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United Kingdom
ACQUISITION FINANCE

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This country-specific Q&A provides an overview of acquisition finance laws and regulations applicable in United Kingdom.

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UNITED KINGDOM
ACQUISITION FINANCE

1. What are the trends impacting acquisition finance in your jurisdiction and what have been the effects of those trends? Please consider the impact of recent economic cycles, Covid-19, developments relating to sanctions, and any environmental, social, and governance ("ESG") issues.

The European leveraged acquisition finance market has been generally impacted by economic volatility and geopolitical instability in 2023 and consequently the volume of debt issuance has been low. Deal flow has been inconsistent throughout the year, but the increased market activity in November and December provided some hope for a more positive outlook in 2024. M&A activity has been subdued and therefore new money deals have been less common. The mismatch in asset valuation between buyers and sellers is problematic, but with private equity holding substantial amounts of dry powder it is anticipated that M&A activity will increase. In 2023 the predominant lending activity in the market has been amend and extend transactions, but there have also been refinancings and incremental facility activity for add-ons. The expectation is that there will be more refinancings on the horizon to deal with the anticipated maturity wall created by subdued market activity over the last few years.

There are a wide range of financial products available to borrowers in the market. These include broadly syndicated loans, high yield bonds, unitranche facilities, super senior revolving credit facilities, asset based lending facilities, mezzanine financing, second lien, holdco payment-in-kind (PIK) debt and preferred equity. The high yield bond and syndicated loan market have both been impacted by market volatility, whilst the private credit lenders have increased their share of the European leveraged finance market. Private credit, providing direct lending and unitranche facilities, has been the popular financing option for acquisitions in the last year, including financing recent take-private transactions. Historically private credit funds provided unitranche deals to the middle market, but now private credit funds participate in the larger cap market for jumbo LBO financings.

Rising interest rates and inflation have contributed to the market instability over the past couple of years. Companies have faced liquidity issues and have looked to documentation and structuring to alleviate this. Sponsors may consider liability management transactions to improve liquidity and subordinated PIK debt to reduce their cash interest burden, rather than exercising their option to inject new equity capital.

Central banks are signalling that further interest rate increases are unlikely in 2024, and inflation is stabilising, but the higher interest rate environment is likely to persist for longer. 2023 was a strong year for European leveraged loans with these high interest rates enabling the asset class to deliver its highest yearly return since the aftermath of the global financial crisis.

ESG and sustainability continues to be a hot topic, but market terms have not evolved much in the last year as new debt issuance has been lower than usual. The most common product in the leveraged loan market is typically a sustainability-linked loan, where the documentation includes an ESG linked margin ratchet. If a borrower meets an ESG related target, typically a pre-negotiated key performance indicator, the margin on the loan decreases. Both the Loan Market Association ("**LMA**") and the International Capital Market Association ("**ICMA**") have published a variety of guidance in relation to sustainability-linked loans and bonds. The LMA is trying to facilitate a more standardised approach to documentation.

2. Please advise of any recent legal, tax, regulatory or other developments (including any reforms) that will impact foreign or domestic lenders (both bank and non-bank lenders) in the acquisition finance market in your jurisdiction.

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Interest rate benchmark reform

The impact of the LIBOR transition in the European leveraged finance market has diminished with the cessation of the use of sterling LIBOR or US dollar LIBOR as a floating rate benchmark for the issuance of new debt. SONIA and SOFR are the market accepted replacement benchmark rates for sterling and US dollars respectively, although these benchmarks may be calculated for use on a compounded basis, a simple average or a specific look forward "term" basis.

The LIBOR transition will effectively conclude for sterling in 2024, with the cessation of "synthetic" three-month sterling LIBOR after 28 March 2024. Publication of "synthetic" US dollar LIBOR will cease after 30 September 2024.

EURIBOR continues to be the benchmark of choice for euro-linked debt in the leveraged finance market. The administrator of EURIBOR is consulting on the methodology for its calculation, but there is currently no proposed discontinuation.

National Security and Investment Act 2021 ("NSIA")

The NSIA is a statutory regime, which permits government scrutiny and intervention in relation to UK-connected acquisitions of certain qualifying entities and assets on the grounds of national security. The NSIA applies to both domestic (UK) and overseas entities, but an overseas entity will only be a "qualifying entity" to the extent that it carries on activities in the UK or supplies goods or services to persons in the UK. A "qualifying asset" can be land, tangible moveable property and/or intellectual property, provided that the asset is used in connection with activities undertaken in the UK or in relation to the supply of goods or services to persons in the UK.

For the acquisition to be a transaction which is within the NSIA regime, there needs to be a trigger event which relates to the control of the qualifying assets or entity being acquired. These trigger events include:

- an increase in the investor's shareholding or voting rights in an entity exceeding the 25%, 50% or 75% thresholds;
- the acquisition of voting rights in an entity which enables the investor to secure or prevent the passage of any class of resolution governing the affairs of the entity;
- the acquisition of material influence over an entity; or
- the acquisition of the right to use the asset to a greater extent, or direct or control how the asset is used.

The NSIA requires the acquirer to notify the secretary of state for Business, Energy and Industrial Strategy (the "**Secretary of State**") to determine whether there is an applicable trigger event which may give rise to national security issues. There are mandatory notification requirements where there is a trigger event involving a qualifying entity in one of the 17 specified high-risk sectors (which include transport, defence, energy etc.). In this situation the acquirer must seek authorisation and obtain approval to complete the acquisition, but the Secretary of State may block the acquisition. There is also a voluntary notification regime and a discretionary call in power for triggered acquisitions of qualifying entities outside the 17 specified high-risk sectors, but in situations which could raise national security concerns. The Secretary of State can approve, impose conditions, or prohibit qualifying transactions. There are also civil and criminal penalties for failure to notify.

The NSIA may apply in the financing of an acquisition and it should be considered at the beginning of the transaction and on a case by case basis. Lenders should also consider whether they intend to take security over assets that are qualifying assets or that would give rise to a trigger event. When taking security over shares in a qualifying entity, the lenders will need to ensure that the taking of security over the applicable shares and related voting rights does not give rise to a trigger event under NSIA and also whether the method of enforcement over the shares could also be a trigger event. Enforcement sales may be subject to NSIA clearances.

It may be advisable to include documentary provisions in finance documents to mitigate against or eliminate the impact of the NSIA. These could include the following:

- a condition precedent that NSIA clearance has been obtained in relation to the transaction being financed;
- adjust any restrictions on the obligors to avoid any argument that the lender has material influence over any obligor;
- consider methods to enforce security to avoid inadvertent trigger events and consider the risk of an automatic transfer of voting rights to lenders with share security; and/or
- ensure any rights and interests a lender acquires in any secured assets or shares does not provide a level of sufficient control which would constitute a trigger event.

IOSCO reports on leveraged loans and private finance

The International Organisation of Securities Commissions

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("**IOSCO**") published two reports in 2023 on aspects of the European leveraged acquisition finance market, which considered perceived risks and vulnerabilities:

a. Leveraged Loans and CLOs – Good Practices for Consideration Consultation Report

This is a consultation paper on proposed good practices for leveraged loans, including broadly syndicated lending and private credit. These proposals are a response to perceived market vulnerabilities. Specific areas of analysis include minimal or loose covenants on investor protections, lack of market transparency and potential conduct related issues. IOSCO would like to protect investors, minimise systemic risk and ensure that the markets are fair, efficient and transparent. The LMA, the Bank of England and other institutions in the leveraged finance space have responded to the consultation. IOSCO will produce a final report taking the feedback into consideration.

b. Thematic Analysis: Emerging Risks in Private Finance

This is a final report on the emerging risk and potential vulnerabilities in private financing activities. The report includes both private equity and private credit in the definition of "private finance" and highlights the inherent opacity of private funds. This lack of transparency is seen as a concern for both regulators and market participants when assessing and quantifying the risk of the private finance transaction. The report also flags concerns with the use of leverage in transactions structures, covenant-lite nature of loans and the risk of transmission to public markets. There is some acceptance of the benefits of the private credit market, but there is concern of hidden risks.

It remains to be seen if these recommendations proposed by IOSCO will be adopted by the Financial Conduct Authority ("**FCA**").

3. Please highlight any specific high level issues or concerns in your jurisdiction that should be considered in respect of structuring or documenting a typical acquisition financing.

There are no jurisdiction specific high level issues or concerns from an English law perspective when structuring or documenting a typical acquisition finance transaction. It is relatively straightforward to take a comprehensive security package over any relevant English assets and also to enforce the security over such assets (explained in further detail below). If security is taken for the benefit of multiple lenders, it can be held on trust by a security agent or security trustee. A security trust is used in a variety of finance transactions and can allow additional lenders to take the benefit of the security at a later date without amendment to the original security document.

Financial assistance provisions are detailed in Q14.

4. In your jurisdiction, due to current market conditions, are there any emerging documentary features or practices or existing documentary provisions/features which borrowers or lenders are adjusting or innovating their interpretation of, or documentary approach to?

Over the last decade, the prevalence of financial covenants tested on a "maintenance" basis (a requirement that certain financial tests must be met on a quarterly basis) has continually reduced. These financial covenants typically include a leverage test as a minimum. The significant majority of broadly syndicated loans currently have a springing leverage covenant solely for the benefit of the revolving facility banks (only tested if the revolving facility is drawn to a certain degree), but not for the term loan lenders. Historically the private credit market was the exception to this trend, with providers continuing to insist upon maintenance covenants. However, particularly at the upper-end of the private credit market, where the private credit product increasingly competes with the broadly syndicated loan market (more so this year than ever before), certain managers are increasingly willing to transact without the protection of such covenants.

This year has also seen an increased focus on amendments and waivers and the requisite consent thresholds required to approve certain transactions relating to a business's capital structure. This has been driven by the rise of liability management transactions that have been termed "lender on lender violence" in certain corners of the press. These transactions can be seen in a stressed scenario where lenders comprising a majority may provide additional liquidity to a borrower in exchange for their exposure (both existing and new) being given a prioritised or preferential position versus the remainder of the lenders. This has led to a renewed focus on the sacred "all lender" voting matters that should apply within documentation, with lenders in particular focusing on matters relating to the incurrence of super priority indebtedness, the non pro rata treatment of lenders, changes to priority and subordination and the ability of borrowers to transact with individual lenders on a bilateral basis. While this has

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primarily been an issue within the broadly syndicated space (given the large and diverse pools of lenders), given the increasing use of large clubs of private credit funds, it is becoming increasingly relevant in that market as well.

5. What are the legal and regulatory requirements for banks and non-banks to be authorised to provide financing to, and to benefit from security provided by, entities established in your jurisdiction?

Commercial lending is not a regulated activity in the UK (as opposed to consumer lending activities). The provision of cash loans to businesses, whether secured or unsecured, does not typically require any banking licence.

6. Are there any laws or regulations which govern the advance of loan proceeds into, or the repayment of principal, interest or fees from, your jurisdiction in a foreign currency?

There are no restrictions on the advancement of loan proceeds in foreign currencies or the payment of interest or fees or any repayment of principal in a foreign currency.

7. Are there any laws or regulations which limit the ability of foreign entities to acquire assets in your jurisdiction or for lenders to finance the acquisition of assets in your jurisdiction? Please include any restrictions on the use of proceeds.

Applicable economic sanctions in relation to foreign entities, where relevant, may need to be considered. There may be restrictions on specific foreign entities, subject to sanctions, from acquiring assets.

The NSIA permits government intervention in relation to acquisitions and investments to protect national security in the UK. It applies to both foreign and UK lenders. Details of the NSIA are set out in Q2.

Under the Economic Crime (Transparency and Enforcement) Act 2022, any foreign entity that owns UK registered property or intends to acquire UK registered property must register their beneficial ownership on an official register held by Companies House (the "**Register**"). The relevant UK property will be a qualifying estate if it is freehold property or leasehold interest for a term of more than seven years. If an overseas entity has not registered their beneficial ownership, then they will be prevented from selling, leasing or creating a legal charge over the property interest. The registered overseas entity will receive an ID number and is obliged to update the Register annually as a minimum.

Acquisitions and/or investments of FCA or Prudential Regulation Authority regulated assets in the UK may also require regulatory change of control approval from the relevant regulator.

8. What does the security package typically consist of in acquisition financing transactions in your jurisdiction and are there any additional security assets available to lenders?

Generally the security package will be an "all asset" English law debenture or security agreement. The lenders will purport to take security over substantially all of the assets of the chargors (who will generally be the borrower and its subsidiaries). The security is typically granted to a security agent or security trustee (as mentioned in Q3) who will hold the security interest on trust for various secured parties. This trust structure also enables new lenders to accede to the transaction and benefit from the security without the risk of restarting hardening periods associated with taking new security.

The scope of the English law security package will depend on the deal, and certain exclusions may be negotiated up front at the term sheet stage of the transaction and included in the "agreed security principles". Whether a charge, mortgage or pledge is taken depends on the asset in question and the commercial agreement between the parties. Under the debenture, there will typically be fixed security over certain key assets granted by the chargors and a floating charge will be granted over a fluctuating pool of assets. This will usually be structured as a charge over all or substantially all of the assets of the chargor (a requirement of a qualifying floating charge which will enable the floating charge holder to appoint an administrator, as outlined in Q23). Whether a charge is "fixed" or "floating" is dependent on the degree of control the lenders exert over the asset. If the chargor has granted a floating charge, they are able to deal with these assets in the ordinary course of business, therefore this is the popular option as it minimises the operational impact for the borrower. The floating charge will crystalise (become "fixed") on certain trigger events under common law as well as various contractual

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triggers.

Typically the security package will include security over shares, bank accounts, receivables and real estate (where applicable). The extent of the security package depends on the assets available, but also the negotiating power of the parties. In strong sponsor-led transactions the scope of the security package is often limited to charges over shares, bank accounts and a floating charge over fluctuating assets (typically subject to carve outs) – the lack of control over certain assets by the lenders may result in the purported fixed charges being recharacterised as floating charges.

9. Does the law of your jurisdiction permit (i) floating charges or any other universal security interest and (ii) security over future assets or for future obligations?

Yes, English law permits floating charges and security over future assets and for future obligations.

10. Do security documents have to (by law) include a cap on liabilities? If so, how is this usually calculated/agreed?

No.

11. What are the formalities for taking and perfecting security in your jurisdiction and the associated costs and timing? If these requirements are different for different asset classes, please outline the main points to note for each of these briefly.

Taking and perfecting English law security is relatively straightforward and generally inexpensive. The assets that typically form the security package in a leveraged finance transaction do not require complex steps to ensure that the security interest is perfected. Registration and perfection of the security help protect the priority of secured creditors.

Perfection of security depends on the asset and the type of security taken, but can require possession, transfer of title, an agreement in writing, notice of the security to any third parties and/or registration.

All charges granted by an English company, or an English LLP entity, require the security agreement (typically a debenture) to be registered at Companies House within 21 days of the date that the security agreement was executed. Registration is required irrespective of the location of the assets if the security is granted by an English company (or LLP). Failure to register the security within the 21 day time limit results in the security being void against creditors, administrators and liquidators of the company. Additionally, when the charge becomes void, the secured liabilities become immediately due and payable (which may also have cross-default implications).

Registration of a charge at Companies House is fairly straightforward and can be achieved by an online web form or a paper MR01 form and a certified copy of the applicable security agreement being delivered to Companies House. Typically, an online registration occurs. Fees are £15 for online registration and £23 for a paper filing.

Registration of security charges at Companies House does not amount to a priorities register and so additional steps may be required to ensure priority of the security. To achieve priority, and assist with enforcement, some additional steps may be required with certain assets that are typically part of the security package in a leveraged finance context (depending on the commercial agreement between the parties):

Land – there are various legal formalities, but the security agreement must be executed as a deed and registered at the Land Registry.

Shares – the share certificates and blank stock transfer forms (signed but undated) are delivered to the security agent/security trustee.

Bank accounts, receivables, insurance policies and other contractual rights – a notice of the security interest should be delivered to the relevant counterparty or third party such as the account bank or the insurer.

Intellectual property – the security interest should be registered at the UK Intellectual Property Office in relation to certain types of intellectual property (such as patents, registered trademarks and registered designs).

12. Are there any limitations, restrictions or prohibitions on downstream, upstream and cross-stream guarantees in your jurisdiction? Please also provide a brief description of any potential mitigants or solutions to these limitations, restrictions or prohibitions.

English companies can grant guarantees (downstream, cross-stream or upstream) provided that they have capacity to provide these under their articles of

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incorporation (i.e. there are no specific restrictions to the directors' powers to grant guarantees) and provided they can demonstrate corporate benefit to the company. Directors of an English company have a general duty to promote the success of the company for the benefit of its members as whole and therefore, they will need to show that adequate corporate benefit is derived from the company giving the guarantee. Typically the corporate benefit test is not an issue for downstream guarantees but may be more difficult to evidence where the guarantees are upstream or cross-stream. It is therefore common practice to require the directors and the members of the company to approve the granting of the guarantee. It should also be noted that since 1 October 2008, financial assistance restrictions only apply to public companies – see Q14. Finally, where the guarantee was granted by a company within a certain period of time prior to the onset of insolvency, the guarantee may be at risk of being set aside under applicable insolvency laws (for e.g. transactions at an undervalue (further explained at Q27), where the company giving the guarantee received less or no consideration for the guarantee provided).

13. Are there any other notable costs, consents or restrictions associated with providing security for, or guaranteeing, acquisition financing in your jurisdiction?

No.

14. Is it possible for a company to give financial assistance (by entering into a guarantee, providing security in respect of acquisition debt or providing any other form of financial assistance) to another company within the group for the purpose of acquiring shares in (i) itself, (ii) a sister company and/or (iii) a parent company? If there are restrictions on granting financial assistance, please specify the extent to which such restrictions will affect the amount that can be guaranteed and/or secured.

Financial assistance restrictions for English private companies were abolished on 1 October 2008. The prohibition on financial assistance today only applies to English public companies, including where they are a subsidiary of an English private company. Financial assistance prohibitions do not apply to assistance given for the acquisition of shares in a sister company.

Financial assistance rules make it unlawful for an English public company whose shares are being, or have been, acquired (or for any of that company's subsidiaries) to give financial assistance for the purposes of the acquisition of its own shares (or the shares of its English holding company, whether private or public).

Although financial assistance is not defined in the Companies Act 2006 ("**CA 2006**"), it is generally construed widely by the courts and includes any form of assistance (direct or indirect) that is financial in nature for the purposes of acquiring shares, including the granting of a guarantees, security, indemnities and any other form of assistance which materially reduces the assets of the assisting company.

Finally, there are both civil penalties (including fines) and criminal penalties (including up to two years of imprisonment) for breach of financial assistance rules.

15. If there are any financial assistance issues in your jurisdiction, is there a procedure available that will have the effect of making the proposed financial assistance possible (and if so, please briefly describe the procedure and how long it will take)?

The CA 2006 includes a number of limited exceptions to the prohibition on financial assistance which would need to be assessed on a case-by-case basis. However, unless the transaction falls within these exceptions, or the public company is re-registered as a private company, the financial assistance prohibition will remain applicable. The shareholders of a public company may be able to re-register the company as private in order to allow financial assistance for the acquisition of its own shares (by means of a special resolution of members representing at least 75% of voting shares and application to Companies House for re-registration). However, this would only be possible if the financial assistance was given after the public company has re-registered as a private company and not before (i.e. re-registration cannot 'whitewash' the financial assistance prohibition).

16. If there are financial assistance issues in your jurisdiction, is it possible to give guarantees and/or security for debt that is not pure acquisition debt (e.g. refinancing debt) and if so it is necessary or strongly desirable that the different types of debt

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be clearly identifiable and/or segregated (e.g. by tranching)?

Yes, an English company subject to financial assistance rules may grant guarantees / security in support of debt other than acquisition debt (i.e. which proceeds are applied towards the acquisition of its own shares) where it is adequately segregated (including by way of tranching).

17. Does your jurisdiction recognise the concept of a security trustee or security agent for the purposes of holding security, enforcing the rights of the lenders and applying the proceeds of enforcement? If not, is there any other way in which the lenders can claim and share security without each lender individually enforcing its rights (e.g. the concept of parallel debt)?

Yes, the concept of a security trustee or security agent for the purposes of holding security, enforcing the rights of the lenders and applying the proceeds of enforcement is recognised and such party is able to act on behalf of all of the lenders without each lender having to individually enforce its rights.

18. Does your jurisdiction have significant restrictions on the role of a security agent (e.g. if the security agent in respect of local security or assets is a foreign entity)?

No, there are not any significant restrictions on the role of a security agent.

19. Describe the loan transfer mechanisms that exist in your jurisdiction and how the benefit of the associated security package can be transferred.

The two methods of effecting a legal transfer of loans are novation or assignment and the documentation to do so (a novation transfer certificate or a template assignment agreement) are typically scheduled to the facilities agreement.

Novation is used to transfer both rights and obligations. With the consent of the other parties to the contract, which in most facilities agreements are effectively obtained in advance subject to the conditions agreed, the transferee lender replaces the existing transferring lender with identical rights and obligations and those of the existing transferring lender are extinguished.

Assignment is used to transfer only rights but not obligations (i.e., a lender's interest in drawn loans, not obligations relating to undrawn commitments). No borrower consent to assignment is required unless the facilities agreement requires it, together with any other conditions which it may specify.

A legal assignment is effected by complying with certain formalities specified in section 136 Law of Property Act 1925 ("**LPA 1925**") being:

- an absolute assignment of rights must be made by the assignor;
- the assignment must be in writing;
- the assignment must be signed by the assignor; and
- notice of assignment must be given to the debtor.

The benefit of security can be assigned with the loan rights, although use of a security trust is the more typical method.

The security package is typically granted in favour of a security agent or a security trustee who will hold that security on trust for the lenders and any other relevant creditors in respect of the secured obligations. This means that upon a transfer of the loan interest by way of assignment or novation, the security agent or security trustee will hold the security package on trust for the transferee obtaining a right to share in the security, and such transferee will become a beneficiary of the security trust.

There are other methods for transferring just aspects of the interests in loans, such as funded and risk participations and the use of credit derivatives for the transfer of the economic interests in loans. In these circumstances there is no actual transfer of loans or of undrawn commitments, just the right to obtain the economic benefit. The transferee of the economic interest would not become the lender of record or obtain a direct interest in the security.

20. What are the rules governing the priority of competing security interests in your jurisdiction? What methods of subordination are used in your jurisdiction and can the priority be contractually varied? Will contractual subordination

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provisions survive the insolvency of a borrower incorporated in your jurisdiction?

The rules governing the priority of competing security interests are often asset specific. Though a company may grant security over all its English assets in a single security instrument (e.g. a debenture), the steps which are taken to ensure the priority of security over all of the assets which are the subject of that instrument vary.

The main priority rules are as follows:

- registration in asset registries (applicable, for example, to land and certain intellectual property) with priorities between competing security interests often being determined by the date of registration of the security interests rather than the date of creation;
- by giving notice (for example, to an account bank or to a contract counterparty) with priority between competing security interests in contractual rights being governed (in most cases) by the first to give notice to the debtor/account bank;
- possession (relevant to tangible assets and for some documentary intangibles);
- legal interests can leapfrog to take priority over a prior established equitable security interest in the same asset if a subsequent security-taker takes a bona fide legal interest for value without notice of any prior interest; and
- the priority of a floating charge, prior to its crystallisation, may be postponed to a subsequent fixed charge if the fixed charge is created without notice of any prohibition on the creation of that security.

Note that while registration of security at Companies House is an essential step to ensure validity of the security against third party creditors and insolvency officers, that registration in this way does not form or equate to a priorities register.

Creditors can contractually agree to vary the priority that would otherwise apply to their security interests.

Subordination

Subordination means a creditor's right to repayment is postponed to the rights of other creditors. The two main methods of subordination of creditor claims are structural subordination and contractual subordination.

Structural Subordination

It arises where the financing for a group is provided at different levels within its corporate structure with the senior creditor typically lending to an asset rich operating company which sits lower in the group structure than the holding company into which the junior creditor lends. Therefore, if the holding company and its operating subsidiaries become insolvent, the creditors of the operating subsidiaries will be paid out first before any distribution is made to the holding company on the basis that all the company's debt claims must be paid before distributions can be made to shareholders. The creditors of the operating companies are therefore de facto senior to the creditors of the holding company, by reason of the structural level at which they have lent to the group.

Contractual Subordination

In contractual subordination, the payment of creditor claims against the company or group (pre or post insolvency) is agreed by way of contract.

In practice, typically this takes the form of in the contract:

- the junior creditor agreeing:
  - that the debtor need make no payments in respect of the junior claim until the senior creditor's claim has been paid in full;
  - to turn over any payments received in relation to its claim until the senior claim has been satisfied in full; and
  - pending such turnover, to hold those amounts on trust for the benefit of the senior creditor; and
- the debtor agreeing not to pay the junior claim until it has satisfied the senior claim.

Contractual subordination involves contractually varying the priority and ensuring the contractual subordination provisions survive the insolvency of a borrower. It does not undermine the pari passu rule because it defers certain creditors' claims as opposed to purporting to grant an advantage over other creditors with which a creditor ranks pari passu on insolvency.

21. Is there a concept of "equitable subordination" in your jurisdiction whereby loans provided by a shareholder (as a creditor) to a company incorporated in your jurisdiction are subordinated by law upon insolvency of that company in your jurisdiction?

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No there is no concept of equitable subordination however, a shareholder must discharge its obligations as a shareholder before it is entitled to receive anything as a creditor.

22. Does your jurisdiction generally (i) recognise and enforce clauses regarding choice of a foreign law as the governing law of the contract, the submission to a foreign jurisdiction and a waiver of immunity and (ii) enforce foreign judgments?

Choice of law

English courts will recognise and enforce a clause which selects a foreign law to govern a contractual relationship. The general principle of party autonomy is a firmly entrenched principle of English law and entitles parties to agree the law of their contract.

The entitlement is codified in domestic legislation, retaining the relevant EU law in English law, namely EC Regulation 593/2008 ("**Rome I**")), which provides that a contract can be governed by the law chosen by the parties. The choice of law must be made freely and cannot be compelled by law (this principle does not prohibit parties from utilising standard forms). The election must be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case, which is to say, in certain circumstances a choice of law may be implied. Where Rome I does not apply, common law rules as to determination of the applicable law will be relevant.

Submission to a foreign jurisdiction

The valid submission to the jurisdiction of a foreign court will also be recognised and enforced by English courts. Such an agreement can be made as part of a contract – by a choice of jurisdiction clause, usually in conjunction with a choice of law clause – or once a dispute has arisen. The validity, existence or incorporation of an agreement to a foreign jurisdiction in a contract will be determined in accordance with the governing law of the contract.

As regards determination by an English court of whether it has jurisdiction over a dispute, since the UK's departure from the EU, it is necessary to consider the application of three possible regimes: (i) whether an international convention applies, most commonly the Hague Convention on Choice of Court Agreements (2005) ("**Hague Convention**"), (ii) a relevant European regime, primarily the Recast Brussels Regulation (Council Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Brussels Recast**")), and (iii) the English common law rules.

Whether a jurisdictional regime or the common law applies will depend on the date on which proceedings were commenced and the applicability of a specific international arrangement. With necessary simplification, an English court may resolve the question of jurisdiction in several ways:

- **if a party to an agreement is based in the EU**: the regime which applies to determine jurisdiction will depend on when proceedings were commenced. If the proceeding commenced on or before 31 December 2020 at 11 pm, jurisdiction of the English court will be determined by application of Brussels Recast. After that date, the Hague Convention or the common law will apply (see below).
- **if a convention applies:** English courts may determine jurisdiction by application of an international convention. The Hague Convention is commonly encountered in the UK given its wide number of signatories, including Mexico, Singapore and the EU states. It will apply only to civil and commercial matters where the parties have entered into an *exclusive* choice of court agreement and which falls within certain definitions, including that the scope of the matter is one defined by the Convention and if the contract/dispute is between contracting states.
- **under the common law**: the common law will apply where neither European Regime nor the Hague Convention applies. At common law, there are no formal requirements for the conclusion of a valid jurisdiction clause. Such an agreement may be concluded orally or in writing and may be incorporated by reference, or a course of dealing.

Waiver of immunity

Foreign states can enjoy state immunity under English law. The default position is that a state, its central bank and monetary authorities can reasonably expect to be immune from proceedings in court relating to sovereign or governmental activities (the same applies to separate entities exercising sovereign authority). The immunity is not absolute, however. For example, acts of a commercial nature will not enjoy immunity.

A state may also waive immunity and submit to the

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jurisdiction of the English courts. This can occur by prior written agreement; submitting to the jurisdiction of the English courts after a dispute has arisen; or by taking of certain steps in relation to a proceeding (other than for the purpose of claiming immunity). Once consent to jurisdiction is effectuated, it is irrevocable. Immunity from adjudication is considered separately, and must be waived separately, from immunity from enforcement.

Enforcement of foreign judgments

A final and conclusive judgment for the payment of a fixed sum of money will typically be capable of enforcement (either without issuance of new proceedings where there is a reciprocal regime (see below) or by means of a new action for summary judgment under the common law).

The procedure for the enforcement of a judgment of a foreign court in England will depend upon (i) where the judgment to be enforced originated from; and (ii) the date the proceedings giving rise to the judgment were instituted.

Three principal regimes can conceivably apply to foreign judgments to be enforced in the UK:

- **the European regime** (the 2001 Brussels Regulation, the 2007 Lugano Convention and the Recast Brussels Regulation) will apply to European judgments arising from proceedings instituted before 31 December 2020. Which European regime will apply depends on when the relevant proceedings were instituted prior to that date and the country of origin, specifically: (i) Brussels Recast will apply to the enforcement in the UK of judgments from EU member states instituted between 10 January 2025 and 31 December 2020; (ii) the 2001 Brussels Regulation to proceedings instituted for EU judgments in proceedings between 1 March 2002 and 10 January 2015; and (iii) the 2007 Lugano Convention for judgments from Iceland, Norway and Switzerland arising from proceedings instituted prior to 31 December 2020);
- **the Hague Convention** will apply to the enforcement in England of judgments from any signatory state where the agreement which is the subject of the judgment includes an exclusive jurisdiction clause; and
- **the English common law** will apply to judgments from countries with which the UK has no reciprocal enforcement arrangements (e.g. the USA), and judgments from EU (and EFTA) in proceedings post-dating 31 December

Whether a foreign judgment will be enforceable or not in England will depend on what type of judgment is to be enforced and whether any defences to enforcement can be raised. Taking important features of each regime in turn:

the European Regime, scope and defences: under the European Regime, the UK court will enforce, broadly, any judgment relating to a civil and commercial matter. Arbitration awards are dealt with under a different regime and insolvency, revenue, customs or administrative matters are also excluded from enforcement. Defences to enforcement can include (i) public policy, in exceptional cases, if recognition of a judgment would be manifestly contrary to UK public policy; (ii) if the judgment is one of judgment in default and there has been a functional (rather than formal) deprivation of a party’s right of reply; (iii) if a judgement is irreconcilable with a judgment on the same matter involving the same parties; and (iv) if the judgment remains subject to appeal.

the Hague Convention, scope and defences: a judgment under the Hague Convention means any decision on the merits given by a court. Notably, non-money judgments, such as final injunctions, are included (not interim protective measures or procedural rulings). The English court is obliged to enforce the judgment if it is satisfied that the original court was designated in an exclusive choice of court agreement and if the judgment is enforceable in its state of origin. As for defences, the is overlap with the available defences under the European Regime, including due to irreconcilability and unenforceability, but typically objections will centre on arguments that the agreement containing the election of exclusive jurisdiction is null and void.

the common law scope and defences: as regards scope, there are notable differences from the European Regime and the Hague Convention. To be enforceable at common law, a judgment must be final and conclusive from the court which gave judgment, for a defined sum of money (not for taxes, fines or penalties), and a judgment “on the merits” – i.e. a judgment which establishes facts as proven or not in dispute, the law applicable to those facts, and a conclusion. A foreign injunction will therefore not be enforced at common law nor will certain judgments which may have been enforceable under the European regime.

23. What are the requirements, procedures, methods and restrictions relating to the enforcement of collateral by secured lenders in your jurisdiction?

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The enforcement options available to a secured lender are typically contained in the security document(s) relating to the financing. Additionally, common law and statute confer various rights on secured lenders to enforce collateral.

Appointment of an administrator

Pursuant to paragraphs 14 to 21 of Schedule B1 of the Insolvency Act 1986 ("**IA 1986**"), the holder of a "qualifying floating charge" in respect of a company's property may appoint an administrator of the company using an out-of-court process[1] if the floating charge is enforceable. No court hearing is necessary and the appointment will take effect following the filing of the appointment documents with the court. If the lender is not the holder of a qualifying floating charge, it may make an application to court for an administration order to be made in respect of the company.

Administration is a collective insolvency process, which means that the administrator is required to carry out the administrator's functions in the interests of creditors (both secured and unsecured) as a whole. In practice, the administrator will work collaboratively with the person who appointed them. The administrator must be a licensed insolvency practitioner.

Appointment of a receiver

Pursuant to the LPA 1925, a creditor may appoint a receiver (without the involvement of the court) to protect and manage secured assets in respect of which the creditor has been granted a mortgage or charge. Given the limited powers afforded to receivers under the LPA 1925, the powers of receivers are typically supplemented by contractual powers contained in the security agreement, as permitted by the LPA 1925. A receiver that has the powers of a receiver under LPA 1925 as well as the contractual powers under the security document is known as a "fixed charge receiver".

A secured lender can appoint a fixed charge receiver to any asset in respect of which it has a fixed charge. All that is required is for the lender to execute the appointment documents and for the security to be enforceable. A receiver is an agent of the borrower but owes its duties primarily to the appointor (i.e. the secured lender); the receiver's primary duty is to realise the property and assets that is subject to the security. The receiver can deal with the property over which it has been appointed but, unlike an administration, has no powers in respect of the company that owns the property, for example to take possession of its books and assets.

A fixed charge receiver need not be a licensed insolvency practitioner.

The appointment of a receiver does not prevent other creditors from taking action against the company.

Appointment of administrative receiver

An administrative receiver is appointed by a creditor that holds security over all or substantially all of the property of a company which, as created, was a floating charge under the terms of the relevant security document. An administrative receiver has the powers conferred on them by the security document under which they were appointed and under IA 1986, the latter of which includes the power to take possession of, sell or otherwise dispose of the property of the company and carry on the business of the company. Administrative receivership is not a collective insolvency process; the administrative receiver's duties are primarily owed to the secured creditor that appointed them. The administrative receiver must be a licensed insolvency practitioner.

Following the Enterprise Act 2002, there is a general prohibition on the holder of a qualifying floating charge appointing an administrative receiver to a company except where the floating charge was created before 15 September 2003, subject to limited exceptions. These exceptions include that an administrative receiver may be appointed in pursuance of an agreement which is or forms part of certain capital market arrangements, to a project company of a project which is a public-private partnership project or utility project and includes step-in rights or a project that relates to certain urban regeneration projects. There is also an exemption relating to certain types of project financings.

Financial collateral arrangements

The Financial Collateral Arrangements (No.2) Regulations 2003 (the "**Financial Collateral Regulations 2003**") provide an alternative remedy to secured creditors to appropriate financial collateral (which can be exercised without a court order) where a security interest is granted in financial collateral. "Financial collateral" includes cash, credit claims and financial instruments including shares and other tradeable securities such as bonds. The Financial Collateral Regulations 2003 have the effect of modifying insolvency law in relation to financial collateral arrangements, including disapplying the administration moratorium on the enforcement of security and certain provisions of a moratorium under Part A1 of the IA 1986 (the "**Part A1 Moratorium**"). The power to appropriate is subject to a duty on secured creditor to value the collateral in accordance with the terms of the arrangement and in any event in a commercially reasonable manner.

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Restrictions relating to the enforcement

A secured lender's right to enforce security will be restricted if the company is subject to the statutory moratorium that applies if the company is in administration (the "administration moratorium") or subject to the Part A1 Moratorium, in each case, subject to exceptions relating to financial collateral arrangements.

Where the secured lender has entered into an intercreditor agreement, deed of priority or similar arrangements with other lenders, there may be contractual restrictions on its ability to enforce security.

Footnotes:

[1] If more detail is required: A floating charge qualifies as a qualifying floating charge if it states that paragraph 14 of Schedule B1 of the IA 86 applies to it or purports to empower the holder of the floating charge to appoint an administrator of the company; this will typically be reflected in the debenture or security document relating to the collateral. A person is the holder of a "qualifying floating charge" if he holds one or more debentures of the company secured by one or more qualifying floating charge which relates to the whole or substantially the whole of the company's property or by charges and other forms of security which together relate to the whole or substantially the whole of the company's property and at least one of which is a qualifying floating charge.

24. What are the insolvency or other rescue/reorganisation procedures in your jurisdiction?

The main insolvency or other rescue/reorganisation procedures in England and Wales are: (i) administration; (ii) company voluntary arrangements ("**CVA**"); (iii) schemes of arrangement; and (iv) restructuring plans.

Administration

Administration can be commenced by court order (following the filing of an administration application) or more commonly through the "out-of-court route" (i.e. no court hearing is held) whereby administration documents are filed by either (i) the company's directors, (ii) the company itself or (iii) a holder of a qualifying floating charge (such as the security agent or trustee).

An administrator of a company must perform his functions with the objective of: (a) rescuing the company as a going concern; (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration); or (c) realising property in order to make a distribution to one or more secured or preferential creditors. The administrator must perform his functions with the objective specified in paragraph (a) above unless he thinks either that it is not reasonably practicable to achieve that objective, or that the objective specified in paragraph (b) would achieve a better result for the company's creditors as a whole. The administrator may perform his functions with the objective specified in paragraph (c) only if he thinks that it is not reasonably practicable to achieve either of the objectives specified in paragraphs (a) and (b).

An administrator is an officer of the court and agent of the company to which it is appointed and must carry out its functions in the interests of the creditors as a whole. When the company enters into administration, the directors remain in office but effectively cede their powers to the administrator. It is possible for a company to go into a "light touch" administration in which the administrators made use of the powers in paragraph 64(1) of Schedule B1 to IA 1986 to authorise directors to continue to exercise management powers.

The company benefits from the administration moratorium during the administration; please see the response to Q25.

The appointment of an administrator will cease to have effect at the end of the period of one year beginning with the date on which it takes effect, subject to his term of office being extended by application to court or for the first extension only, with the consent of the creditors for an additional six months.

There are a number of separate administration regimes that amend the administration process set out in IA 1986, which apply to certain types of entity that carry out a critical public service or where there is otherwise a wider public interest in having a separate administration regime, for example, energy providers, private registered providers of social housing, banks, building societies and investment banks.

Company voluntary arrangement

A CVA is a legally binding arrangement between the company and its unsecured creditors under Part I of the IA 1986 that enables a company to make an agreement with its unsecured creditors in relation to the company's debts. A CVA must be proposed by the directors of the company, unless the company is in administration or being wound-up, and supported by a report submitted to the court by a nominee, which must be a licensed insolvency practitioner, stating whether in his opinion, the proposed voluntary arrangement has a reasonable

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prospect of being approved and implemented. The CVA is a flexible mechanism; the IA 1986 does not prescribe the form that a proposal must take. If the proposed arrangement is approved by at least 75% by value of the creditors who vote in the decision procedure it will come into effect (including in relation to creditors who voted against it or did not vote), unless those voting against the proposal include more than 50% by value of the unconnected creditors who can vote on the proposal. A CVA cannot bind secured or preferential creditors without their consent.

Companies that are subject to a CVA do not benefit from an automatic moratorium (the moratorium that applied to small companies was abolished by the Corporate Insolvency and Governance Act 2020 ("**CIGA 2020**")). As such, CVAs are often used in conjunction with an administration to benefit from the administration moratorium. CVAs can also be combined with the Part A1 Moratorium.

Scheme of arrangement ("Scheme")

A Scheme is statutory procedure under Part 26 of the CA 2006. A Scheme of arrangement is a flexible tool that can be used to implement a range of arrangements including compromises of debt and debt for equity swaps or any other matter in which a company may wish to make a compromise or arrangement with its members or creditors or any class of them; the proposal put to creditors (or members) must have an element of "commercial give and take". Unlike CVAs, Schemes are binding on secured creditors. A Scheme is not an insolvency process and there is no need for a company to be insolvent to propose a scheme of arrangement, but it has been used as a restructuring tool by English and overseas companies experiencing financial distress with increasing prevalence since the global financial crisis.

The proposed arrangement is approved by the affirmative vote of at least 75% by value (and 50% by number) of each class of creditors or members present and voting. Once approved by the relevant classes, the Scheme must be sanctioned by the court, which has discretion as to whether or not to sanction the Scheme.

Restructuring plan ("RP")

The RP was introduced by CIGA and is similar to a Scheme but is only available for companies facing financial difficulty. Like Schemes, RPs are binding on secured creditors and can be used to implement a range of arrangements including compromises of debt and debt for equity swaps.

The main differences between a Scheme and RP is that: (i) there is no requirement for a majority in number of a class to approve the RP; and (ii) dissenting classes can be bound by the RP if at least 75% in value of one "in the money" class votes for the plan (the "cross-class cram-down"), subject to the court being satisfied that: (i) none of the dissenting class would be worse off in the relevant alternative; and (ii) at least 75% by value of a class of creditors or members that would receive payment or have a genuine economic interest if the relevant alternative was pursued voting in favour of the plan. As with Schemes, the court has discretion as to whether to sanction a RP.

Terminal procedures: liquidation

As a last resort, a company can be liquidated, usually through the appointment of a liquidator who will be the official receiver or an insolvency practitioner. There are two types of liquidation: (i) compulsory (by court order usually by a creditor); and (ii) voluntary (by resolution of the company) which can be a members' voluntary liquidation (requiring a declaration of solvency) or a creditor's voluntary liquidation (no solvency declaration).

The liquidator will collect the assets, sell them and distribute the proceeds (in accordance with the order prescribed by statute) ahead of the dissolution of the company.

25. Does entry into any insolvency or other process in your jurisdiction prevent or delay secured lenders from accelerating their loans or enforcing their security in your jurisdiction?

Administration

Whilst a company is in administration, it benefits from an extensive statutory moratorium i.e. the administration moratorium. The rationale behind the administration moratorium is to give the distressed company "breathing space" during which the company and its assets are protected from creditor action and the administrator takes steps to investigate the position of the company, its business and assets, and formulates his/her proposals.

The moratorium inhibits: (i) enforcement of security over the company's property, (ii) repossession of good under a hire-purchase agreement (including a contract that incorporates retention of title provisions), (iii) exercise by a landlord of a right of forfeiture by peaceable re-entry in relation to premises let to the company and (iv) instituting or continuing legal process (including legal proceedings, execution, distress and diligence), in each case without the consent of the administrator or

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permission of the court. Outstanding winding-up petitions are dismissed, or where the administrator has been appointed by the holder of a qualifying floating charge, suspended, and no resolution may be passed by the company for its winding-up, subject to limited exceptions. The administration moratorium does not apply to security created or arising under a financial collateral arrangement within the meaning of the Financial Collateral Arrangements Regulations 2003.

An interim moratorium applies prior to the appointment of an administrator: (i) where an application for an administration order has been made but the application has not yet been granted or dismissed or the application has been granted but the administration order has not yet taken effect; or (ii) where a notice of intention to appoint administrator has been filed at court by the company, its directors or the holders of a qualifying floating charge, in which case the interim moratorium continues until the administrator is appointed or the prescribed time expires. The key difference between the permanent moratorium and the interim moratorium is that it does not prevent the appointment of administrators by a holder of a qualifying floating charge using the out-of-court process.

Insolvent liquidation

In a compulsory liquidation, a creditor can enforce its security as there is no automatic moratorium, however there is a stay on the commencement or continuation of proceedings against the company without the leave of court and therefore where the enforcement of security requires proceedings, leave would be needed from the court.

Part A1 Moratorium

CIGA 2020 introduced the Part A1 Moratorium, which allows the management of a debtor that is or is likely to become insolvent to pursue a rescue under the protection of a moratorium of, initially, 20 business days, although it can be extended. Unlike the moratorium that applies during administration, existing management can continue to manage the business and seek to navigate out of financial difficulty under the protective shield of the moratorium, subject to the monitor "monitoring" the company's affairs. During the moratorium, restrictions apply to the commencement of insolvency proceedings (except where commenced by the directors), the enforcement of security, including on the holder of a qualifying floating charge appointing an administrator and on the commencement or continuation of legal process, subject to limited exceptions. The holding of a floating charge may not give any notice which would have the effect of causing the floating charge to crystallise. If a lender were to accelerate the loan during the moratorium period, so that the debt became due and payable, then it is likely that the monitor would be required to terminate the moratorium, following which the lender would be free to enforce its security in the ordinary course.

The moratorium does not apply to security created or arising under a financial collateral arrangement within the meaning of the Financial Collateral Arrangements Regulations 2003.

CVAs, RPs and Schemes

CVAs, RPs and Schemes do not benefit from moratoria. However, CVAs, RPs and Schemes can be implemented whilst a company is in administration to benefit from the administration moratorium.

Cross-border recognition

There is scope for the recognition of overseas proceedings under the Cross-Border Insolvency Regulations 2006. Where an overseas insolvency proceeding is recognised in England as a main proceeding, a stay applies to certain actions against the debtor similar to the stay that applies upon the winding up of a company under IA 1986.

26. In what order are creditors paid on an insolvency in your jurisdiction and are there any creditors that will take priority to secured creditors?

Broadly, the IA 1986 and the Insolvency (England and Wales) Rules 2016 (SI 2016/1024) prescribe that in England and Wales the order in which creditors are paid on an insolvency is:

- **first**, creditors with fixed security over the company's assets;
- **second**, where administration or liquidation occurs within 12 weeks of a moratorium, any moratorium debts and "priority pre-moratorium debts" for which the company did not have a payment holiday during the moratorium but which were not paid;
- **third**, to satisfy the expenses of the insolvent estate (including the remuneration of the administrator or liquidator and debts or liabilities arising out of contracts entered into by the administrator);
- **fourth**, to primary preferential creditors of the company (namely, employees in respect of certain employee claims);
- **fifth**, to secondary preferential creditors (namely, HMRC in respect of certain taxes

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collected by the company on HMRC's behalf including VAT and PAYE);
- **sixth**, the prescribed part. The prescribed part is an amount set aside for the unsecured creditors of a company as prescribed by statute and calculated as a percentage of the value of the company's property which is subject to any floating charges, subject to an overall cap of £800,000 where the charge was created on or after 6 April 2020;
- **seventh**, creditors who hold security which, at the time of creation, was a floating charge;
- **eight**, to any unsecured creditor of the company; and
- **finally**, to the shareholders of the company.

27. Are there any hardening periods or transactions voidable upon insolvency in your jurisdiction?

Certain antecedent transactions entered into by an insolvent company before it goes into a formal insolvency process can be challenged under the IA 1986.

Section 238 IA 1986: Transaction at an undervalue

Where a company transferred an asset to another party for no consideration, or for significantly less than the asset's true value at the "relevant time", a liquidator or administrator can apply to court for an order to set aside the transaction. The "relevant time" is two years ending with the onset of insolvency but that time is not a "relevant time" unless the company is at that time unable to pay its debts or becomes unable to pay its debts in consequence of the transaction. These requirements are presumed to have been satisfied if the transaction was with a connected person (broadly a company's directors, shadow directors and each of their spouses and/or close relatives and any affiliated companies).

The Court shall not make an order if it is satisfied that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

Section 239 IA 1986: Preferences

Where a company has given a preference to a person at the "relevant time" an administrator or liquidator may apply to court for an order to set the transaction aside. A company gives a preference to a person if at the "relevant time" that person is one of the company's creditors or a surety or guarantor and the company does anything (or suffers anything to be done) which has the effect of putting that person into a better position in the event of the company going into insolvent liquidation/administration.

The company that gave the preference must have been influenced in deciding to give the preference by a desire to prefer the party (which is presumed where the person is connected, unless the contrary is shown).

The "relevant time" is two years before the onset of insolvency for preference to a connected party or six months before the onset of insolvency for a preference to an unconnected party, but, that time is not a "relevant time" unless the company is at that time unable to pay its debts becomes unable to pay its debts in consequence of the preference.

Section 244 IA 1986: Extortionate credit transaction

Where the company is or has been party to a transaction for the provision of credit to a company, an administrator or liquidator may make an application to court for the transaction to be set aside. The terms of the credit transaction either require the company to make grossly exorbitant payments or otherwise grossly contravene the ordinary principles of fair dealing and that the transaction was made in the three years prior to the administration or liquidation.

Section 245 IA 1986: Invalid floating charges

A floating charge on a company's property or undertaking created within: (i) 12 months ending with the onset of insolvency if at the time the charge was created the company was unable to pay its debts or becomes unable to do so as a consequence of such transaction; or (ii) two years in the case of a charge created in favour of a person who is connected with the company is invalid, in each case except to the extent of the value of so much of the consideration for the creation of the charge as consists of money paid to the company at the same time as, or after, the creation of the charge.

Section 423 IA 1986: Transactions defrauding creditors

This section applies to a transaction that was entered into at an undervalue for the purpose of putting assets beyond the reach of a creditor so as to frustrate an actual or potential claim that the creditor has against the company. There is no requirement for the company to be insolvent and it is not a requirement that the transferor in the transaction was insolvent at the time of the transaction or became insolvent as a consequence of it.

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28. Are there any other notable risks or concerns for secured lenders in enforcing their rights under a loan or collateral agreement (whether in an insolvency or restructuring context or otherwise)?

No.

29. Please detail any taxes, duties, charges or related considerations which are relevant for lenders making loans to (or taking security and guarantees from) entities in your jurisdiction in the context of acquisition finance, including if any withholding tax is applicable on payments (interest and fees) to lenders and at what rate.

The primary UK tax consideration for lenders is withholding tax on interest payable to lenders. The UK does not generally levy stamp duty or registration tax on a lender making a loan to a UK borrower or taking security in relation to any such loan. In the UK the provision of certain financial services, including lending, is exempt from VAT.

UK withholding tax is charged on payments of "yearly interest" that have a "UK source". The current rate is 20% and the obligation to withhold and account to His Majesty's Revenue & Customs ("**HMRC**") is on the person making the payment (i.e. the borrower) or the person that the payment is being made through (i.e. a payment agent). The test for determining whether or not interest has a "UK source" comes from UK case law and requires a "multi-factorial" analysis of the circumstances to determine whether the interest has a sufficient nexus to the UK to be "UK source". Often this will be reasonably clear. However, there are scenarios where the test may be difficult to apply, such as where the borrower is a tax transparent entity with links to various jurisdictions, and a careful analysis may be required.

UK resident lenders are generally not subject to UK withholding tax, as there are specific statutory exemptions for UK corporation tax payers, which includes UK permanent establishments of non-UK entities, and for UK regulated lenders, including certain UK branches of non-UK banks. Certain types of UK investment funds, such as authorised unit trusts and open-ended investment companies (OEICs), may also be exempt from UK withholding tax on interest paid to them.

The UK has recently introduced a qualification of "qualifying asset holding company" (or "**QAHC**") which is a UK resident company that can pay yearly interest to any lender without withholding tax without the need for the lender to qualify for any specific exemption. There are conditions that must be met in order for a company to qualify as a QAHC, including requirements as to its ownership be so-called "Category A" investors. Any borrower wishing to avail of QAHC status should take advice on the qualifying criteria.

There are other exemptions that a non-UK lender may be able to avail of (please see the response to Q30 for more details).

30. Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?

As discussed above in the response to Q29, non-UK lenders may be subject to UK withholding tax on interest that has a "UK source" unless they can rely on one of the exemptions available to such lenders.

Non-UK lenders may be eligible for reduced or zero withholding tax rates on interest payments under double tax treaties ("**DTTs**") between the UK and the lender's country of residence. An application must be made to HMRC to avail of treaty relief and lenders may also avail of the UK's DTT passport scheme (often referred to as the DTTP scheme), which can streamline the process to obtain clearance from HMRC to pay interest gross of withholding where the lender has obtained a DTTP scheme passport number. This is the most common means of addressing UK withholding tax risk for non-UK lenders which make loans regularly. HMRC publishes a list of those lenders which do have DTTP scheme numbers. There are requirements for non-UK lenders to be eligible for registration under the DTTP scheme and these should be checked by each new lender intending to apply.

Interest payable on a "Quoted Eurobond" is also exempt from UK withholding tax. What constitutes a Quoted Eurobond is set out in UK tax legislation and, broadly, it is a debt instrument issued by a company which carries a right to interest and which is listed on a recognised stock exchange (HMRC maintains the list of these). If a lender wishes to avail of this exemption, it needs to ensure that the debt instrument governing the loan arrangement is capable of being listed (this is usually addressed by having the borrower issues loan/promissory notes) and that it is listed prior to the first interest payment.

The Qualifying Private Placement ("**QPP**") exemption

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may also be available for non-UK lenders to address UK withholding tax risk. The conditions for this exemption are set out in UK tax legislation and are more prescriptive than the above exemptions. For example, the QPP exemption is only available for “private placements” which have a value over £10 million and a term shorter than 50 years. The lender, or every person beneficially entitled to the interest if different, must also provide a valid “QPP Certificate” stating that they are beneficially entitled to the interest and are resident in a jurisdiction with which the UK has a DTT with a non-discrimination article. Accordingly, there are jurisdictional limitations to be considered when seeking to apply the QPP exemption and the status of the lender or lenders should be considered in each case.

Certain lenders, such as credit funds structured as partnerships which lend directly, might not easily fit within the DTT, DTTP or QPP exemptions and would have to consider whether their investor base would be able to make applicable withholding tax exemption claims or whether they might establish a corporate lending vehicle that could benefit from one of the relevant exemptions.

31. What is the regulatory framework by which an acquisition of a public company in your jurisdiction is effected?

The main regulatory framework for the acquisition of public companies in the United Kingdom is the City Code on Takeovers and Mergers (the “**Code**”), which has statutory basis in the UK. The Code is administered by the Panel on Takeovers and Mergers (the “**Panel**”), which has certain powers of enforcement in respect of the transactions to which the Code applies.

The Code contains six general principles and 38 detailed rules (including interpretative notes), and the Panel also publishes practice statements containing guidance relating to the Code from time to time.

Given the complexity of takeovers and the difficulty in creating rules to cover every possible scenario, both the rules and the general principles are interpreted by the Panel in accordance with their spirit as well as the precise language, and the general principles may therefore apply in situations not expressly covered by the rules. The Code aims to ensure that target company shareholders are provided with fair and equal treatment, and that takeovers are conducted in an orderly manner. It is also designed to promote, alongside other regimes, the integrity of the financial markets, and is responsible for shaping the structure and timing of takeovers of public companies in the UK.

Other key pieces of legislation that are relevant to public takeovers in the UK include:

- the CA 2006 which sets out the procedures relating to schemes of arrangement and the squeeze-out of minorities following a takeover;
- the UK Market Abuse Regulation which prohibits actions such as insider dealing;
- the Financial Services and Markets Act 2000 which requires disclosure of certain information from issuers and their senior managers and directors in connection with a public takeover; and
- the Criminal Justice Act 1993 which has criminalised the act of engaging, or encouraging others to engage, in certain dealings in securities whilst possessing inside information.

32. What are the key milestones in the timetable (e.g. announcement, posting of documentation, meetings, court hearings, effective dates, provision of consideration, withdrawal conditions)?

Different timetables will apply in respect of both contractual offers and schemes of arrangement. Certain key milestones for each procedure are set out below which assume that no competing offer has been made and that the timetable will not be suspended to allow for regulatory conditions to be satisfied. Extensions may be granted in certain circumstances with the consent of the target company and/or the Panel.

Days are calendar days unless otherwise indicated.

Contractual offer

- Day 28 – Announcement of Potential Bid: The potential bidder makes an announcement in respect of its possible bid and the offer period begins. The potential bidder has 28 days to either announce a firm intention to make a bid or announce that it will not make a bid (unless agreed otherwise by the Panel).
- Day 0 – Publication of Offer Document: This must be made available to various relevant persons (including the target company’s shareholders) and posted online.
- Day 14 – Publication of Target Company Defence: Deadline by which the target company must publish a defence document (where the bid is hostile).
- Day 21 – First Possible Offer Closing Date:

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Bids must remain open for acceptance until the earlier of (i) the 21st day after publication of the offer document, or (ii) the date on which the offer becomes unconditional or lapses.

- Business day following Day 21 – Announcement of Acceptances: The first day on which the bidder must announce the level of acceptances. Several similar announcements are required on certain other dates throughout the process.
- Day 46 – Revision of Offer Deadline: The latest date on which the bidder can revise its offer.
- Day 53 – Competing Offer Deadline: The last date for any potential competing bidder to make an offer or withdraw.
- Day 60 – Unconditional Date: The last date for all conditions to be fulfilled, including the acceptance condition, and the date by which the offer must become unconditional or lapse.
- Day 74 – Payment of Consideration: This is the latest date by which consideration must be paid to shareholders.

Scheme of arrangement

- Day 28 – Announcement of Potential Bid: The potential bidder makes an announcement in respect of its possible bid and the offer period begins. The potential bidder has 28 days to either announce a firm intention to make a bid or announce that it will not make a bid (unless agreed otherwise by the Panel).
- Prior to Day 0 – Directions Hearing: Court hearing of claim form seeking directions for convening of target shareholders' meetings and sanction of the court to the scheme if approved by shareholders.
- Day 0 – Publication of Scheme Document: This must be posted by the target company to all relevant persons and made available online within 28 days of the announcement.
- Day 14 – Competing Offer Deadline: This is normally the last day for any potential competing bidder to clarify its intentions, however the Panel has flexibility to extend this deadline until prior to the court sanction hearing.
- Day 21 – Scheme Meetings: The earliest date for court and shareholder meetings to approve the scheme and any relevant resolutions.
- Business day following Day 21 – Announcement of Results: The target company must make an announcement of the results of the scheme meetings.
- Prior to Court Sanction Hearing: Bidder to confirm to the target company and the Panel that all of the conditions to the bid have been satisfied or waived (other than those that can only be satisfied following sanction of the scheme).
- Day 38 – Court Sanction Hearing: Court hearing to grant order sanctioning the scheme.
- Day 39 – Filing of Court Order: The court order sanctioning the scheme is filed with the Registrar of Companies and the scheme becomes effective.
- Within 14 days of the Scheme Effective Date – Payment of Consideration: This is the latest date by which consideration must be sent to shareholders.

33. What is the technical minimum acceptance condition required by the regulatory framework? Is there a squeeze out procedure for minority hold outs?

Minimum Acceptance Condition

The bid will contain a condition specifying the minimum number of acceptances which are required from the target company shareholders. Although the Code requires a minimum acceptance condition of the acquisition of shares representing more than 50% of the voting rights in the target company, the minimum acceptance condition is more usually set at 90% (being the point at which the statutory squeeze-out procedure for minority shareholders can be invoked). In the case of a mandatory offer, the required acceptance condition is 50% (plus one share).

In the case of a scheme of arrangement, the scheme must be approved by a majority in number of the voting shareholders representing at least 75% in value of the shares held by the voting shareholders. If approved, the scheme will deliver 100% of the target company shares to the bidder.

Squeeze-Out

The CA 2006 provides a statutory procedure allowing the bidder to squeeze-out the outstanding minority shareholders and compulsorily acquire the remaining shares in the target company following completion of a takeover offer. The bidder can invoke this procedure provided that it has acquired (or unconditionally contracted to acquire) 90% (by reference to both the value and voting rights of) the shares to which the takeover offer relates.

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34. At what level of acceptance can the bidder (i) pass special resolutions, (ii) de-list the target, (iii) effect any squeeze out, and (iv) cause target to grant upstream guarantees and security in respect of the acquisition financing?

A target group company can pass special resolutions, de-list and re-register as a private company with the consent of the holders of 75% or more of its voting shares. Once a company is de-listed and re-registered as a private company via these means, it may grant upstream guarantees and security without being subject to financial assistance restrictions. However, as mentioned above a squeeze-out procedure requires 90% approval by reference to both the value and voting rights of the relevant company's shares.

35. Is there a requirement for a cash confirmation and how is this provided, by who, and when?

If an offer is made for a public company and the consideration for that offer wholly or partially consists of cash, both the offer announcement (or the announcement of a firm intention to make the offer) and the offer document itself must include a confirmation provided by an appropriate third party that the offeror has sufficient financial resources available to it to consummate the transaction. The appropriate third party is typically the offeror's own financial adviser.

36. What conditions to completion are permitted?

Once a firm intention to make an offer has been announced, the offeror must proceed to make and proceed with that offer unless the Takeover Panel gives its consent. However, it is permitted to attach certain conditions to such an offer which may allow such offer to lapse without the consent of the Takeover Panel, being: (i) the minimum acceptance condition (see Q33), (ii) a condition relating to the approval of a scheme of arrangement by target's shareholders or sanctioning of that scheme, (iii) a condition required to give effect to a legal or regulatory requirement or a requirement under the offeror's articles for its shareholders to approve the deal, (iv) a long-stop date for the offer or scheme and/or (v) where required by law or regulation, a condition relating to the issuance of securities necessary to finance cash consideration (if applicable).

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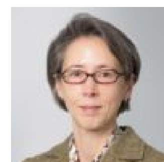

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