycles for several weeks and has had a long-term impact on the company’s standing.

It is important to recognise that while ESG is a significant factor in engaging the workforce, ESG does not change existing employment law in respect of an employer’s obligation to provide information and to consult with employees and / or employee representatives. The obligations to provide information and to consult are set out in the relevant legislation and this is described in

more detail below. However, it should be noted that the relevant legislation does not include any obligations for an agreement to be actually concluded with the employees or their representatives.

- *Collective Redundancies (Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA))*

  If a restructuring plan is likely to result in the redundancies of 20 or more employees at one establishment (an establishment can be wider than a single workplace but may not include the entire organisation) within a period of 90 days or less, the employer must consult with a recognised trade union and / or employee representatives (section 188 of the TULRCA). In addition to collective consultation, the employer must also:

  - consult individually with potentially redundant employees; and
  - notify the Department for Business, Energy and Industrial Strategy (BEIS). Failure to notify the BEIS is a criminal offence.

  The obligation to consult under the TULRCA must "begin in good time" and acts as a standstill period in which the proposed dismissals cannot take effect once consultation has started. Consultation must begin at least 45 days before the first dismissal takes effect where an employer proposes to dismiss more than 100 proposed redundancies and consultation must begin at least 30 days before the first dismissal takes effect where the proposal relates to fewer than 100 proposed redundancies.

  The consultation must be about ways of:

  - avoiding the dismissals;
  - reducing the numbers of employees to be dismissed; and
  - mitigating the consequences of the dismissals and be conducted with a view to reaching agreement on these matters.

  A breach of the obligation to consult under the TULRCA can result in a substantial liability to the employer as it may result in an award of up to 90 days' actual gross pay for each affected employee. The protective award is an order that the employer shall pay the employees for a "protected period". The protective award is designed to punish the employer for not complying with its obligations to consult under the TULRCA and receipt of wages during the protected period will not reduce an employee's entitlement under the protective award. However, while there is an obligation to consult with a view to reaching an agreement, there is no obligation to actually reach an agreement.

- *The Information and Consultation of Employees Regulations 2004 (ICE Regulations)*

  In any restructuring, consideration will need to be given as to whether an information and consultation agreement (I&C Agreement) has been put in place under the ICE Regulations. The ICE Regulations apply to organisations that have 50 or more employees and have a registered or head office or principal place of business in Great Britain. The I&C Agreement will set out the procedures that the employer needs to follow in providing information and consulting employees on important economic and employment-related matters.

  Disputes in respect of the I&C Agreement can be taken to the Central Arbitration Committee (CAC) within three months of the disputed event. If a complaint is upheld, then:

  - the CAC may order that the situation is rectified by a specified date. BEIS guidance states that CAC orders may be enforced through the courts. However, the CAC cannot: (i) alter, undo, delay or prevent any action that an employer has undertaken or proposes to undertake (regulation 22(9)); or (ii) issue an order that has the effect of preventing an employer from implementing a business decision or arrangement, or of requiring the employer to change the decision or arrangement (regulation 9(9)); and

- the employee may apply for a penalty to be imposed against the employer by the Employment Appeal Tribunal (EAT) and the penalty is payable to the Secretary of State. The maximum penalty that can be awarded is £75,000.

- *Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)*

  If the restructuring arrangements involve a transfer of employees from one employer to another under TUPE (a relevant transfer), both the buyer (transferee) and seller (transferor) must inform and (if applicable) also consult representatives of their employees who will be affected by the transfer. There is a list of statutory information that must be provided to the representatives in writing. If an employer envisages measures will be taken in relation to affected employees then the employer that envisages such measures has an obligation to consult the employee representatives about them.

  There are no exceptions for insolvent businesses to avoid the obligations to inform and consult. The insolvent transferor may try the defence that "special circumstances" make information and consultation not reasonably practicable (regulation 13(9) of the TUPE). However, this defence is likely to be narrowly construed.

  The obligation is to provide the statutory information referred to above and, if required in the particular circumstances, to consult about the relevant measures with a view to reaching agreement on them, but there is no obligation to actually conclude an agreement. If the employer fails to provide the required information and / or to consult (if applicable), a claim may be brought by a recognised trade union, elected employee representative or affected employee (regulation 15 of the TUPE). The employment tribunal can award compensation payable to the relevant affected employees of up to 13 weeks' pay for each affected employee.

- *Changes to pensions*

  If the restructuring arrangements involve an organisation that has more than 50 employees in the United Kingdom and the employer is proposing changes to occupational or personal pension schemes where there are direct payment arrangements in place that enable the employer to make contributions for its employees then the employer is required to consult with both active and prospective scheme members or their representatives (Occupational and Personal Pensions Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006).

  The consultation process should be for a minimum of 60 days (regulation 15(4)) and the parties are under a duty to work in a spirit of cooperation, taking into account the interests of employer and employees (regulation 15(2)). The Pensions Regulator can enforce the consultation requirements and may impose a penalty of up to (i) £5,000 for an individual; or (ii) £50,000 for a company, if the employer has failed to comply with the duty to consult without a reasonable excuse. However, the Pensions Regulator does not have the power to reverse a change that the employer has made without meeting the consultation requirements.

- *Health and safety*

  If a restructuring involves changes to the way in which an organisation operates (e.g. changes to premises, staffing ratios, training, introduction of new technologies, etc), there may be health and safety implications that need to be considered.

  Employers must consult with employees on health and safety matters under: (i) the Safety Representatives and Safety Committee Regulations 1977 (which applies where the employer recognises a trade union); and (ii) the Health and Safety (Consultation with Employees) Regulations 1996 (which applies when there is no recognised trade union).

  There are significant implications for failing to comply with obligations under the Health and Safety at Work etc Act 1974 (HSWA). On summary conviction in the Magistrates Court, the

maximum fine is unlimited and the maximum prison sentence is six months. On conviction in the Crown Court, the fine is unlimited or a two year prison sentence.

- *Takeovers*

  If the restructuring involves a public offer to purchase all the shares of a listed company, the City Code on Takeovers and Mergers (Takeover Code) will apply. The Takeover Code requires that the bidder and target companies provide relevant information in respect of the offer to employee representatives and / or employees. The information should be provided at the same time as posting the offer document to shareholders.

  There is no obligation to consult employees under the Takeover Code. However, any I&C Agreement will need to be checked as a consultation may be required under the terms of the I&C Agreement.

  In the event of a breach of the employees right to be informed, the breach would be dealt with by the Takeover Panel. The Takeover Panel will determine the consequences depending on the nature of the breach.

3.3 Governance (G): board / management conflicts addressed in a restructuring

English company law requires directors of companies to avoid conflicts of interests in connection with their fiduciary duties owed to the relevant company. Section 177 of the Companies Act 2006 also provides that, if a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he or she must declare the nature and extent of that interest to the other directors.

In a restructuring of a private equity portfolio company, conflicts can sometimes arise where the sponsor of an operational company being restructured has appointed directors on that company to represent its interests. Often sponsors only appoint directors on holding companies at the top of the corporate structure and executive management team members are appointed directors of the operational companies.

However, where there are shareholder appointees at the level in the corporate structure where the restructuring is being implemented, there is a risk of conflict (e.g., where the sponsor is considering injecting additional funding into the group in exchange for a debt write-off). In the case of conflict, the practical solution is sometimes for the board to form a sub-committee of independent directors and delegate the negotiation of the terms of the restructuring with the company's stakeholders to that sub-committee. It is not unusual to see such sub-committees formed during a restructuring. Early formation of such a sub-committee can allow the independent directors to focus on delivering the desired restructuring outcome. The sub-committee members may agree a formal or informal framework for its conduct.

Conflicts can also arise where management incentive plans (MIPs) are proposed as part of a restructuring. In a restructuring it is commonplace for directors of the relevant company to benefit from MIP and creditors are often willing to agree to MIPs where they are perceived to assist in achieving successful performance of the company post-restructuring. The management would typically be separately advised and would negotiate terms of the MIP directly with the creditors (assuming that the shareholders had no economic interest in the company post restructuring).

4. "Soft law" framework

4.1 Environmental (E): industry guidelines and / or best practices that are prescribed for the protection of the environment in a restructuring

The United Kingdom's environmental regimes are largely embodied in statute and at common law rather than in industry guidelines.

However, in terms of best practices, it is recommended that in any restructuring or insolvency where environmental issues are a concern, insolvency practitioners: (i) carry out effective due

diligence in respect of any potential environmental issues or liabilities; and (ii) engage with the Environment Agency or other relevant environmental agency or authority as soon as possible.

4.2 Social (S): industry guidelines and / or best practices that are prescribed for the protection of employee rights in a restructuring

There are a limited number of "soft law" instruments in the United Kingdom that are applicable in protecting employees' interests in a restructuring context. Some of the most relevant examples include:

- 2018 UK Corporate Governance Code (2018 Code)

  The 2018 Code is not law and compliance is not compulsory. The Financial Reporting Council (FRC) asks that companies either follow the 2018 Code or explain why they do not. Even though the 2018 Code only applies to premium listed companies, many smaller companies follow the 2018 Code for best practice.

  Provision 5 of the 2018 Code states that the board should understand the views of the company's key stakeholders, including employees, and should describe in the annual report how the interests of these stakeholders and the matters set out in section 172 of the Companies Act 2006 have been considered in board discussions and decision-making.

  Provision 5 also states that for engagement with the workforce, one or a combination of three workforce engagement methods should be used:

  - a director appointed from the workforce;
  - a formal workforce advisory panel; and / or
  - a designated non-executive director (NED).

- Wates Corporate Governance Principles for Large Private Companies and supporting guidance (Wates Principles)

  The 2018 Code was complemented by the Wates Principles for the governance of large private companies. It is hoped that a wider range of companies than those required to report under the new legislative requirements (section 414CZA of the Companies Act 2006 (CA 2006) requires certain companies to include a section 172 statement) will use the Wates Principles. The Wates Principles are intended to be flexible and high-level. The guidance is not intended to be a set of requirements but to assist companies in understanding how to apply the principles. Principle 6 (stakeholder relationships and engagement) of the Wates Principles includes a section on workface engagement that encourages employers to:

  - consider the impact to stakeholders that the company's activities may have, which could include environmental impacts;
  - engage with stakeholders;
  - ensure that boards should have the facility to receive feedback from discussion with stakeholders; and
  - develop both informal and formal channels to enable meaningful two-way dialogue. This may include engagement with trade unions or employee groups.

- Living wage

  There has been an increase on the focus of the social impact of low pay. In a restructuring it may need to be determined whether the employer is an accredited Living Wage Employer. The living wage is set by the Living Wage Foundation and provides for a voluntary minimum hourly rate of pay calculated according to the basic cost of living. About half of FTSE 100

companies are accredited Living Wage Employers along with about 10,000 smaller companies. If a restructuring proposed to reduce employee wages below the Living Wage, the employer would need to consider both the contractual and reputational issues associated with no longer being an accredited Living Wage Employer.

4.3 Governance (G): industry guidelines or codes of conduct relating to the avoidance of conflicts of interests that restructuring professionals are subject to

Insolvency practitioners are subject to the "Insolvency Code of Ethics", which aims to help insolvency practitioners meet their professional and ethical obligations.

The Insolvency Code of Ethics provides five fundamental principles for ethics for insolvency practitioners:

- integrity – to be straightforward and honest in all professional and business relationships;
- objectivity – not to compromise professional and business judgments because of bias, conflict of interest or undue influence of others;
- professional competence and due care – to: (i) attain and maintain professional knowledge and skill at the level required to ensure that a client or employing organisation receives competent professional service, based on current technical and professional standards and relevant legislation; and (ii) act diligently and in accordance with applicable technical and professional standards;
- confidentiality – to respect the confidentiality of information acquired as a result of professional and business relationships; and
- professional behaviour – to comply with relevant laws and regulations and avoid any conduct that the insolvency practitioner knows or should know might discredit the profession.

Paragraph 2310 of the Insolvency Code of Ethics provides that insolvency practitioners are required to comply with the fundamental principles and apply the conceptual framework to identify, evaluate and address threats. It also provides that provides that a conflict of interest creates threats to compliance with the principle of objectivity and might create threats to compliance with other fundamental principles.

Paragraph 2311 provides that an insolvency practitioner shall not allow a conflict of interest to compromise professional or business judgment and, where a threat to the principle of objectivity or other fundamental principles cannot be eliminated, an insolvency practitioner shall not accept the proposed insolvency appointment.

5. ESG in financing

5.1 ESG-linked loans, bonds or investments

The appetite for ESG finance has experienced dramatic growth since the first green bond was issued in 2007. Almost EUR 750 billion of ESG bonds and loans were issued in Europe in 2021,[3] with the global ESG finance market estimated to be valued in the region of US $2 trillion.

ESG finance is intended to lead to increased investment in sustainable activities. While there is no single definition for ESG finance, it is described by the UN PRI as investment approaches that "seek to combine financial return with a moral or ethical return". A wide range of ESG finance products have been developed and these include green bonds and loans, social bonds and loans, sustainability-linked bonds and loans and sustainability bonds.

[3] Association for Financial Markets in Europe (AFME).

5.1.1 Green bonds and loans

The most established and by far the largest portion of the ESG finance market to date is green bonds and loans. Voluntary but market-accepted guidelines for green bonds and loans are published and updated by the International Capital Market Association (ICMA) and the Loan Market Association (LMA). The ICMA's Green Bond Principles (GBP) defines green bonds as "any type of bond instrument where the proceeds or an equivalent amount will be exclusively applied to finance or re-finance, in part or in full, new and / or existing eligible green projects and which are aligned with the four core components of the GBP". Therefore, while the terms "green bonds" (or "green loans") are often used generically in the context of green and sustainable transactions, the terms should only be used in circumstances where the following four core components apply:

- use of proceeds – the proceeds (or an equivalent amount) are utilised to finance or refinance in part or in full new and / or existing eligible "green projects", being those that will promote progress on environmentally sustainable activities (e.g. infrastructure for clean energy, pollution prevention, procuring low carbon transport solutions, climate change adaptation, etc);
- process for evaluation and selection – outline the decision-making process followed to determine the eligibility of the green projects, including the type of projects the funds are meant to support, the criteria for assessing environmental benefits, and the environmental impact they expect the projects to produce. The processes for project evaluation and selection can be supplemented by a review by a third party;
- management of proceeds – net proceeds (or an equivalent amount) should be moved to a sub-portfolio or otherwise tracked by the issuer or borrower and attested to by a formal internal process that will be linked to the issuer's or borrower's lending and investment operations for projects; and
- reporting – companies should make and keep readily available up-to-date information on the use of proceeds allocation, and report this at least annually such as via newsletters, website updates or filed financial reports on the specific investments made from the green bond or loan proceeds, detailing (wherever possible with regards to confidentiality and / or competitive considerations) the specific projects and amounts invested along with the expected environmentally sustainable impact.

The offering circular for such green bond deals will generally include disclosure of the company's framework (or a summary of the framework) which reflects the four components, including the green projects in respect of which an "amount equal to" the net proceeds will be used. For example, an issuer of green bonds by may disclose in its offering circular that an amount equal to the net proceeds would be used to fund or refinance new or existing eligible green projects related to:

- clean transportation;
- pollution prevention and control;
- sustainable water management;
- renewable energy; and
- energy efficiency in alignment with the GBP.

5.1.2 Social bonds and loans

The core principles in respect of social bonds and loans mirror in large part the above principles. However, the main difference being that the proceeds in respect of social bonds and loans must be used to finance or refinance a "social project" (e.g. affordable housing, employment generation, food security and access to essential services).

5.1.3 Sustainability bonds and loans

Sustainability bonds mirror in large part the above principles for green and social bonds and loans. However, sustainability bonds and loans can be used for the financing or refinancing of a combination of both green and social projects.

5.1.4 Sustainability-linked bonds and sustainability-linked loans

Sustainability-linked bonds (SLBs) and sustainability-linked loans (SLLs) incentivise the issuer or borrower to improve its performance against certain forward-looking and pre-determined sustainability performance targets (SPTs). They are not conditional on the net proceeds being used for a specific, "green" purpose. In practice, this would typically mean that the pricing on the bond or loan is directly linked to the sustainability performance of the issuer or borrower.

As with green bonds and loans and social bonds and loans, the ICMA and the LMA have produced voluntary but market-accepted guidelines for SLBs and SLLs. The five core principles that apply SLBs and SLLs are:

- selection of one or more key performance indicators (KPIs) – the KPIs should be relevant, core and material to the company's overall business, as well as quantifiable and able to be externally verifiable and benchmarked;
- calibration of one or more SPTs per KPI – SPTs should be "ambitious" and reflect the company's ESG strategy (i.e. represent a material improvement in the respective KPI and be more than a business-as-usual trajectory);
- bond or loan terms – the financial or structural terms of the instrument will vary if the selected KPI(s) do not reach the SPT(s), most commonly that failing to achieve KPIs and / or SPTs will result in a step-up in the coupon or interest rate;
- reporting – the company's performance against KPIs and SPTs should be reported regularly, at least annually; and
- verification – independent and external verification in respect of the company's performance against KPIs and SPTs should be undertaken at least annually, such as by an auditor or an environmental consultant.

5.1.5 Restructuring implications

The precise implications in respect of a potential restructuring will be dependent on the terms of the relevant bond or loan documents. The legal documents should cover the obligations in respect of the core principles set out above and the consequences of breaching these obligations will be dependent on what the parties have agreed. While it is unlikely that there will be any events of default in respect of breaching any of the core principles (although this should of course be checked), the potential consequences could include: (i) a higher coupon or interest rate on a SLB or SLL which in turn will increase the cost of financing to the entity being restructured; and (ii) the closing off of any other ESG related financing routes if it is not able to comply with current obligations.

5.2 Financial institutions (banks and funds) and their commitment to achieve ESG targets

Financial institutions have shown their commitment to ESG through a range of voluntary industry initiatives that include:

- the International Finance Corporation's (IFC) Environmental and Social Performance Standards – these standards define IFC clients' responsibilities for managing their environmental and social risks. The IFC works with financial institutions to introduce environmental, social, and governance standards, as well as risk management to their lending practices;

- Equator Principles (project finance) – EP 1 (2003); current version EP 4 – the Equator Principles (EPs) are a set of voluntary guidelines which have been adopted by approximately 134 banks and other financial institutions across 38 countries. The EPs provide a framework for identifying, assessing, and managing the environmental and social risks of large infrastructure and industrial projects EPFIs finance using project financing and certain qualifying corporate loans;

- LMA / APLMA / LSTA Green Loan Principles (2018) – as described above, the Green Loan Principles (GLPs) comprise voluntary recommended guidelines, to be applied by market participants on a deal-by-deal basis depending on the underlying characteristics of the transaction, that seek to promote integrity in the development of the green loan market by clarifying the instances in which a loan may be categorised as "green". The GLPs build on and refer to the Green Bond Principles (GBPs) of the International Capital Market Association, with a view to promoting consistency across financial markets;

- UNEPFI Responsible Banking Principles (2019) – the UNEPFI was founded in 1992 as a means by which the United Nations and the global financial sector could work more closely together in developing a more sustainable world. It commits signatories to integrating environmental issues into all aspects of their operations and recommends that signatories report publicly on environmental issues. The UNEPFI Principles for Responsible Banking are a set of global voluntary guidelines for banks. They provide the framework for a sustainable banking system and help the industry to demonstrate how it makes a positive contribution to society. The framework comprises six principles, a document setting out the key steps for signatories, and a reporting and self-assessment template. The UNEPFI has published non-binding guidance to banks on measures to implement each principle;

- the TCFD (2015) – as noted above, the TCFD is advisory body set up by the G20 and the FSB to address concerns around insufficient disclosure of climate-related risks and opportunities for businesses. The TCFD published its final recommendations in June 2017, which are intended to apply to all companies with listed debt or equity in the G20, and additionally to asset managers and asset owners (recognising that these organisations are typically unlisted). In the United Kingdom, all premium listed companies were mandated to report their climate risk exposure in line with the TCFD's recommendations from 1 January 2021, and this will expand to all United Kingdom companies by 2025 (see more detail in section 5.3 below);

- the Task Force on Nature-Related Financial Disclosures (2020) – this is an international initiative that builds on a model developed by the TCFD. Its mission is to provide a framework for how organisations can address environmental risks and opportunities with the ultimate goal of channelling capital flows into positive action. The TNFD is developing an integrated risk management and disclosure framework for organisations to report and act on evolving nature-related risks and opportunities. The TNFD plans to release its final recommendations for the Framework in September 2023;

- the ICMA: Social Bond Principles (2020), Green Bond Principles (2018), Sustainability-Linked Bond Principles (2020) and Sustainability Bond Guidelines (2018) – as referenced in the prior section, these principles are a collection of voluntary frameworks with the stated mission and vision of promoting the role that global debt capital markets can play in financing progress towards environmental and social sustainability; and

- the AFME roadmap, "Governance, Conduct and Compliance in the Transition to Sustainable Finance" (September 2020) – this addresses issues such as corporate purpose, board governance oversight, shareholder activism and greenwashing. The paper sets out 15 key principles that firms may wish to consider when developing their approach. The principles cover objectives and governance, risk management, compliance and monitoring and impact measurement. The AFME intends the paper to serve as a roadmap to assist boards and senior leadership in establishing or furthering their corporate purpose and objectives in relation to sustainable finance.

5.2.1 Restructuring implications

As most of the above initiatives are voluntary, the implications on a potential restructuring will be dependent on the content of the legal documentation. However, the United Kingdom Government has shown a desire for the United Kingdom to become a "net zero financial centre" and to start adopting some of these voluntary initiatives as mandatory requirements (see further details below in respect of the TCFD). Restructuring professionals will need to ensure that they are up to date on all current mandatory requirements to avoid any potential breaches on a restructuring.

5.3 Promoting ESG by the central bank and regulators

The promotion of ESG in the United Kingdom by regulators has largely focused on disclosure requirements. For example:

- PRA supervisory statement SS3/19 and letter dated 1/7/2020 on managing climate-related financial risk

  In 2019, the Bank of England's Prudential Regulation Authority (PRA) issued a Supervisory Statement (SS3/19) that sets expectations for firms regarding their consideration of climate risk across four areas: governance arrangements, risk management, stress testing and scenario analysis, and disclosure.

  The PRA expects firms to address the financial risks from climate change through their existing risk management frameworks, and should consider disclosing how climate-related financial risks are integrated into their governance and risk management processes. This includes the process by which a firm has assessed whether these risks are considered material or principal risks.
  Firms are expected to:

  - embed the consideration of the financial risks from climate change in their governance arrangements;
  - incorporate the financial risks from climate change into existing risk management practice;
  - use long-term scenario analysis to inform strategy setting, and risk identification and assessment; and
  - develop an approach to disclosure on the financial risks from climate change.

- CP22/20: Sustainability Disclosure Requirements (SDR) and investment labels

  The FCA has expressed its concerns in respect of "greenwashing". This is where firms make exaggerated, misleading or unsubstantiated sustainability-related claims about their investment products. In October 2022, the FCA proposed a set of new measures including investment product sustainability labels and restrictions on how terms like "ESG," "green" or "sustainable" can be used. The FCA is proposing to introduce:

  - three sustainable investment product label categories – including one for products improving their sustainability over time – underpinned by objective criteria;
  - restrictions on how certain sustainability-related terms can be used in product names and marketing for products which don't qualify for the sustainable investment labels;
  - a more general anti-greenwashing rule covering all regulated firms;
  - consumer-facing disclosures to help consumers understand the key sustainability-related features of an investment product. This includes disclosing investments that a consumer may not expect to be held in the product;

  - more detailed disclosures, suitable for institutional investors or retail investors that want to know more; and

  - requirements for distributors of products, such as investment platforms, to ensure that the labels and consumer-facing disclosures are accessible and clear to consumers.

  The FCA's consultation period about its proposals has now closed and it is due to publish its proposed rules (having considered responses to the consultation) by the end of 2023.

- UK Green Taxonomy (or dictionary)

  The United Kingdom Government will implement a green taxonomy that will set out the criteria that specific economic activities must meet to be considered environmentally sustainable or taxonomy-aligned. Firms will be required to report against the green taxonomy as part of the SDR regime described above. Certain companies and providers of investment funds will need to disclose which proportion of their activities are taxonomy-aligned.

  In October 2022, the Green Technical Advisory Group (GTAG) published a report containing its advice on the development of a UK green taxonomy. Among other things, the report looks at how to approach onshoring the EU taxonomy set out in Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088 (Taxonomy Regulation), on which the United Kingdom green taxonomy is based. The GTAG recommends the United Kingdom Government should take an "adopt some and revise some" approach. This approach builds on the view that the focus of taxonomy use should be on investors and financial market participants, as well as their regulators. The United Kingdom Government is set to publish an updated Green Finance Strategy in 2023 that will include more information about the green taxonomy.

- TCFD Mandatory Requirements Roadmap

  The United Kingdom Government announced in November 2020 that it intended to make it mandatory for large companies and financial institutions to make climate-related disclosures aligned with the TCFD recommendations by 2025. It is anticipated that a large part of the mandatory requirements will have been implemented by 2023. The roadmap published by the UK TCFD taskforce sets out a disclosure strategy for the following categories of organisation:

  - listed commercial companies. The requirements for premium listed companies apply in relation to financial years beginning on or after 1 January 2021 and the requirements for standard listed issuers apply in relation to financial years beginning on or after 1 January 2022;

  - United Kingdom registered companies. The requirements apply from financial years beginning on or after 6 April 2022;

  - banks and building societies. No additional regulatory requirements are proposed at this time;

  - insurance companies. No additional regulatory requirements are proposed at this time;

  - asset managers, life insurers and FCA-regulated pension schemes. The requirements apply on a phased basis from 1 January 2022; and

  - occupational pension schemes. The requirements apply on a phased basis from October 2021.

- Green gilts

  In an exception to the mandated disclosure requirements set out above, the United Kingdom Government has sought to encourage ESG finance through an issuance of "green" gilts. On 30 June 2021, HM Treasury and the United Kingdom Debt Management Office (DMO) published

the United Kingdom Government Green Financing Framework (Framework), setting out the Government's climate and environmental agenda and detailing how the proceeds of the Government's proposed green gilt issues will be used. The Framework, which is aligned with the core components and key recommendations of the ICMA Green Bond Principles, sets out the basis for the identification, selection, verification and reporting of green projects that are eligible for financing from the green gilt issues. A total of £16 billion has been raised from the green gilt for projects like zero-emissions buses, offshore wind and schemes to decarbonise homes and buildings. This means the United Kingdom is one of the top three biggest national issuers of green bonds in the world.

5.3.1 Restructuring implications

As part of any restructuring, restructuring professionals will need to ensure compliance with all relevant disclosure requirements.

INSOL INTERNATIONAL

GROUP OF THIRTY-SIX

AlixPartners LLP
Allen & Overy LLP
Alvarez & Marsal
Baker McKenzie
Baker Tilly
BDO
Brown Rudnick LLP
Clayton Utz
Cleary Gottlieb Steen & Hamilton
Clifford Chance LLP
Conyers
Davis Polk & Wardwell LLP
De Brauw Blackstone Westbroek
Deloitte LLP
Dentons
DLA Piper
EY
Freshfields Bruckhaus Deringer LLP
FTI Consulting
Galdino & Coelho Advogados
Grant Thornton
Greenberg Traurig LLP
Harneys
Hogan Lovells
Houthoff
Interpath
Jones Day
King & Wood Mallesons
Kirkland & Ellis LLP
KPMG LLP
Kroll
Linklaters LLP
Mayer Brown
McDermott Will & Emery LLP
Morgan Lewis & Bockius LLP
Norton Rose Fulbright
PwC
Quantuma
Rajah & Tann Asia
RSM
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
South Square
Teneo
Troutman Pepper
Weil, Gotshal & Manges LLP

Member Associations

American Bankruptcy Institute
Asociación Argentina de Estudios Sobre la Insolvencia
Asociación Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales
Asociación Profesional de Administradores Concursales Sainz de Andino
Associação Portuguesa de Direito da Insolvência e Recuperação
Association of Business Recovery Professionals - R3
Association of Restructuring and Insolvency Experts (Channel Islands)
Association of Turnaround and Insolvency Kenya Ltd
Australian Restructuring, Insolvency and Turnaround Association
Bankruptcy Law and Restructuring Research Centre, China University of Politics and Law
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
Business Recovery Professionals (Mauritius) Ltd
Canadian Association of Insolvency and Restructuring Professionals
Commercial Law League of America (Bankruptcy and Insolvency Section)
Finnish Insolvency Law Association
Ghana Association of Restructuring and Insolvency Advisors
Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
Indian Institute of Insolvency Professionals of the Institute of Chartered Accountants of India
INSOL Europe
INSOL India
Insolvency Practitioners Association of Malaysia
Insolvency Practitioners Association of Singapore
Instituto Brasileiro de Estudos de Recuperação de Empresas
Instituto Iberoamericano de Derecho Concursal
Instituto Iberoamericano de Derecho Concursal – Capitulo Colombiano
International Association of Insurance Receivers
International Women's Insolvency and Restructuring Confederation
Japanese Federation of Insolvency Professionals
Korean Restructuring and Insolvency Practitioners Association
Law Council of Australia (Business Law Section)
Malaysian Institute of Accountants
Malaysian Institute of Certified Public Accountants
National Association of Federal Equity Receivers
NIVD - Neue Insolvenzrechtsvereinigung Deutschlands e.V.
Recovery and Insolvency Specialists Association (BVI) Ltd
Recovery and Insolvency Specialists Association (Cayman) Ltd
Restructuring and Insolvency Specialists Association (Bahamas)
Restructuring and Insolvency Specialists Association of Bermuda
Restructuring Insolvency & Turnaround Association of New Zealand
South African Restructuring and Insolvency Practitioners Association
Turnaround Management Association (INSOL Special Interest Group)
Turnaround Management Association Brasil (TMA Brasil)
Xiamen Association of Bankruptcy Administrators (XMABA)

INSOL International, 6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

Copyright © No part of this document may be reproduced or transmitted in any form or by any means without the prior permission of INSOL INTERNATIONAL. The publishers and authors accept no responsibility for any loss occasioned to any person acting or refraining from acting as a result of any view expressed herein.

The views expressed in each chapter are those of its authors and do not necessarily represent the views of the publisher or editor. The publishers and authors accept no responsibility for any loss occasioned to any person acting or refraining from acting as a result of any view expressed herein.

INSOL
INTERNATIONAL