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An Evaluation of the Role of Creditors in Insolvency Proceedings: Report on Comparative Study

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Foreword

In 2017, INSOL International announced that it would seek to provide funding to worthy academic projects that would also be of interest to its general membership. This gesture by INSOL International demonstrates its continued investment in, and support of, its academic members. As a result, the academic community was informed that proposals for limited financial assistance for academic projects would be considered.

As delighted as I was to be the first recipient of INSOL International funding for the proposal I put forward on evaluating the role of creditors in insolvency proceedings, I am even more delighted to be publishing this report – written in conjunction with David Burdette at INSOL International – the first output under my funding application submitted to INSOL in late 2017.

The genesis of this project lies in the fact that, historically, creditors have had important roles to play in insolvency proceedings. Considering how insolvency law is constantly evolving to meet the demands of an ever-changing world, it was questioned whether the roles of creditors in different types of insolvency proceedings, which may be mainly historical, remain appropriate in the modern insolvency environment.

The process followed in getting this report published is more clearly set out in the report itself; suffice it to state that it was surprising to find that what appears at first glance to be a quite mundane topic, generated an immense amount of interest from both academics and practitioners alike. While this report reflects the result of the comparative analysis conducted on the insolvency laws of 13 jurisdictions, this is not the end of the investigation. The analysis conducted provides a solid basis for the formulation of principles as to how creditor roles in different types of insolvency proceedings should be determined in the modern insolvency environment. The formulation of such principles will be the subject of the next report under this funding application, and will be compiled with a view to providing a resource for those concerned with the creation or reform of insolvency law and the wider insolvency community.

It would be remiss of me not to acknowledge the contribution of the many people who provided the information on which this report is based (their names are listed in Appendix 2 to this report). Not only did they complete the questionnaire for this project, they also had an active say in what the questionnaire should cover. After having compiled this report, those contributors who could also went the extra mile by providing feedback on the content of the report. However, it must be emphasised that any errors in the report as a result of a misinterpretation of the information provided, remain those of the authors.

I am extremely grateful to INSOL International for the funding it has made available in order to undertake this project. Without it, the completion of this project would not be possible.

Donna McKenzie Skene
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An Evaluation of the Role of Creditors in Insolvency Proceedings: Report on Comparative Study*

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1. General Introduction

Historically, creditors have had important roles to play in insolvency proceedings. However, insolvency law is constantly evolving and changes in insolvency law may give rise to questions as to whether the roles of creditors in different types of insolvency proceedings, which may be mainly historical, remain appropriate in the modern insolvency environment.

In an attempt to answer such questions, it seemed appropriate to carry out an evaluation of the role(s) of creditors in different types of insolvency proceedings in the modern insolvency environment with a view to formulating principles as to how creditor roles in different types of insolvency proceedings should be determined. It was thought that such an evaluation should include examining existing international best practice guidance on the roles of creditors in insolvency proceedings and gathering information about the roles of creditors in different insolvency proceedings in a number of different jurisdictions in order to provide a comparative analysis. This would form a solid basis for the formulation of principles as to how creditor roles in different types of insolvency proceedings should be determined in the modern insolvency environment with a view to providing a resource for those concerned with the creation or reform of insolvency law and the wider insolvency community.

A paper outlining the possible scope of such a project was delivered to the INSOL Academics Group colloquium in July 2016. It highlighted some of the existing international best practice and gave a historical overview of the position in Great Britain as an exemplar of the issues involved. Based on this, it tentatively suggested that the determination of appropriate creditor roles in a modern insolvency environment required to take into account, *inter alia*, the underlying philosophy and culture of insolvency law; the general trend in insolvency law of a shift in focus from creditors to debtors and other stakeholders, and from certain types of creditors to others; the different issues that might arise in relation to different types of debtor; the differences between debt management and debt relief and between liquidation and rescue; the interaction of insolvency law with other areas of law; practical issues; the public and private aspects of insolvency law; and European and global developments.

The paper received a positive response and expressions of interest in providing information about the roles of creditors in different insolvency proceedings in different jurisdictions for the purposes of a comparative analysis were duly sought. Following a very positive response, a questionnaire designed to obtain relevant information about the roles of creditors in different jurisdictions was prepared and circulated to those who had expressed an interest. The questionnaire was adjusted in the light of feedback received and then circulated for completion. A copy of the questionnaire has been included as Appendix 1. Completed questionnaires from outside Great

* The authors are grateful to INSOL International for the funding that was made available in order to complete this project. Without this funding, the completion of this project would not have been possible.
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Britain were received for the following jurisdictions: Australia; Egypt; France; Germany; Italy; Latvia; New Zealand; Romania; Russia; Spain; and USA. The authors are extremely grateful to those who completed the questionnaires: a full list can be found in Appendix 2.

This report presents the results of the comparative analysis of the roles of creditors in Great Britain and the listed jurisdictions, with preliminary observations and conclusions. The results were presented at the INSOL International Academics' Colloquium which took place on 12 and 13 July 2018 and will inform the subsequent development of proposed principles as to how creditor roles in different types of insolvency proceedings should be determined in the modern insolvency environment.

2. Different Types of Procedure and Their Initiation

By way of introduction to the questionnaire for this project, participants were requested to list and summarise all the insolvency procedures in their jurisdiction, to briefly explain what type of procedures they are and to answer specific questions regarding the role of creditors in each. The questionnaire covered both consumer and corporate insolvency and participants were requested to also mention, where appropriate, hybrid or pre-insolvency proceedings.

2.1 Summary of Different Types of Procedure and to Whom They Apply

The striking aspect of the responses to this part of the questionnaire, is the wide range of options available in some jurisdictions, compared to very few options in others. For example, in Italy and France there are a variety of different procedures while in Germany, Russia and the United States, there are fewer options available.

Some insolvency systems are striking in their simplicity (for example, Germany, Spain and the United States), compared to others where the system appears complicated due to the many options available (for example, France and Italy).

In the summary below, each of the available procedures are briefly described based on the responses received from the respondents who participated in this study. Throughout this report, reference is made to the procedures set out below.

2.1.1 Australia

Bankruptcy

This is a statutory procedure whereby property, other than certain exempt property, vests in a trustee in bankruptcy, who gathers in and realises the property and distributes it to the creditors. It applies to individual debtors whether the debt is consumer debt or the debts were incurred while running a business as a sole trader.

Personal insolvency agreement

This is an alternative to bankruptcy and is made as a binding agreement between the debtor and creditors.

Debt agreement

This is also an alternative to bankruptcy and is made as a binding agreement between the debtor and creditors. This procedure is mainly for low income debtors with little prospect of the payment of debts.

Receivership

This is a contractual procedure whereby a receiver is appointed to a company where the charge (security interest) covers the whole, or substantially the whole, of the company's assets.

Voluntary administration

This procedure is directed towards corporate rescue. One possible outcome of the procedure is a deed of company arrangement (a deed made with creditors for recovery); the other two possible outcomes are liquidation or returning the profitable company back to its pre-insolvency status.

Liquidation

This is a statutory procedure for winding up a company, realising its assets and distributing the proceeds to those entitled to them. This procedure ultimately results in the company ceasing to exist. It may be voluntary (members' voluntary liquidation where there is a declaration of solvency, or creditors' voluntary liquidation where the company is insolvent), or involuntary (including, *inter alia*, where the company is insolvent).

2.1.2 Egypt

Bankruptcy

This is a judicial procedure formally initiated when a bankruptcy judgment is rendered by the court. The procedure may end in a number of ways: full voluntary payment by the debtor, a judicial settlement, or liquidation, but in practice the majority of cases end in liquidation. The procedure applies to all debtors, whether natural or juridical persons, which qualify as merchants under the provisions of the Commercial Code, including corporate entities (to which some additional provisions apply).

Pre-bankruptcy compromise

This procedure is intended as a preventive measure for distressed debtors concerned about their future ability to pay debts, or having already ceased payment in the preceding 15 days. The procedure suspends any ongoing bankruptcy claim until a decision is rendered on the compromise. The procedure applies to all debtors, whether natural or juridical persons, which qualify as merchants under the provisions of the Commercial Code, including corporate entities (to which some additional provisions apply).

Restructuring

The restructuring procedure is available for debtors, provided no bankruptcy judgment has been issued or none providing for the commencement of the pre-bankruptcy compromise procedure. The formulation of a restructuring plan is entrusted to a restructuring committee formed by the bankruptcy judge. The restructuring procedure suspends an ongoing bankruptcy claim, or pre-bankruptcy compromise proceeding, until a decision is rendered on the restructuring.

Personal insolvency

This is a judicial procedure regulated in the Civil Code and which applies to non-merchant debtors with respect to non-commercial debts where the debtor's assets are insufficient to pay their due debts. The procedure does not preclude the debtor from continuing to personally manage or dispose of assets (subject to certain conditions), or unsecured creditors from pursuing individual actions against the debtor.

2.1.3 England and Wales

Bankruptcy

This is a statutory procedure where all of a debtor's non-exempt assets and, where relevant, contributions from income, are transferred to a trustee in bankruptcy for realisation and distribution to creditors. This procedure applies to individual debtors (traders or consumers).

Debt relief orders

This is a statutory procedure whereby a debtor who is unable to pay its debts and whose assets, income and debts do not exceed specified limits, may obtain a moratorium on enforcement action by most creditors and at the end of which the debtor is discharged from most debts. No distribution to creditors is envisaged. The procedure applies to individual debtors (traders or consumers).

Individual voluntary arrangements

This is a statutory procedure for the composition of the debtor's debts or a scheme of arrangement of their affairs with an optional pre-procedure moratorium against creditor action in certain cases. It applies to individual debtors (traders or consumers).

Company voluntary arrangements

This is a statutory procedure for the composition of the debtor's debts or a scheme of arrangement of its affairs with an optional pre-procedure moratorium against creditor action in certain cases. It applies to companies and in modified form to partnerships and limited liability partnerships (LLPs).

Administration

This is a statutory procedure where the debtor's affairs, business and property are managed by an administrator with a view to (i) the rescue of the debtor as a going concern, or (ii) achieving a better result for the debtor's creditors than would be achieved if the debtor entered liquidation without going into administration first, or (iii) realising property for distribution to secured or preferential creditors. It applies to companies and, in modified form, to partnerships and LLPs.

Receivership

This is a procedure for the enforcement of the specific form of security known as a floating charge, whereby the debtor's assets are realised with a view to payment of the floating charge creditor and certain other creditors. It applies to companies and LLPs.

Liquidation

This is a statutory procedure for winding up the debtor, realising its assets and distributing the proceeds to those entitled to them. The procedure ultimately results in the dissolution of the debtor. The procedure may be voluntary (members' voluntary liquidation where there is a declaration of solvency and creditors' voluntary liquidation if there is no declaration of solvency) or compulsory (where, *inter alia*, the debtor is unable to pay its debts). It applies to companies and, in modified form, to partnerships and LLPs.

2.1.4 France

Accord amiable

This is an extra-judicial proceeding relating to individuals, for the conclusion of an arrangement between the debtor and the creditors.

Délai de grâce

This is a judicial proceeding relating to individuals, whereby the court may report or arrange payment within a period of 2 years with the option of imposing special conditions.

Procédure de surendettement

This is a procedure relating to individuals, commenced before the *commission de surendettement* and which may lead to judicial procedural steps.

Procédure de conciliation; liquidation judiciaire; redressement judiciaire; procédure de sauvegarde; procédure de sauvegarde accélérée; procédure de sauvegarde accélérée financière; mandataire ad hoc

These are all judicial proceedings relating to corporate debtors.

2.1.5 Germany

Insolvency proceedings

These are statutory proceedings which provide for the transfer of the debtor's non-exempt assets (including income) to an insolvency practitioner for realisation and distribution to creditors where the debtor is insolvent, although the possibility of a restructuring is not excluded where a corporate debtor is at least imminently unable to pay its debts. It applies to companies as well as individuals, whether consumers or entrepreneurs.

2.1.6 Italy

Accordi di ristrutturazione dei debiti

This is a pre-insolvency out-of-court proceeding arranged between a debtor (either individual or corporate who is an entrepreneur and, now, also a farmer) and creditors representing at least 60% of the total debts. The proceedings aim at restructuring the debtor's debts and non-participating and dissenting creditors must be paid in full. There is an automatic stay that can be extended by the court. A special variant of this procedure (*accordi di ristrutturazione dei debiti con banche o altri intermediari*

finanziari) allows a debtor to restructure its debts with banks and other financial institutions: this allows for the possibility of the debtor dividing its creditors (banks) into classes and imposing the arrangement on those who are either non-participating or dissenting, by means of an intra-class cram-down.

Concordato preventivo

This is a pre-insolvency judicial proceeding involving an arrangement between an entrepreneur (either individual or corporate) and all its creditors. Arrangements vary and may involve the reorganization of a company's organisational structure. An insolvency practitioner is appointed but the debtor remains in possession, although court approval is needed for extraordinary transactions. Division of the creditors into classes of creditors and cross-class cram-downs are possible, although court approval is required.

Fallimento

This is a judicial proceeding aimed at liquidating the assets of an entrepreneur (both individual and corporate) and distributing the proceeds among their creditors according to the *pari passu* principle. This procedure may result in a settlement arranged between the debtor and its creditors (*concordato fallimentare*), which is the concluding phase of the bankruptcy rather than an autonomous set of insolvency proceedings.

Liquidazione coatta amministrativa

This is an administrative proceeding that applies to special categories of company (such as cooperatives) with a view to excluding them from the economic system. The procedure may be opened for reasons other than insolvency and insolvency, pre-insolvency or similar prerequisites, are not necessarily required. The procedure is regulated by reference to the regulations on bankruptcy proceedings, unless otherwise provided. It may be concluded by a settlement with creditors.

Amministrazione straordinaria delle grandi imprese in stato di insolvenza

This is both an administrative and a judicial proceeding, with the aim of combining the satisfaction of creditors with the rescue of the business of a large insolvent company. The procedure is governed by two different sets of rules and can therefore be implemented in terms of two different proceedings: '*prodibis* proceedings' and '*marzano* proceedings'. These proceedings apply to large insolvent firms as defined. These proceedings are aimed only at rescuing the firm by means of either the sale of the assets as a whole, or a reorganisation. However, provision is also made for a form of asset sale.

Procedura di composizione della crisi da sovraindebitamento – accordo

These are judicial proceedings involving an arrangement between an over-indebted non-entrepreneur debtor and all its creditors. These proceedings mirror the *concordato preventivo*. The debtor usually remains in possession.

Procedura di composizione della crisi da sovraindebitamento – piano del consumatore

These are judicial proceedings involving an arrangement between an over-indebted non-entrepreneur debtor and all its creditors. The procedure is similar to *accordo*,

but the court may approve the arrangement notwithstanding failure to achieve the required majority of creditor approval.

Liquidazione dei beni

These are judicial proceedings aimed at the liquidation of the assets of a non-entrepreneur debtor and distribution of the proceeds among his or her creditors according to the *pari passu* principle. These proceedings mirror the *fallimento* procedure.

2.1.7 Latvia

Insolvency proceedings of a legal person

These are judicial insolvency proceedings relating to a legal person, partnership, individual merchant or person registered in a foreign country, who performs permanent economic activities in Latvia.

Insolvency proceedings of a natural person

These are judicial insolvency proceedings relating to a natural person who has been a taxpayer in the Republic of Latvia in the previous six months and who is in financial difficulty. It includes the bankruptcy procedure (where all of the debtor's property, apart from property specified in the Civil Procedure Law to which recovery cannot be applied, are sold and the proceeds applied in settling the claims of creditors) and the procedure of extinguishing obligations in succession (where the debtor's income is applied for settling the claims of creditors for a specified period, after which the obligations not covered within the scope of this procedure are extinguished).

Legal protection proceedings

This is a judicial procedure relating to legal persons, partnerships, individual merchants, persons registered in a foreign country who perform permanent economic activity in Latvia, and to the producers of agricultural products. The purpose of the proceeding is to renew the ability of a debtor to settle its debt obligations where the debtor has come into financial difficulties, or expects to do so. There is a moratorium on creditor action while the debtor formulates a reorganisation plan, which must be co-ordinated with creditors and approved by the court. The debtor remains in possession, but is supervised by a supervisor chosen by the creditors in agreement with the debtor and appointed by the court.

Extra-judicial legal protection proceedings

This is a judicial procedure which is the same as legal protection proceedings, except that the debtor must formulate and co-ordinate the reorganisation plan before submitting an application to the court for the initiation of the proceedings. This procedure can be used to restore solvency during an insolvency proceeding.

2.1.8 New Zealand

Bankruptcy

This is a statutory procedure providing for the vesting of the debtor's non-exempt assets and, where relevant, contributions from income in the Official Assignee, an independent and state employed official whose principal task is to realise property

and distribute the proceeds to creditors. It applies to individual debtors, whether consumers or traders, and can be initiated by the debtor or a creditor.

Proposals

This is a procedure whereby an insolvent individual, who has not been declared bankrupt, may make a proposal to creditors for the payment or satisfaction of debts. There are three stages to the procedure: the proposal is filed at the High Court and there is a meeting of creditors to consider it; acceptance by creditors of the proposal; and approval of the proposal by the court. The decision of the court focuses on the reasonableness and expediency of the proposal. If the court approves the proposal, it is binding on all creditors.

Summary instalment orders

This procedure is available to an insolvent debtor whose unsecured debts total not more than NZ$47,000 and permits the debtor to pay the debts either in full or in part. The maximum period is five years, but a debtor will need to provide an explanation in the summary instalment order application to extend payments beyond three years. A supervisor, appointed as part of the order, monitors the debtor's compliance. Unless the debtor defaults or the supervisor agrees, no person can begin or continue any other proceeding in respect of a debt covered by the summary instalment order. Discharge occurs when the debts covered by the summary instalment order are repaid in accordance with it, plus the costs of administration.

No asset procedure

This is a procedure initiated by the debtor, but the assignee must consent. The debtor must have no realisable assets and debts of between NZ$1,000 and NZ$47,000. The debtor must not previously have been admitted to a no asset procedure. Once admitted to the procedure, the debtor has a moratorium on debts (with some exceptions) for 12 months and is then discharged from both the procedure and the debts.

Composition

This procedure is available after a debtor has been adjudicated bankrupt. A composition is an arrangement approved by both the creditors and the court, under which it is agreed that the creditors will receive repayment of most, or all, of the debts. Once approved by the court, the adjudication of bankruptcy is annulled and the composition binds all creditors in respect of provable debts.

Liquidation

This is a procedure whereby a solvent or insolvent company is wound up. A liquidator may be appointed voluntarily (by board resolution if provided for in the constitution of the company, or by special resolution of the shareholders) or by the court upon application by specified persons.

Compromise

This is a procedure under Part 14 or Part 15 of the Companies Act 1993: the Part 14 procedure requires the company's creditors to agree to a compromise, while the Part 15 procedure involves an application to the court for approval of a compromise or arrangement.

Voluntary administration

This is a procedure whereby a company which is insolvent, or nearly insolvent, can voluntarily appoint a voluntary administrator or have one appointed by a liquidator (if the company is in liquidation), a secured creditor, or the court. The administrator is required to investigate the company's affairs and consider which of the three options is best for the company before calling a second meeting of creditors to vote on the options. The options are: (i) the company is handed back to the directors, (ii) the company goes directly into liquidation, or (iii) the creditors agree to sign a compromise (called a deed of company arrangement). If a deed of company arrangement is agreed and signed by the creditors, it is binding on them.

Receivership

This is a procedure whereby a secured creditor in a general security agreement may appoint a receiver to enforce the security, if the debtor company is in default. The court also has residual power to appoint a receiver. The receiver's principal duty is to realise assets covered by the security in order to repay the secured creditor. This procedure may exist concurrently with liquidation as well as with voluntary administration and a compromise.

2.1.9 Romania

Ad-hoc mandate

This is an insolvency prevention proceeding, applying to business professionals (as defined) in financial distress. It is a confidential proceeding initiated at the request of the debtor, whereby an *ad-hoc* trustee, appointed by the court, negotiates with creditors in order to strike a deal between one or several creditors and the debtor, so that the latter overcomes its financial difficulty.

Arrangement with creditors

This is an insolvency prevention proceeding, applying to business professionals (as defined) in financial distress. A contract is entered into by the debtor (with certain exceptions) and creditors holding at least 75% of the accepted and undisputed claims and validated by the syndic judge, whereby the debtor proposes a plan for the recovery and satisfaction of creditors' claims and the creditors agree to the plan.

General insolvency proceeding

This is an insolvency proceeding, applying to all business professionals (as defined) with the exception of those who are subject to the simplified insolvency proceeding referred to below. The debtor is kept under observation for a period of time before undergoing reorganisation and then bankruptcy, or reorganisation or bankruptcy, as appropriate.

Simplified insolvency proceeding

This is an insolvency proceeding applying to all business professionals (as defined) who fall into defined categories and whereby there is direct entry into bankruptcy when specified circumstances, which are incompatible with reorganisation, apply.

2.1.10 Russia

Insolvency (bankruptcy)[1]

This is a procedure that has several possible stages, encompassing both reorganisation and liquidation procedures. The various stages are (i) supervision, (ii) financial rehabilitation, (iii) external administration, and (iv) liquidation. The various stages may follow each other or, in defined circumstances, some stages may be skipped (for example, the company may pass from the financial rehabilitation stage to the liquidation stage). The first three stages (supervision, financial rehabilitation and external administration) do not apply in cases of simplified insolvency procedures (for example, in the liquidation of a legal entity whose property is insufficient to satisfy all creditors' claims, or in the liquidation of a so called "absent debtor"). The debtor and its creditors can also agree on an amicable settlement at any stage of the insolvency procedure. The procedure generally applies to legal entities (companies) that can be declared bankrupt under the Russian Civil Code, including various types of legal entities and individual entrepreneurs. However, certain entities are specifically excluded and in the case of some types of legal entities, the general insolvency (bankruptcy) procedures apply with certain modifications. The insolvency / bankruptcy of financial organisations are also regulated by a separate Federal Law and other laws. The Insolvency Law also includes a special chapter that regulates the insolvency of individual debtors who are not entrepreneurs.

2.1.11 Scotland

Sequestration

This is a statutory procedure where all of a debtor's non-exempt assets and, where relevant, contributions from income are transferred to a trustee in sequestration for realisation and distribution to creditors. The procedure applies to individuals (traders or consumers) and certain legal entities.

Protected trust deed

This is a voluntary deed transferring a debtor's non-exempt assets (with some exceptions) and, where relevant, contributions from income to a trustee for realisation and distribution to creditors. It applies to individuals (traders or consumers) and certain legal entities.

Debt payment programme

This is a statutory procedure allowing repayment of debts from income and, optionally, non-exempt assets, over an extended period of time while protected from enforcement action by creditors. It applies to individuals (traders or consumers) and certain legal entities.

Company voluntary arrangement

This is a statutory procedure for composition of the debtor's debts, or a scheme of arrangement of its affairs, with an optional pre-procedure moratorium against creditor

[1] The responses provided for Russia relate to the insolvency of legal entities only and do not take into account specific provisions that may apply to specific types of legal entities or individuals.

action in certain cases. It applies to companies and, in modified form, limited liability partnerships (LLPs).

Administration

This is a statutory procedure where the debtor's affairs, business and property are managed by an administrator with a view to (i) the rescue of the debtor as a going concern, or (ii) achieving a better result for the debtor's creditors than would be achieved if the debtor entered liquidation without going into administration first, or (iii) realising property for distribution to secured or preferential creditors. It applies to companies and, in modified form, LLPs.

Receivership

This is a procedure for the enforcement of the specific form of security known as a floating charge, whereby the debtor's assets are realised with a view to payment of the floating charge creditor and certain other creditors. It applies to companies and LLPs.

Liquidation

This is a statutory procedure for winding up the debtor, realising its assets and distributing the proceeds to those entitled to them. Liquidation ultimately results in the dissolution of the debtor company. The procedure may be voluntary (members' voluntary liquidation where there is a declaration of solvency and a creditors' voluntary liquidation where there is no declaration of solvency) or compulsory (where, *inter alia*, the debtor is unable to pay its debts). It applies to companies and limited liability partnerships.

2.1.12 Spain

Concurso

This is the main insolvency procedure in Spain. It is a formal procedure that applies to all individuals (whether merchants or non-merchant s), companies and other legal entities. It is a unitary process in which the debtor may continue to manage the business under the control of an insolvency administrator, or an insolvency administrator manages the debtor's estate. It is designed to conclude with a reorganisation agreement, but the majority of cases end in liquidation.

Acuerdo de refinanciación

These are restructuring agreements and may be concluded under two different statutory provisions. In each case, the agreement can be concluded between any debtor and its creditors, but in practice it is used by companies. Agreements under one statutory provision are protected against avoidance actions in a subsequent insolvency process and require, *inter alia*, certification by the auditors and a report by an independent expert. Agreements under the other statutory provision fulfil the general requirements of restructuring agreements, but in addition can bind a minority of financial creditors if confirmed by the court.

Acuerdo extrajudicial de pagos

This is a procedure which may be used by any individual or company with debts not exceeding €5 million. A mediator appointed by a Notary, or the commercial registry /

chamber of commerce, seeks an agreement between the debtor and its creditors. The debtor continues to manage its business and there is a limited stay of creditor actions to support the negotiations.

2.1.13 United States

Chapter 7

Chapter 7 (bankruptcy) is the procedure whereby an appointed trustee collects the debtor's non-exempt property and distributes its value among the debtor's creditors. It involves no income redistribution and no entry criterion such as insolvency. It applies to both natural and juridical persons, consumers and merchants, but not to banking and insurance companies (among others).

Chapter 11

Chapter 11 (reorganisation) is available to natural and juridical persons, but its most notable use is by the latter. The debtor proposes a plan of reorganisation (often of both the business and the creditors' rights) to its creditors, who vote by majorities of debtor-determined classes to accept or reject the proposed modification of their rights, though a plan may be “crammed down” on dissenting classes if certain conditions are met. In rare cases, creditors may propose reorganisation plans as well.

Chapter 13

Chapter 13 (individual debt adjustment) applies only to natural persons and only to those persons with regular income (with which to fund a payment plan), whose debts do not exceed statutory limits. In exchange for being allowed to retain non-exempt assets, the individual debtor is required to offer creditors “good faith” payments from future income (or some other source) pursuant to a plan lasting between 3 and 5 years, which payment must be at least as much as creditors would receive if in a Chapter 7 liquidation. The plan may alter the rights of some under-secured creditors, and it allows debtors with mortgage arrears to spread out repayment of their arrears, which are common reasons for individuals to invoke this procedure.

2.2 Creditors’ Ability to Initiate Proceedings

2.2.1 Generally

Whether or not creditors have the ability to initiate insolvency proceedings is largely dependent on the nature of the procedure. In the case of formal bankruptcy / liquidation proceedings, creditors generally have the right to commence proceedings for the bankruptcy or liquidation of consumer and corporate debtors, although very often there are minimum thresholds or conditions for being able to do so (see para 2.2.2 below). The position is more disparate in relation to the ability of creditors to commence corporate rescue proceedings and, in most cases, creditors do not have the ability to initiate proceedings as an alternative to formal bankruptcy for consumer debtors.

2.2.2 Creditors’ Ability to Initiate Formal Bankruptcy / Liquidation Proceedings and Conditions for Initiating the Procedure

Generally speaking, creditors have the right to commence both formal bankruptcy proceedings (consumer debtors) and formal liquidation proceedings (corporate

debtors) in most jurisdictions. Often the ability to initiate the procedure is conditional, although the conditions vary from jurisdiction to jurisdiction.

In Australia, creditors have the right to commence involuntary (consumer) bankruptcy proceedings, although the creditor must have a liquidated enforceable claim against the debtor of at least AU$5,000 which is due and payable at the time of the application. A secured creditor must surrender its security for the benefit of all creditors in order to initiate the procedure. In addition, the debtor must have committed an act of bankruptcy. In regard to corporate liquidation proceedings, creditors have the right to commence involuntary liquidation proceedings, but not either of the voluntary forms of liquidation. There are various grounds of liquidation, including the insolvency of the company.

In Egypt, any creditor may initiate formal bankruptcy proceedings which apply to both natural and juridical debtors considered as “merchants” under the provisions of the Commercial Code. This is conditional on the debt being due, commercial and undisputed and the debtor must no longer be able to pay its debts as a result of a severe disruption in their financial dealings. With respect to personal insolvency, any creditor is entitled to file a claim against its consumer debtor, provided it has proof only of the outstanding debt. It is on the debtor to show that its assets are equal to, or exceed, its obligations.

In England and Wales, creditors may commence an involuntary bankruptcy proceeding, although this is dependent on a minimum amount of unsecured debt being due to creditors which the debtor is unable, or has no reasonable prospect of being able, to pay. In regard to corporate liquidation proceedings, creditors have the right to commence involuntary liquidation proceedings, but not either of the voluntary forms of liquidation. There is a requirement that the company must be unable to pay its debts.

In France, creditors may commence the *délai de grâce* procedure in the case of consumer debtors and the *liquidation judiciaire* (liquidation) procedure or the *redressement judiciaire* (recovery) procedure in the case of corporate debtors. While no conditions are stated under the *délai de grâce* procedure, a cessation of payments is all that is required for the commencement of the *liquidation judiciaire* procedure.

In Germany, creditors have the ability to commence insolvency proceedings in respect of both consumer and corporate debtors. The creditor must demonstrate a legal interest in the opening of proceedings, establish its claim and furnish reasons for requesting the opening of proceedings. There is also a requirement that the debtor must be insolvent. Insolvency may take one of two forms: inability to pay debts as they fall due or over-indebted ness, although only the former will apply in the case of consumer insolvency while both will apply in the case of corporate debtors.

In Italy, creditors may commence the *fallimento* proceeding by establishing that the debtor is a “relevant debtor” and that the debtor is insolvent. The term “relevant debtor” is a reference to the fact that this procedure applies to entrepreneurs, which may be individuals or corporates.

In Latvia, creditors do not have the ability to commence judicial insolvency proceedings relating to natural persons (this procedure includes what is known as formal bankruptcy in most jurisdictions). Only unsecured creditors may commence insolvency proceedings relating to legal persons, partnerships, individual merchants

or persons registered in a foreign country who perform permanent economic activities in Latvia. Commencement is conditional on a variety of grounds relating to an inability to meet obligations and a deposit of a specified amount is required before proceedings can be initiated. A creditor, or group of creditors, may initiate the extra-judicial legal protection proceeding where the proceeding transitions from an insolvency proceeding to a legal protection proceeding.

In New Zealand, creditors may commence involuntary bankruptcy proceedings, provided that the creditor is owed NZ$1,000 or more, the debt is of a certain amount, the debt is payable immediately or at a fixed date in the future, the debt is legally enforceable and unsecured, and the debtor has committed an act of bankruptcy within a period of three months prior to the filing of the creditor's petition. In regard to corporate liquidation proceedings, creditors have the right to commence involuntary liquidation proceedings, but not a voluntary liquidation. The petitioning creditor must be an unsecured creditor eligible to claim in the liquidation, or a secured creditor in respect of that part of a debt which is unsecured. The court must be satisfied that one of the statutory grounds for liquidation is satisfied, which in the case of a creditor's application usually will be that the company is unable to pay its due debts.

In Romania, the general insolvency proceeding and the simplified insolvency proceeding can both be commenced by creditors. The creditor must have a debt which is certain, liquid and which has been outstanding for more than 60 days. The debtor must be insolvent as defined and there is a minimum debt threshold for opening proceedings.

In Russia, only specified creditors may open insolvency proceedings. Conditions for initiating insolvency proceedings vary according to circumstances. Unless otherwise provided, the debtor must owe a minimum amount (which is higher for certain entities). Authorised bodies, insolvency creditors and employees can file for insolvency where there is a court decree (in respect of their claim) that has entered into force. Authorised federal bodies can file for insolvency 30 days after the date of the decision to collect on the relevant payment, or the date of the court decision to collect on the claim. Credit organisations may file for insolvency from the date when the debtor starts to exhibit "signs of insolvency" (where the debtor fails to meet its monetary obligations within three months after the respective due date), subject to the requirement of publishing its intention to file for insolvency at least 15 days prior to filing the application with the court.

In Scotland, creditors may commence an involuntary sequestration procedure, although this is dependent on a minimum amount of debt due to creditors in addition to the debtor's apparent insolvency. In regard to corporate liquidation proceedings, creditors have the right to commence compulsory liquidation proceedings, but not either of the voluntary forms of liquidation. There is a requirement that the company must be unable to pay its debts.

In Spain, creditors may commence the main insolvency procedure (*concurso*), which applies to both individuals and corporations. However, a creditor who acquired a claim after it became due and within six months before submitting the petition, would not be entitled to apply for the commencement of the proceeding. A creditor must establish its claim and its status, and provide evidence that the debtor is unable to pay its obligations as they fall due.

In the United States, creditors may commence a Chapter 7 proceeding which applies to both natural and juridical persons. Creditors may initiate proceedings where three or more creditors who are owed at least US$15,775 in non-contingent, undisputed,

unsecured claims petition jointly or, if the debtor has fewer than 12 such creditors, by any one creditor with such a claim type and amount. The petitioning creditor(s) must establish that the debtor is "generally not paying [his / her / its] debts as such debts become due" or a custodian, receiver, or trustee has been appointed within the past 120 days to take charge of all of the debtor's property.

2.2.3 Creditors' Ability to Initiate Proceedings as an Alternative to the Formal Bankruptcy of Consumer Debtors

Generally, where the insolvency laws allow for an alternative to formal bankruptcy, this is in the form of an agreement with creditors. In most cases creditors cannot initiate the proceedings, although as a general rule their consent is required for the adoption or implementation of the agreement.

In Australia (personal insolvency agreement, debt agreement), England and Wales (debt relief order, individual voluntary arrangement), Italy (*accordi di ristrutturazione dei debiti, concordato preventivo, procedura di composizione della crisi da sovraindebitamento – accordo, procedura di composizione della crisi da sovraindebitamento – piano del consumatore*), Romania (ad-hoc mandate, arrangement with creditors), Scotland (protected trust deed, debt payment programme), Spain (*acuerdo extrajudicial de pagos*) and the United States (Chapter 13), creditors cannot initiate the procedure.

In New Zealand, creditors cannot commence the proposal or no asset procedure, but may commence the summary instalment order procedure with the consent of the debtor. In France, creditors may open negotiations under the *accord amiable* procedure and in Spain creditors may commence negotiations under the *acuerdo de refinanciación* proceeding, but not under the *acuerdo extrajudicial de pagos* proceeding.

In Egypt, Germany and Latvia there are no alternatives to formal bankruptcy.

2.2.4 Creditors' Ability to Initiate Corporate Rescue Proceedings

Creditors' ability to commence rescue proceedings varies from jurisdiction to jurisdiction, with some procedures allowing for commencement by creditors and others not.

In Australia, only certain secured creditors may commence voluntary administration proceedings, although this is rare. In Egypt, creditors may not commence the pre-bankruptcy compromise procedure or the restructuring procedure (although the latter may be initiated by the bankruptcy judge or the trustee, based on considerations of the creditors' interests). In England and Wales and Scotland creditors may commence the administration procedure, but not the company voluntary arrangement procedure. In France, creditors may not commence the *procédure de conciliation, procédure de sauvegarde, procédure de sauvegarde accélérée* or the procedure *de sauvegarde accélérée financière*, but they may commence the procedures of *liquidation judiciaire* or *redressement judiciaire*. In Italy, creditors may commence the *amministrazione straordinaria delle grandi imprese in stato di insolvenza* procedure, but not the *accordi di ristrutturazione dei debiti* or the *concordato preventivo* procedures. In New Zealand, secured creditors may initiate the voluntary administration procedure and creditors may, with the consent of the court, initiate a Part 14 compromise. In Romania, creditors may not initiate the ad-hoc mandate or arrangement with creditors procedures, but may initiate the general insolvency proceeding (which includes the possibility of a reorganisation). The

insolvency procedure in Russia, which includes the possibility of a reorganisation, allows specified creditors to commence the proceeding. In Spain, creditors may commence the *concurso* proceeding and may initiate negotiations under the *acuerdo de refinanciación* proceeding, but may not commence proceedings under the *acuerdo extrajudicial de pagos* proceeding. In the United States, creditors may commence a Chapter 11 proceeding.

In Latvia, creditors may not commence legal protection proceedings, although a creditor or group of creditors may initiate the extra-judicial legal protection proceeding where the proceeding transitions from an insolvency proceeding to a legal protection proceeding.

2.2.5 Creditors' Ability to Initiate Other Forms of Insolvency Proceedings

In Australia, England and Wales, New Zealand and Scotland, receivership may be commenced by the secured creditor holding a security interest over all or most of the debtor's property. The right to initiate the proceeding is contractual and is contained in the agreement or instrument creating the security interest.

2.3 Consent to and Objections Against the Procedures

In Australia, there is no requirement for positive consent when a consumer debtor enters formal bankruptcy. The bankruptcy order will only be refused if there will be substantial injustice to the debtor which cannot be remedied by the court. Under the personal insolvency agreement and debt agreement procedures, creditors provide their consent indirectly by voting on the proposed agreement. In the case of a personal insolvency agreement, a majority in number and 75 per cent in value of those present and voting, must vote in favour of the agreement. In the case of a debt agreement, creditors must accept the agreement in order for the debtor to be released from his or her obligations; the agreement may subsequently be varied with the consent of both the debtor and the creditors. Under the voluntary administration procedure there is no need for positive consent by the creditors, but they may object if the procedure is being used by the company to avoid its obligations. Creditors vote at the first creditors' meeting and a quorum of at least two creditors, with all creditors having been given notice, is required. The consent of creditors is not required under the liquidation procedure.

In Egypt, under the bankruptcy procedure, there is no requirement for creditor consent to file for bankruptcy. Creditors who are not party to the filing may object to or appeal against the court's decision to commence proceedings. In addition, there is no requirement for creditor consent for the debtor to propose a post-bankruptcy judicial settlement or initiate a restructuring procedure. Under the pre-bankruptcy compromise agreement procedure, there is no requirement for creditor consent to the debtor filing. Unsecured creditors can vote on the proposed compromise and secured creditors can also vote if they relinquish their security. A two-thirds majority, based on the value of the accepted claims and a majority of the creditors participating in the vote, is required. Secured creditors must relinquish their security in full or in part (to at least equal to one-third of the debt). In addition, creditors can object to the settlement before the court. Under the personal insolvency procedure, there is no requirement for creditor consent to file, although creditors may object to or appeal against the court decision rendering the debtor insolvent. Objections to or appeals against the court decision rendering the debtor insolvent, would have to be based on the commencement criteria (the debtor's assets being equal to or in excess of his debts).

In England and Wales, under the bankruptcy procedure, creditor consent to bankruptcy is not necessary but creditors may seek annulment of the bankruptcy. Bankruptcy may be annulled on grounds it should not have been granted, or that the debtor's debts have been paid. Under the debt relief order procedure, creditors may object to the making of the order. Objections must be made within a specified period within the moratorium period and may be to the making of the order, the inclusion of the creditor's debt, or the details of the debt. Under the individual voluntary arrangement procedure, where a moratorium is in place, individual creditors may apply for the lifting of the moratorium. Creditor consent is required for individual voluntary arrangement itself. Approval of a proposed individual voluntary arrangement requires the consent of three-quarters in value of unsecured creditors and the specific consent of any secured or preferential creditors whose rights are affected by the arrangement. Creditors may challenge approval of an individual voluntary arrangement in certain circumstances. Under the company voluntary arrangement procedure, where a moratorium is in place, creditor consent is required for an extension beyond the initial statutory period and individual creditors may apply for the lifting of the moratorium. Creditor consent is required for the company voluntary arrangement itself. Extension of the moratorium requires the consent of three-quarters in value of creditors. Approval of a proposed company voluntary arrangement requires the consent of three-quarters in value of unsecured creditors and the specific consent of any secured or preferential creditors whose rights are affected by the arrangement. Creditors may challenge the approval of a company voluntary arrangement in certain circumstances. Under the administration procedure, a floating charge holder must consent to the making of an administration order in certain circumstances. The floating charge holder's consent is required where it has appointed an administrative receiver, provided the floating charge is not challengeable. Under the liquidation procedure, creditors may object to the making of a winding-up order in the case of a compulsory liquidation.

In France, under the *procédure de sauvegarde accélérée financière* proceeding, the debtor must obtain an arrangement with most of its financial creditors in order to launch proceedings. This is not the case regarding any of the other procedures.

In Germany, the consent of creditors is not required for the commencement of insolvency proceedings.

In Italy, under the *accordi di ristrutturazione dei debiti* procedure, the arrangement must be accepted by creditors representing at least 60 per cent of the total debts and non-participating and dissenting creditors must be paid in full. Under the *accordi di ristrutturazione dei debiti con banche o altri intermediari finanziari*, the creditors may be divided into classes and the arrangement may be imposed on those who are either non-participating or dissenting by means of an intra-class cram-down. Under the *concordato preventivo* proceeding, the arrangement must be accepted by creditors. Secured creditors who will be impaired by the plan have the same voting rights as the unsecured creditors, while secured creditors who will not be impaired by the plan cannot vote unless they renounce their security interests in whole or in part. The arrangement is approved if it is accepted by creditors representing the majority of the claims recognized as being able to vote. The majority of classes of creditors must also vote in favour of the arrangement and final approval by a court is required. The creditors can propose an alternative arrangement in certain circumstances. Under the *fallimento* procedure, consent of the creditors is not required, but creditors may challenge the opening of proceedings on the basis that the debtor is not a relevant debtor, is not insolvent, or on the basis that the court lacks jurisdiction. In the first two cases, the proceedings will be dismissed; in the third case, the proceedings will be transferred to the correct court. Under the *liquidazione coatta*

amministrativa procedure, consent of the creditors is not required but creditors may challenge the opening of proceedings in a similar way to the *fallimento* procedure. However, the fact that the debtor is not insolvent does not prevent the proceedings from remaining open, as the proceedings do not necessarily require the debtor's insolvency. Under the *amministrazione straordinaria delle grandi imprese in stato di insolvenza* procedure, consent of the creditors is not required but creditors may challenge the opening of proceedings in a similar way to the *fallimento* procedure. If the court finds that the debtor is not a relevant debtor but is insolvent, it must open *fallimento* proceedings instead. Under the *procedura di composizione della crisi da sovraindebitamento – accordo* procedure, the arrangement must be accepted by creditors representing at least 60 percent of the total debts. Non-participating and dissenting creditors who do not believe they will be paid in full, can challenge the arrangement. Creditors may be divided into classes. Under the *procedura di composizione della crisi da sovraindebitamento – piano del consumatore* procedure, the position is similar to the *accordo* procedure, but if the requisite majority of creditors has not accepted the arrangement, the court can nonetheless approve it. In such a case, creditors can challenge the arrangement but the court may still approve it if the challenging creditor receives not less than that which he would receive in a liquidation.

In Latvia, under insolvency proceedings of a legal person, the consent of creditors is required. The debtor may object to a creditor's claim in certain circumstances. Under insolvency proceedings of a natural person, the consent of creditors is not required for the commencement of the proceeding. Under legal protection proceedings and extra-judicial legal protection proceedings, creditors may submit written objections to the plan. The plan is accepted if it is supported by specified majorities of secured and unsecured creditors.

In New Zealand, under the bankruptcy, summary instalment order, no asset procedure and liquidation procedures, creditor consent is not required for the commencement of the proceedings and unsecured creditor consent is not required for receivership. In the case of a proposal, the proposal needs to be approved by creditors representing a majority in number and three-quarters in value, before approval by the court will be made. In the case of a composition under Part 14 of the Companies Act, the composition must be approved by creditors. In the case of a compromise, a majority in number representing 75 per cent in value of the creditors have the power to enter into a compromise. Voting is in classes and a dissenting creditor may apply to the court on specified grounds not to be bound by the compromise. Under Part 15 of the Companies Act, a compromise can be approved by the court where the requisite majority has not been obtained for a compromise under Part 14. Under the voluntary administration procedure, a secured creditor with a charge over the whole, or substantially the whole, of the company's property, has a 10 working-day decision period from the appointment of the administrator, to decide whether or not to enforce its rights under the charge.

In Romania, under the *ad-hoc* mandate and the arrangement with creditors procedures, creditors may not object once the proceedings have been opened. Under the general insolvency proceeding and the simplified insolvency proceeding, creditors may object to the opening of proceedings. Where the request to open the proceeding is made by the debtor, creditors may object within a specified time after the decision to open proceedings.

Under the Russian insolvency proceeding, no consent from creditors is required for the initiation of the procedure. However, the consent of creditors is required for the decision to move to certain stages of the procedure once proceedings have been

opened. There are also specific voting requirements for the decisions to move to certain stages of the proceeding.

In Scotland, under the sequestration procedure, creditor consent is required in some cases where the debtor applies for sequestration. Creditors may object to the granting of a sequestration, or seek recall if granted. Under the protected trust deed procedure, creditor consent is required in order for the trust deed to become protected and to bind non-consenting creditors. Consent is deemed to have been given, unless the majority in number and more than one-third in value, object. Under the debt payment plan procedure creditor consent is required but consent may be deemed or dispensed with if the plan is fair and reasonable. Under the company voluntary administration procedure, where a moratorium is in place, creditor consent is required for the extension of the moratorium beyond the initial statutory period and individual creditors may apply for the lifting of the moratorium. Creditor consent is required for the company voluntary administration itself. Extension of the moratorium requires the consent of three-quarters in value of the creditors. Approval of the proposed company voluntary arrangement requires the consent of three-quarters in value of unsecured creditors and the specific consent of any secured or preferential creditors whose rights are affected by the arrangement. Creditors may challenge the approval of the company voluntary arrangement in certain circumstances. Under the administration procedure, a floating charge holder must consent to the making of an administration order in certain circumstances. Under the liquidation procedure, creditors may object to making of a winding-up order in the case of a compulsory liquidation.

In Spain, under the *concurso* procedure, there is no requirement for creditor consent but creditors can appeal the decision to commence insolvency proceedings. Any appeal would be on the basis that the requirements for commencing the insolvency proceedings have not been met. Under the *acuerdo de refinanciación* procedure, creditor consent to negotiations is required. While creditor consent is not required under the *acuerdo extrajudicial de pagos* procedure, creditors may refuse to negotiate and thereby bring the procedure to an end.

Under Chapter 7 and Chapter 11 proceedings in the United States, it is possible for creditors to object to the opening of involuntary proceedings on the basis that the relevant criteria for the opening of proceedings have not been satisfied. However, this is extremely rare in practice and is only mentioned here for the sake of completeness.

3. Officeholders

3.1 Appointment

It is not always the case that an officeholder is appointed in insolvency proceedings. In some cases, because of the nature of the procedure, there is or may be no officeholder at all. For example, in Australia, there may be no officeholder in debt agreements if the debtor acts as administrator; in Egypt, no officeholder is appointed in the personal insolvency procedure; in Italy, there is no officeholder in *accordi di ristrutturazione dei debiti* or in a *procedura di composizione della crisi da sovraindebitamento – accordo* or *procedura di composizione della crisi da sovraindebitamento – piano del consumatore* (although in the latter procedures a mediator is appointed to negotiate the agreement); in New Zealand, there is no officeholder in a compromise under Part 14 and 15 of the Companies Act 1993; in Scotland there is no officeholder in a debt payment programme; in Spain, there is no officeholder in an *acuerdo de refinanciación* or an *acuerdo extrajudicial de pagos*

(although in the latter a mediator is appointed to negotiate the agreement); and in the USA, there is no officeholder in Chapter 11 proceedings unless one is appointed in specified circumstances. Furthermore, in some cases, the officeholder's role is or may be carried out by a public official. For example, in Australia, the official trustee puts the debtor's proposal for a debt agreement to the creditors and administers bankruptcies where a private trustee is not appointed; in England and Wales, the Official Receiver may be the trustee in bankruptcy, administers all debt relief orders, and may be the liquidator in a compulsory liquidation; in New Zealand, the Official Assignee administers all bankruptcies and no asset procedures and may also administer some liquidations; and in Scotland the Accountant in Bankruptcy may (and in some cases must) be the trustee in sequestration.

Where there is an officeholder, the role of creditors in the appointment of the officeholder varies widely and may also differ between procedures. In some cases, the officeholder is chosen by the debtor, at least initially, and there is no creditor input as such (although creditors may no doubt make suggestions). For example, in Australia, the trustee in a personal insolvency agreement is chosen by the debtor and where voluntary administration is initiated by a company debtor, the administrator is chosen by the company; in England and Wales, the nominee in an individual voluntary arrangement is chosen by the debtor; in England and Wales and in Scotland, the nominee in a company voluntary arrangement is chosen by the debtor company and an administrator may be appointed by a company debtor if certain conditions are satisfied; in New Zealand, where voluntary administration is initiated by the company debtor, the administrator is chosen by the company; in Romania, the debtor may nominate the ad-hoc trustee appointed by the court in the *ad-hoc* mandate procedure and the interim insolvency practitioner in insolvency proceedings; and in Scotland, the trustee in a trust deed for creditors is chosen by the debtor, and in a debtor application for sequestration, the debtor may nominate the trustee to be appointed by the Accountant in Bankruptcy (although the debtor's choice is not determinative).

In other cases, the appointment is made by the court or other authority and creditors have no input at the appointment stage, although they may have a role in the subsequent replacement or removal of the officeholder. For example, in Egypt, the trustees are appointed by the court in the bankruptcy and pre-bankruptcy compromise procedures; in England and Wales, the Official Receiver is always appointed initially as trustee in bankruptcy and as liquidator in a compulsory liquidation; in Germany, the officeholder is chosen independently by the court unless a preliminary creditors' committee is established (see further below); in Italy, there is no creditor input into the appointment of the insolvency practitioner / supervisor in *concordato preventivo*, *fallimento*, *liquidazione coatta amministrativa*, *amministrazione straordinaria delle grandi imprese in stato di insolvenza* or *liquidazione dei beni* proceedings or the mediator in *procedura di composizione della crisi da sovraindebitamento – accordo* or *procedura di composizione della crisi da sovraindebitamento – piano del consumatore* proceedings; in Latvia, the court appoints the insolvency administrator in the insolvency proceedings for both legal and natural persons; in Romania, the court appoints an interim trustee in an arrangement with creditors; in Scotland, there is no creditor input in those cases where a trustee in sequestration is appointed by the Accountant in Bankruptcy, or in certain cases where a trustee in sequestration is appointed by the court; in Spain, the insolvency administrator in *concurso* proceedings is appointed by the court and the mediator in *acuerdo extrajudicial de pagos* proceedings is appointed by a notary or the commercial registry / chamber of commerce; and in the USA, the case trustee in chapter 7 and chapter 13 proceedings and, if the court orders one to be appointed, the trustee in chapter 11 proceedings, is appointed by the US Trustee.

In some cases, the appointment is made by the court or other authority but creditors have (or may have) input at this stage. For example, in England and Wales and Scotland, in a creditor application for administration, the creditor(s) may nominate the administrator to be appointed and a qualifying floating charge creditor may choose the administrator to be appointed by the court in certain cases; in Germany, if a preliminary creditors' committee is established, the court is obliged to appoint the officeholder proposed unanimously by it, unless it considers that the person is not suitable to take on the office; in Latvia, the majority of creditors in conjunction with the debtor recommend to the court a person to supervise the proceedings in both legal protection proceedings and extra-judicial legal protection proceedings; in New Zealand, it is theoretically possible for creditors to have some involvement in the selection of the supervisor in summary instalment orders and some creditors have input into the liquidator initially appointed by the court in a court liquidation; in Romania, the creditor may nominate the interim insolvency practitioner in insolvency proceedings; in Russia, the arbitration manager appointed by the court may be selected by the person applying for the opening of the insolvency proceedings (including a creditor) or the creditors' meeting; and in Scotland, in a creditor application for sequestration, the creditor may nominate the trustee to be appointed by the court and in a creditor application for compulsory liquidation, the creditor may nominate the provisional / interim liquidator to be appointed by the court.

In some cases, the appointment is or may be made directly by the creditor or creditors. For example, in Australia, a secured creditor may appoint a receiver in certain circumstances and a secured creditor with a significant interest may appoint an administrator for the purposes of a voluntary administration; in England and Wales and Scotland, a qualifying floating charge creditor may appoint an administrator if certain conditions are satisfied, a floating charge creditor may appoint a receiver in certain circumstances and the creditors effectively choose the liquidator in a creditors' voluntary liquidation; and in New Zealand, a secured creditor may appoint a receiver in certain circumstances and may appoint an administrator for the purposes of a voluntary administration.

3.2 Removal or Replacement

In all jurisdictions, creditors have or may have a role in the removal or replacement of an officeholder, either in some or all proceedings. In some cases, creditors confirm the appointment made by the court or other authority or may remove or replace the officeholder directly at that stage or at a later stage, on specified grounds or otherwise. For example, in Australia, creditors may replace a trustee in bankruptcy, an administrator in a voluntary administration and a liquidator in a liquidation; in England and Wales, the creditors may vote to replace a trustee in bankruptcy other than the Official Receiver, replace the nominee in an individual or company voluntary arrangement with another officeholder to act as supervisor and may be able to remove or replace the supervisor in terms of the arrangement, may have a role in the replacement of an administrator in certain cases and may remove or replace a liquidator; in Germany, the first creditors' meeting may replace the officeholder appointed by the court; in Latvia, the officeholder may be removed by the creditors in insolvency proceedings of a legal or natural person; in New Zealand, creditors may have a role in the replacement of an administrator in a voluntary administration and a liquidator (although the replacement of a court appointed liquidator requires the approval of the court); in Romania, the interim trustee appointed by the court in an arrangement with creditors may be confirmed or replaced by the assembly of creditors and the interim officeholder appointed by the court in insolvency proceedings may be confirmed or replaced by the assembly of creditors or a creditor holding more than 50% of claims; in Scotland, the creditors may vote to replace the

trustee in sequestration appointed by the court or Accountant in Bankruptcy at the first meeting of creditors and / or may remove or replace the trustee at a later stage, may be able to remove or replace a trustee under a trust deed for creditors depending on the terms of the deed, may replace the nominee in a company voluntary arrangement with another officeholder to act as supervisor and may be able to remove or replace the supervisor in terms of the arrangement, may have a role in the replacement of an administrator in certain cases and may remove or replace a liquidator; and in the USA, creditors may vote to replace the interim case trustee appointed by the US Trustee in Chapter 7 proceedings.

In some cases, creditors may, either alternatively or in addition, apply to the court or other authority to remove or replace the officeholder, usually on specific grounds. For example, in Australia, an application may be made to the court for removal or replacement of a trustee in bankruptcy, an administrator in a voluntary administration, a receiver and a liquidator and for the setting aside of personal insolvency agreement on the ground, *inter alia*, that the trustee has erred in his duties; in Egypt, the creditors may request the removal or replacement of trustees in the bankruptcy procedure; in England and Wales, an application may be made to the court for the removal or replacement of a trustee in bankruptcy, the supervisor of an individual or company voluntary arrangement, an administrator or a liquidator and for the removal of a receiver; in Italy, creditors may apply to the court for removal of the officeholder in *fallimento* and *concordato preventivo* proceedings; in Latvia, the authorized representative of the majority of creditors may apply to the court for the removal of the officeholder in legal protection proceedings and extra-judicial legal proceedings; in Romania, the court may replace the officeholder in insolvency proceedings following a decision by the creditors' assembly; in Russia, the arbitration manager may be removed by the court on the application, *inter alia*, of the creditors' committee; in Scotland, an application may be made to the court or the Accountant in Bankruptcy for the removal or replacement of an interim trustee or trustee in sequestration and to the court for the removal or replacement of the supervisor of a company voluntary arrangement, an administrator or a liquidator and for the removal of a receiver; and in Spain, the creditors may apply to the court for the removal of the insolvency administrator in *concurso* proceedings.

There are some cases where creditors do not have any role in the removal or replacement of the officeholder. For example, in England and Wales, the Official Receiver administers all debt relief orders and is not susceptible to removal or replacement; in New Zealand, the Official Assignee administers all bankruptcies and no asset procedures and some liquidations and is not susceptible to removal or replacement; and in the USA, creditors have no role in relation to the removal or replacement of the case trustee appointed in Chapter 13 proceedings.

3.3 Remuneration

The role of creditors in fixing of the officeholder's remuneration generally takes one of two forms. Broadly speaking, the first is where creditors have direct input into the fixing of the officeholder's remuneration, either by fixing it or deciding on any increased or additional remuneration to that which is prescribed; the second is where the officeholder's remuneration is prescribed or set by the court, but creditors have a right to challenge the amount of remuneration allowed. In broad terms, the jurisdictions which adopt the first form for all or most types of proceedings are Australia, England and Wales, Latvia, Romania, Russia and Scotland, and the jurisdictions which adopt the second form for all or most types of proceedings are Egypt, Germany, New Zealand, Spain and USA. The response for Italy indicates

that remuneration is prescribed with a margin of discretion for the court and creditors have no role to play at all.

3.4 Release or discharge

Very few respondents identified any role for creditors in deciding on the release or discharge of the officeholder. The jurisdictions which did were England and Wales (where creditors have a role in the discharge of a trustee in bankruptcy other than the Official Receiver, the consent of a specified majority of certain creditors is required in the case of an administrator appointed out of court and creditors have a role in the release of a liquidator in certain cases); Romania (where creditors may raise objection to the officeholder's final report and closure of the proceedings and therefore indirectly to the officeholder's release on conclusion of the proceedings); Scotland (where creditors may object to or appeal against the discharge of the trustee in sequestration, the majority of creditors must consent to the discharge of a trustee under a trust deed for creditors and creditors may apply to be excluded from that discharge, the consent of a specified majority of certain creditors is required in the case of an administrator appointed out of court and creditors have a role in the release of a liquidator in certain cases); and Spain (where creditors may oppose the officeholder's final statement of accounts before the conclusion of the proceedings).

4. Managing the Estate

4.1 Creditors' Committee

Whether or not creditors' committees must or may be formed varies widely across all jurisdictions. Where provision is made for a creditors' committee to be appointed, in the majority of cases this is optional, although in some isolated cases this is compulsory. In Egypt, France, Latvia and Spain, no provision is made for the appointment of a creditors' committee at all.

Likewise, the functions of the creditors' committee appear to be quite limited in most cases, with the creditors' committee mainly being responsible for collecting information on behalf of the general body of creditors. A brief summary of the provisions relating to creditors' committees in the various jurisdictions appears below.

In Australia, no provision is made for a creditors' committee under bankruptcy law or any of the alternatives to formal bankruptcy. Under voluntary administration, it is optional for the creditors to form a creditors' committee. The creditors' committee has various roles, including to consult, review reports of the administrator, etc. Under the liquidation procedure the appointment of a creditors' committee is optional.

In England and Wales, provision is made for the appointment of a creditors' committee under the bankruptcy procedure, although this is optional. Creditors' committees are optional under the company voluntary arrangement procedure. There is a statutory provision for a creditors' committee during the moratorium, but it otherwise depends on the terms of the company voluntary arrangement. Under administration and receivership, creditors' committees are optional. Under a receivership, the creditors' committee has limited functions. In a liquidation, provision is made for a creditors' committee although it is optional. In a compulsory liquidation, a creditors' committee is only appointed if an insolvency practitioner replaces the Official Receiver as liquidator. The creditors' committee's consent is required for certain transactions and it has various other functions.

In France, a recent reform has seen employees' representatives progressively being gathered into a committee called the *comité social et économique* (social and economic committee).

In Germany, a creditors' committee is initially established by the court and may contain members other than creditors. The continued existence and / or composition of the committee is subsequently confirmed or otherwise by the creditors' meeting. There may also be a preliminary creditors' committee at the application stage of the proceedings.

In Italy, under *fallimento* and *liquidazione dei beni* proceedings, the appointment of a creditors' committee is compulsory. The committee has various roles, mainly aimed at the supervision of the officeholder, including consent to various actions of the officeholder, input into decisions on whether the debtor is allowed to continue business and supervision of a debtor who is so allowed. The committee has the right to inspect documents, ask the officeholder and the debtor for information and clarification, and make written comments about the officeholder. The committee must also advise the court, the appointed judge as well as the officeholder. Under the *liquidazione coatta amministrativa* proceeding, there is a supervisory committee consisting of persons who are preferably, but not necessarily, creditors. The committee has inspective and consultative powers. Under the *amministrazione straordinaria delle grandi imprese in stato di insolvenza* proceeding, there is a supervisory committee, including some members who are creditors. The committee has an advisory role. Under the *procedura di composizione della crisi da sovraindebitamento – accordo* and *procedura di composizione della crisi da sovraindebitamento – piano del consumatore*, there are no creditors' committees.

In New Zealand, provision is made for the optional appointment of experts or a committee of persons – not necessarily creditors – under the bankruptcy procedure. Under liquidation and voluntary administration, the appointment of a creditors' committee is optional. In a liquidation the creditors' committee has certain statutory powers. There is no provision for a creditors' committee under the compromise procedure.

In Romania the appointment of a creditors' committee under the general insolvency proceeding and the simplified insolvency proceeding is optional. The committee has a variety of functions which may be performed by the creditors' assembly if there is no committee.

In Russia, a creditors' committee is appointed unless there is less than a specified number of creditors. The committee is elected by the creditors' meeting. The committee represents the interests of the insolvency creditors and authorised bodies and exercises control over the arbitration manager. The committee has a variety of other functions as specified or authorised by the creditors' meeting, including requesting information about the debtor's financial situation from the arbitration manager or the debtor, challenging actions of the arbitration manager in court, calling a creditors' meeting, making decisions to recommend to the creditors' meeting to remove the arbitration manager and taking other actions specified in the Law and / or delegated to it by the creditors' meeting.

In Scotland, provision is made for the appointment of a creditors' committee under the bankruptcy procedure, although this is optional. Under the protected trust deed procedure, the appointment of a creditors' committee is optional and largely depends on the terms of the trust deed. A creditors' committee is optional under the company voluntary arrangement procedure. There is a statutory provision for a creditors'

committee during the moratorium, but it otherwise depends on the terms of the company voluntary arrangement. Under administration and receivership, creditors' committees are optional. Under receivership the creditors' committee has limited functions. In a liquidation there is provision for a creditors' committee, although it is optional. The creditors' committee's consent is required for certain transactions and it has certain other functions.

Under the United States Chapter 7 procedure, creditors' committees are optional. The committee may consult with and make recommendations to the case trustee and submit questions to the court / trustee. Creditors' committees under this procedure are rare in practice. Under Chapter 11, a creditors' committee is theoretically compulsory, but optional in practice. The committee collects information about the debtor and the case and makes it available to creditors, solicits comments from creditors on the case, consults with the trustee or debtor-in-possession on matters of case administration of concern to creditors, investigates the debtor and its operations with a view to evaluating the desirability of continuing the debtor's business and / or pursuing pre-bankruptcy transactions for potential avoidance, and participates in the formulation of and voting on the plan of reorganisation.

4.2 Creditors' Meetings

Considering the traditional role of creditors in insolvency proceedings, it is not surprising to find that in most of the respondents' submissions, creditors' meetings are held in nearly all proceedings. However, there are some jurisdictions, such as England and Wales, where creditors' meetings are not held. Instead, decisions are taken in accordance with a statutory decision-making procedure.

In Australia, creditors' meetings are held in all insolvency proceedings with the exception of receivership, where creditors' meetings would in any event not be required. Under the bankruptcy procedure, creditors' meetings are usually only held when there is a complex issue to be decided, for example for the removal of the trustee. Under the personal insolvency agreement procedure, creditors' meetings will only be held where the creditors request such a meeting. Under the debt agreement procedure, creditors' meetings will only be held if the agreement needs to be varied.

In Egypt, creditors' meetings are held under the bankruptcy procedure where there is a liquidation or post-bankruptcy judicial settlement. In liquidation, the creditors' meeting votes on the trustee's continued management of the debtor's business and may request the replacement of the trustee. In judicial settlements, a meeting of creditors considers the settlement presented by the debtor and creditors may be represented at the meeting by an agent authorised to vote by proxy. Under the pre-bankruptcy compromise proceeding, a meeting of creditors considers the compromise presented by the debtor, and creditors may be represented at the meeting by an agent. Under the personal insolvency procedure, no creditors' meetings are held.

In England and Wales, there are no creditors' meetings under any of the insolvency procedures. Where decisions need to be taken, these are taken in terms of statutory decision-making procedures.

In France, there are no creditors' meetings under the *accord amiable, délai de grâce, procédure de surendettement, procédure de conciliation*, *liquidation judiciaire* and *mandataire ad hoc* procedures. Under the *redressement judiciaire, procédure de sauvegarde, procédure de sauvegarde accélérée and procédure de sauvegarde*

accélérée financière procedures, creditors' meetings are held and remote attendance at these meetings is not excluded.

In Germany, creditors' meetings are mandatory at specified stages of the proceeding and optional at other times. No remote attendance at creditors' meetings is possible.

In Italy, creditors' meetings are provided for under the *concordato preventivo* procedure for the purposes of voting on an arrangement, although remote attendance is not possible. However, within 20 days after the date of the meeting those creditors who did not vote at the meeting (personally or by proxy) may send to the Judge appointed for those proceedings a letter, facsimile or e-mail, expressing their disagreement with the debtor's proposal. If they do not send such a communication, they will be assumed to have accepted the debtor's proposal. Creditors' meetings are also provided for under the *procedura di composizione della crisi da sovraindebitamento – accordo* procedure, but in this case there is the possibility of voting remotely.

In Latvia, under insolvency proceedings for legal and natural persons, creditors' meetings make decisions on specified matters, including the determination of the type of sale of the debtor's property if the property has not initially been sold, the extension of the deadline for the sale of the debtor's property, and further action in relation to property that is excluded from the sale plan of the property. Under legal protection proceedings and extra-judicial legal protection proceedings, a creditors' meeting may be convened in connection with the formulation of the plan.

In New Zealand, creditors' meetings may be held under the bankruptcy procedure, but are rarely held in practice. Under the liquidation and voluntary administration procedures, creditors' meetings may be held but are optional. Under the liquidation procedure the creditors' meetings have certain statutory powers. No provision is made for creditors' meetings under any of the other procedures, although a creditors' meeting is required to approve a proposal by the trustee after the proposal application has been filed at court and any composition agreement requires creditor approval.

In Romania, no provision is made for creditors' meetings in the *ad-hoc* mandate or simplified insolvency proceeding. Under the arrangement with creditors proceeding, creditors' meetings are held and the functions of the meeting include approving the trustee's reports, appointing a creditor representative and deciding on the termination of the arrangement. Postal votes are allowed under this procedure. Under the general insolvency proceeding, provision is made for creditors' meetings and creditors vote on all management decisions. Postal votes are allowed and may be communicated by means of any medium.

In Russia, the insolvency proceeding makes provision for creditors' meetings. Some functions may be delegated to the creditors' committee. There is no possibility of remote attendance at meetings.

In Scotland, under the sequestration proceeding, creditors' meetings may be held for certain purposes. Under the protected trust deed procedure, creditors' meetings are optional and will largely depend on the terms of the trust deed. No provision is made for creditors' meetings under the debt payment programme. In the case of company voluntary arrangements and administration, no provision is made for creditors' meetings and decisions are taken in accordance with statutory procedures. Under receivership there are creditors' meetings, but the meeting has very limited functions. In liquidation, creditors' meetings can be held for certain purposes.

In Spain, creditors' meetings are held although decisions may be made by a written procedure and no actual meetings may take place. The main role of creditors is to decide on any reorganisation of the debtor. Any meetings held are physical meetings; no provision is made for participation by means of electronic communications.

In the United States, provision is made for creditors' meetings in procedures under Chapters 7, 11 and 13. Under Chapter 7, the initial meeting may elect a creditors' committee and trustee and provide for the examination of the debtor. Under Chapters 11 and 13, the initial creditors' meeting provides for the examination of the debtor.

4.3 Right to Information

From the responses submitted by participants, it is clear that creditors generally have the right to information regarding the administration of the proceeding.

In Australia, creditors have the right to information under all procedures, although the right to be furnished with information is more limited under receivership. In New Zealand, creditors are generally entitled to be provided with information under all procedures. In Latvia, creditors are generally entitled to be provided with information under all the procedures, although under the legal protection proceeding and the extra-judicial legal protection proceeding, creditors are entitled to specified information.

In Egypt, under the bankruptcy procedure, creditors are entitled to receive information on the course of the proceedings and have the right to request updates and clarifications from the trustee via the creditor(s) appointed to supervise the trustee. Under the pre-bankruptcy compromise procedure, creditors have the right to receive information related to the proceedings, for example information on the financial status of the debtor, reasons for its deterioration, its outstanding debts, the trustee's view on the compromise proposed by the debtor, etc. Under the restructuring procedure, creditors are entitled to a progress report on the implementation of the plan every three months. Under the personal insolvency procedure, information on the judgments rendered by the court are available in a register, which is available to the public.

In England and Wales, creditors have rights to specific or specified information under the bankruptcy, debt relief order and individual voluntary arrangement procedures. In the case of company voluntary arrangements, administration and liquidation, creditors have the right to information throughout the procedure. Under receivership, the floating charge creditor will generally have contractual rights to information and the receiver is bound to provide other creditors with certain information.

In France, under the *procédure de surendettement*, the Commission makes information available to creditors when deciding their claims. Under all other procedures, the information before the court is generally available to creditors as insolvency procedures in France are public procedures.

In Germany, creditors are informed about the courts' decisions exclusively by way of public announcement (on the Internet). Creditors are entitled to be furnished with information via the creditors' committee and creditors' meetings. Creditors also have the right to consult the court's files.

In Italy, creditors' are entitled to be furnished with information via the creditors' committee under the *fallimento* procedure.

In Romania, under the *ad-hoc* mandate procedure, there is no specific provision relating to the provision of information, but there is a general principle relating to the disclosure of information. In practice, the proceeding will only work if full disclosure is made. Under the arrangement with creditors procedure, there is no specific provision, but there is a general principle relating to the disclosure of information. In practice, the proceeding will only work if there is full disclosure. The trustee must inform creditors if the debtor fails to meet its obligations under the arrangement. Under the general insolvency proceeding and the simplified insolvency proceeding, creditors have the right to initial notification and thereafter all relevant information appears in a public register. Certain creditors have a right to receive specified information and documents from the debtor.

In Russia, the creditors' committee has the right to request specified information regarding the debtor. There are also other provisions aimed at transparency for creditors, including the right to receive timely notifications. Certain information is subject to mandatory disclosure or publication.

In Scotland, under the sequestration procedure, the creditors' committee has the right to certain information; creditors generally also have rights to certain information. Under the debt payment plan procedure, creditors have the right to certain information. Under the protected trust deed, company voluntary arrangement, administration and liquidation procedures, creditors have the right to information throughout the relevant proceedings.

In Spain, under the *concurso* procedure, creditors have the right to receive specified information and if the insolvency administrator does not comply with their information duties to creditors, the court will reduce the remuneration of the insolvency administrator.

In the United States, under Chapter 7, Chapter 11 and Chapter 13 proceedings, creditors have the right to information on request and may also participate in the examination of the debtor.

5. Clawback Provisions

It often happens that the officeholder elects, for whatever reason, not to challenge prior transactions entered into by the debtor. This may happen for a variety of reasons, for example a lack of solid evidence, a lack of funds to challenge the transactions in court, impecuniosity of defendants, etc. The question in such a case is whether a creditor or creditors may challenge such prior transactions independently or in the place of the officeholder.

In Australia, under the bankruptcy and debt agreement procedures, creditors are not able to challenge prior transactions. Under the personal insolvency agreement procedure, creditors are not able to challenge prior transactions but they may specify transactions to be challenged under the agreement. The provisions relating to challenging prior transactions do not apply to receivership and voluntary administration. Under the liquidation procedure, only the liquidator may challenge prior transactions. Similar rules apply in New Zealand.

In Egypt, under the bankruptcy proceeding, only the trustee (on own initiative or upon instruction by the bankruptcy judge) can challenge transactions that fall within the

suspect period prior to bankruptcy, but creditors may challenge the trustee's decision not to do so. Under the restructuring procedure, creditors may challenge transactions undertaken by the debtor and which affect their interests (including sales outside ordinary course of business, donations, gifts, etc). Under the personal insolvency proceeding, any creditor holding a matured claim may challenge actions taken by the debtor if they result in a reduction of the assets, or increase in the liabilities, of the debtor and thereby aggravate or trigger the debtor's insolvency. Different requirements apply in regard to different types of transactions.

In Romania, under the general insolvency proceeding and the simplified insolvency proceeding, creditors may bring proceedings challenging prior transactions only if the officeholder has failed to do so. The provisions relating to the challenge of prior transactions do not apply in the case of the *ad-hoc* mandate proceeding or the arrangement with creditors proceeding.

In Russia, certain creditors who satisfy specified requirements may challenge prior transactions.

In Scotland, creditors may challenge prior transactions under all the procedures apart from a debt payment plan and a company voluntary arrangement. In the case of a company voluntary arrangement, the provisions relating to prior transactions will not apply, unless the debtor is already in administration or liquidation, in which case creditors would be able to challenge prior transactions as already stated.

In Spain, under the *concurso* procedure, creditors may challenge prior transactions, but only if the creditors have requested that the insolvency administrator raise proceedings and he has not done so within specified time limits. The provisions relating to prior transactions do not apply to the other procedures available under Spanish insolvency law.

In the United States, creditors may possibly challenge prior transaction under Chapter 7 proceedings if the trustee refuses to do so without justification. The same position applies to Chapter 11 proceedings, where the debtor in possession or the trustee refuses to do so without justification.

In England and Wales, Germany, Italy and Latvia, creditors do not have the right to challenge prior transactions in any circumstances under any of the procedures.

6. Claims Against Directors

In relation to corporate insolvency, some insolvency systems allow for the creditors to institute claims against the directors and other officers of the company in circumstances where they have traded recklessly or fraudulently, have been in breach of duty or guilty of misfeasance, or traded in insolvent circumstances.

In Australia, New Zealand, Germany and Italy, creditors do not have the ability to sue directors in any circumstances under any of the corporate insolvency procedures. This situation also pertains in Egypt, although there the court has the authority (in cases where the assets of the insolvent company do not cover at least 20 percent of its debts) to hold all or some of its board members or managers personally liable for its debts in whole or in part, unless they can demonstrate that they had exercised their duties with the necessary caution.

In England and Wales and Scotland, creditors may sue the directors in certain circumstances under the administration, receivership and liquidation procedures.

Under the company voluntary arrangement procedure this would not apply, although creditors may challenge certain actions of directors during any moratorium (if there is one).

In France, under all insolvency proceedings relating to corporate debtors, creditors may sue the directors if the officeholder fails to act, and also in certain specified circumstances.

In Latvia, under insolvency proceedings of a legal person, a creditor has the right to participate as a third party in proceedings brought by the officeholder in accordance with the procedures specified in the Civil Procedure Law. The creditor is entitled to bring an action in the amount of his unsecured claim if the officeholder has not brought proceedings within a specified time limit.

In Romania, under the general insolvency proceeding and the simplified insolvency proceeding, the creditors' committee or the creditors' assembly may initiate proceedings, but only if the officeholder fails to do so. Certain specified creditors also have the right to bring proceedings. In Russia, creditors have the right to institute proceedings in specified cases.

In Spain, under the *concurso* procedure, creditors do not generally have the right to sue the directors. However, where liability has been found, the creditors may request the insolvency administrator to enforce such liability and if the insolvency administrator does not act within a specified period of receiving this request, creditors will be entitled to request the payment from the directors in the name of the insolvency estate.

In the United States, under both Chapter 7 and Chapter 11 proceedings, creditors may only sue the directors if the trustee refuses to pursue claims without justification and the court's consent has been obtained.

7. *Locus Standi* of Creditors

All respondents indicated that, where relevant in the context of the particular procedure, creditors would have *locus standi* before the court, either generally in relation to any relevant matter or in relation to specified matters.

8. Involvement of Public Officials

Public officials may carry out a variety of roles in relation to insolvency proceedings.

As noted above, in some jurisdictions the role of the officeholder is or may be carried out by a public official in some procedures.

In addition, in some jurisdictions, a public official may have a role to play in supervising officeholders or insolvency proceedings. For example, in Australia, the Inspector-General in Bankruptcy is responsible for the general administration of the bankruptcy legislation and, *inter alia*, regulates bankruptcy trustees and debt agreement administrators and reviews decisions of trustees; in New Zealand, the Official Assignee is appointed under the bankruptcy law and is also involved in the administration of compositions and oversees any supervisor appointed to supervise a debtor's compliance with a summary instalment order; in Scotland, the Accountant in Bankruptcy has the function of supervising, *inter alia*, interim trustees and trustees in sequestration and trustees under protected trust deeds; and in the United States, the

United States Trustee oversees the administration of bankruptcy cases and private trustees.

In some jurisdictions, some insolvency proceedings are administrative in nature and are carried out under the auspices of a public official or other administrative authority. For example, in France, the *procédure de surendettement* is a procedure relating to individuals commenced before the *Commission de surendettement*; and in Italy, a *liquidazione coatta amministrativa* is an administrative procedure administered under the auspices of the administrative authority supervising the firm and an *amministrazione straordinaria delle grandi imprese in stato di insolvenza* is an administrative and judicial procedure administered under the auspices of the Italian Ministry for Economic Development.

In some cases, roles originally carried out by creditors may now be carried out by a public official, or a public official may carry out roles which would otherwise be carried out by creditors but are not, for example because a creditors' committee which would carry out such roles (if it existed) is optional and has not been appointed. There are a number of examples of such cases in Scotland, but no specific question on this was asked and none of the responses made any mention of similar developments in other jurisdictions in the context of reforms. It is thought that this is an area which might be explored further in future research.

9. Discharge of the Debtor

One of the questions respondents were requested to answer was what role creditors play, if any, in the discharge of the debtor (where there is in fact such a discharge). Whether or not creditors may object to or have any say in the discharge of the debtor varies considerably across all jurisdictions. In most cases creditors may object to a discharge, mostly on the grounds that the requirements for a discharge have not been met. In some cases, creditors may ask for specific debts to be excluded from the discharge. A summary of the position in the various jurisdictions appears below.

In Australia, creditors have no say in regard to the discharge of the debtor under the bankruptcy, personal insolvency agreement or liquidation procedures. Under the debt agreement procedure, the debtor is released from debts if the creditors accept the agreement. Under the voluntary administration procedure, the debtor may be discharged under a deed of company arrangement.

In Egypt, in the context of a settlement under the pre-bankruptcy compromise procedure, creditors may grant the debtor a period of time to fulfil its obligations and may waive their debts in part. Under the restructuring procedure, creditors may approve a plan that involves the restructuring of their debts (but the plan has to be implemented within a period of five years). Although the state of personal insolvency lapses under the legal regime automatically after five years from the date of the insolvency judgment, it is not accompanied by a discharge.

In England and Wales, creditors have no say regarding a discharge under the bankruptcy procedure. Under the debt relief order procedure, creditors do not have a say regarding any discharge, although if the creditor is successful in obtaining a revocation of the order, the debtor will not be discharged. Under the individual voluntary arrangement procedure, creditors will have a say regarding the discharge in so far as they vote on the terms of the arrangement. The arrangement will normally provide for the discharge of the debtor; it operates as a statutory novation and, assuming it is implemented according to its terms, the debtor will be discharged. Under administration, whether the creditors will have a say regarding the discharge

of the debtor will depend on the terms of the administrator's proposals. Creditors have no say over a discharge under the liquidation procedure, as dissolution of the company will take place upon the conclusion of the administration and brings about an automatic discharge of the company's debts.

In France, under the *procédure de surendettement, redressement judiciaire, procédure de sauvegarde, procédure de sauvegarde accélérée* and *procédure de sauvegarde accélérée financière procédures*, the insolvency plan will make provision for the discharge of the debtor, so creditors will have a say by approving the plan.

In Germany, creditors may apply for the discharge of a debtor to be refused on the grounds that the prerequisites for a discharge have not been met.

In Italy, under the *fallimento* procedure, only natural person debtors may obtain a discharge. The creditors' committee has the right to be heard by the court, which makes the decision regarding a discharge. Creditors may object to a discharge before the same court. Under the *procedura di composizione della crisi da sovraindebitamento – accordo* and *procedura di composizione della crisi da sovraindebitamento – piano del consumatore* procedures, creditors have no say regarding the discharge of the debtor. Under the *liquidazione dei beni* procedure, creditors remaining totally or partially unpaid have the right to be heard by the court that makes the decision regarding a discharge.

In Latvia, under the insolvency proceedings of a legal person procedure, creditors have no say regarding a discharge. Under the insolvency proceedings of a natural person procedure, a creditor may submit an application for the termination of the procedure for extinguishing obligations in certain circumstances. Under the legal protection proceedings and the extra-judicial legal protection proceedings procedures, the creditors have no say regarding a discharge.

In New Zealand, creditors do not have a say regarding the discharge of the debtor under any of the procedures other than compositions and voluntary administration. If the creditors agree to a composition, subject to the approval of the court, a debtor's bankruptcy will be annulled. Under the voluntary administration procedure, the debtor may be discharged under a deed of company arrangement.

In Romania, under the *ad-hoc* mandate and arrangement with creditors procedures, the creditors consent to a discharge in so far as the arrangement with creditors writes off existing debt. Under the general insolvency proceeding, creditors consent to a discharge in so far as the debtor is discharged upon approval of a reorganisation plan; however, discharge is conditional on the success of the reorganisation. Creditors do not have a say regarding the discharge of the debtor at the conclusion of the bankruptcy procedure.

In Russia, it is not clear whether a discharge is granted for legal entities or individual entrepreneurs covered by the insolvency procedure.

In Scotland, under the sequestration and protected trust deed procedures, creditors may object to or appeal against the discharge of the debtor. The discharge of a debtor under the administration procedure will depend on the terms of the administrator's proposals. Under the liquidation procedure the debtor company is dissolved upon conclusion of the administration process, which brings about an automatic discharge of all the debts of the company.

In Spain, under the *concurso* procedure, creditors may oppose a discharge based on a lack of compliance with the requirements described in the law and may request revocation of the discharge within 5 years of the judicial decision in specified cases.

In the United States, under Chapter 7 and Chapter 13 proceedings, creditors may object to a debtor's discharge on specified grounds, or seek the exclusion of certain claims from the discharge. Under Chapter 11 proceedings, creditors control the discharge in so far as it is part of the reorganisation plan.

10. Outcome of Procedure

The role of creditors in determining the outcome of insolvency proceedings largely depends on the type of proceedings involved. Where creditors do have a role in determining the outcome of the proceedings, this may be an exclusive role or it may be subject to the control of the court or other authority, which may be required to approve the creditors' decision or have the ability to override it in certain circumstances.

Where the proceedings by their nature have more than one possible outcome, creditors will generally have a role in determining what that outcome should be, in particular whether the proceedings should result in liquidation of the debtor's assets or a compromise or plan. For example, in Australia, where a personal insolvency agreement is proposed, the creditors may vote to initiate the agreement, for the debtor to file for bankruptcy or for the debtor to do neither; and in a voluntary administration, the creditors determine whether the outcome should be liquidation, return to the directors or a deed of company arrangement; in England and Wales and Scotland, the creditors vote to determine the outcome of administration; in Germany, the creditors decide whether the debtor's business should be closed down or temporarily continued and may commission the insolvency practitioner to draw up an insolvency plan; in Italy, in a *fallimento* proceeding, the creditors' committee has a role in determining whether and under what conditions the debtor may continue business and the creditors have the right to apply to the court for a bankruptcy settlement and propose a plan; in New Zealand, the creditors in a voluntary administration determine whether the outcome should be liquidation, return to the directors or a deed of company arrangement; in Russia, the creditors' meeting determines the move to later stages of the procedure (financial rehabilitation, external administration or liquidation) following the initial mandatory stage of observation and whether to enter into an amicable settlement agreement at any time during the proceedings; and in Spain, the creditors in *concurso* proceedings determine whether the outcome should be liquidation or reorganisation and the conditions of the reorganisation plan.

Where the creditors determine that a compromise or plan should be the outcome of the proceedings, or where the proceedings are by their nature proceedings for a compromise or plan, the creditors will generally determine the outcome in so far as they are asked to vote on the compromise or plan (subject, as noted, to the control of the court or other authority in some cases) or they may have the right to propose their own plan. Thus, in Australia, creditors vote on personal insolvency agreements, decide whether to accept debt agreements and vote on any deed of company arrangement in a voluntary administration; in Egypt, all creditors need to approve any judicial settlement put forward by the debtor in the bankruptcy procedure. Creditors also vote on any compromise proposed by the debtor in the pre-bankruptcy compromise procedure (subject to the confirmation of the court) and may object to a compromise before the court; in England and Wales, creditors vote on individual and company voluntary arrangements; in France, the creditors in *redressement judiciaire,*

procédure de sauvegarde, procédure de sauvegarde accélérée and *procédure de sauvegarde accélérée financière* have the right to propose their own plan which may lead to changes in the debtor's plan (the plan ultimately being decided on by the court); in Germany, the creditors vote on any insolvency plan (subject to confirmation by the court); in Italy, creditors vote on the restructuring agreement in *accordi di ristrutturazione dei debiti* proceedings and *ristrutturazione dei debiti con banche o altri intermediari finanziari* proceedings (subject to the confirmation of the court), vote on the debtor's proposal and may propose a competing proposal in *concordato preventivo* proceedings (subject to the approval of the court), vote on the debtor's proposal in *procedura di composizione della crisi da sovraindebitamento – accordo* proceedings and may challenge any settlement which is agreed, vote on the debtor's proposal in *procedura di composizione della crisi da sovraindebitamento – piano del consumatore* (subject to the power of the court to approve the settlement if the requisite majorities are not obtained) and may challenge (but not vote on) a settlement proposed by the *commissari liquidatori* in *liquidazione coatta amministrativa* proceedings; in Latvia, the creditors must support the debtor's plan of measures in legal protection proceedings and extra-judicial legal protection proceedings; in New Zealand, creditors vote on proposals (subject to confirmation by the court), compositions following bankruptcy (subject to confirmation by the court), compromises under Part 14 of the Companies Act 1993 (subject to the power of the court to approve a compromise under Part 15 of the Companies Act 1993 if the requisite majorities are not achieved) and a deed of company arrangement in a voluntary liquidation; in Romania, creditors may negotiate an agreement with the debtor in *ad-hoc* mandate proceedings, must vote on the arrangement in an arrangement with creditors (subject to confirmation by the court) and vote on any reorganisation plan in insolvency proceedings; in Russia, the creditors vote on the confirmation of any plan of financial rehabilitation, confirmation of and changes to any plan of external administration and entry into an amicable settlement agreement; in Scotland, creditors decide whether a trust deed may become protected, whether to accept a debt payment programme (subject to the power of the Accountant in Bankruptcy to approve such a programme without creditor consent) and vote on company voluntary arrangements; in Spain, the creditors vote on any reorganisation plan in *concurso* proceedings, on restructuring agreements and on plans in *acuerdo extrajudicial de pagos* proceedings; and in the USA, creditors vote on the plan of reorganisation in Chapter 11 proceedings.

The provisions for voting vary. In almost all cases, approval of the compromise or plan requires a specified majority rather than unanimity and the majority required may vary depending on the type of agreement; in some cases, there are also additional requirements, for example the consent of specific types of creditors. Creditors may be divided into classes and there may be provision for cramdown. For example, in Germany, creditors are divided into classes and there is provision for cramdown; in Italy, creditors are divided into classes and there is provision for cramdown in *ristrutturazione dei debiti con banche o altri intermediari finanziari*, *concordato preventivo*, *procedura di composizione della crisi da sovraindebitamento – accordo* and *procedura di composizione della crisi da sovraindebitamento – piano* proceedings; in New Zealand, creditors in voluntary administration may be divided into classes and there is provision for cramdown; and in the USA, creditors in Ch 11 proceedings are divided into classes and there is provision for cramdown.

Creditors may also have a role in bringing proceedings, or any compromise or plan agreed as a result of proceedings, to an end. For example, in Australia, the creditors may terminate or seek the termination by the court of a personal insolvency agreement, may seek the termination by the court of a debt agreement and may terminate or seek the termination by the court of a deed of company arrangement; in

Egypt bankruptcy proceedings are brought to an end if the creditors approve a judicial settlement; in England and Wales, creditors may apply for the annulment of bankruptcy or a debt relief order, challenge an individual or company voluntary arrangement, apply for the end of administration and apply for a sist of liquidation; in Germany, creditors must consent to any request by the debtor to discontinue insolvency proceedings; in Italy, the committee of creditors has the right to seek the conclusion of *fallimento* proceedings and, as noted above, creditors in a *fallimento* proceeding have the right to apply to the court for a bankruptcy settlement and propose a plan resulting in the termination of the *fallimento* proceedings if the plan is approved; in Latvia, creditors may apply to the court to change insolvency proceedings of a legal person into legal protection proceedings, apply to the court for the termination of insolvency proceedings of a natural person where these comprise proceedings for extinguishing the debtor's obligations in specified circumstances, and apply to the court to terminate legal protection proceedings or extra-judicial legal proceedings if the debtor fails to implement the plan of measures; in New Zealand, creditors may seek termination by the court of a proposal, may seek the termination by the Assignee of a summary instalment order or a no asset procedure or the termination of a deed of company arrangement; in Romania, creditors may seek the termination of an arrangement with creditors and have an indirect role in the termination of insolvency proceedings if there are insufficient assets to pay the expenses of the procedure; in Russia, creditors may seek conclusion of any given stage of the insolvency proceedings and initiation of the next or a different stage of proceedings; in Scotland, creditors may apply for the recall of sequestration, apply for sequestration in certain circumstances where the debtor has granted a trust deed for creditors, apply for variation or revocation of a debt payment programme, challenge a company voluntary arrangement, apply for the end of administration and apply for a sist of liquidation; and in Spain, *concurso* proceedings may be brought to an end if all creditors desist after the first phase of the proceedings.

11. Cross-Border Insolvencies

Nearly all respondents indicated that the role of creditors was no different in cross - border insolvency proceedings as opposed to national or domestic proceedings, although one respondent noted that the classification of foreign claims and their ranking might impact on the role of some creditors (France). It is thought that although not specifically mentioned by other respondents, this practical point might also be relevant in other jurisdictions, for example in Russia, where foreign claims may not be recognised.

12. Practical Issues

A number of respondents identified practical or other issues with regard to the role of creditors in insolvency proceedings. There were some common themes in the responses as well as some issues which were specific to individual jurisdictions.

A number of respondents identified creditor apathy as an issue, often linked to the costs of initiating or participating in insolvency proceedings and / or the low returns to be expected (England and Wales, Germany, Italy, Latvia, Scotland, Spain and USA). In the responses for England and Wales, Italy, Scotland and Spain it was noted that creditor apathy is likely to be more marked in (consumer) bankruptcy and liquidation cases than in (corporate / business) rescue cases.

The issue of claims trading was identified by a number of respondents (Germany, Spain and USA) and the linked issues of position voting in Ch 11 cases and claims acquisition in anticipation of takeover, was also specifically identified in the USA.

The excessive length of proceedings and the disproportionate costs of proceedings / costs of proceedings generally, was identified by two respondents (Italy and Russia).

Other specific issues identified by respondents included: problems where the tax authority is a creditor in phoenix trading cases and a related issue regarding the non-payment of certain employee creditor claims and other matters (Australia); the level of court involvement (Egypt); the lack of a stay on secured creditors (Egypt); lack of interest or role for other creditors in receivership (England and Wales and Scotland); potential criminal liability for creditors on the grounds of theft or breach of confidence in certain circumstances (France); practical difficulties in selling secured assets (Italy); in plan proceedings, lack of flexibility, uncertainty in the legal framework and lack of post - commencement finance (Italy); delays resulting from disputes regarding claims being heard in a different court from that dealing with the insolvency proceedings (Latvia); fictitious creditors (Latvia); access to information (Romania); fictitious bankruptcies (Russia); delays in court proceedings generally (Russia); the quality of officeholders (Russia); issues of judicial expertise and experience (Russia); and the untested provisions on director liability (Russia); and the “newness” of the insolvency regime which is still at the developmental stage (Russia).

13. Reforms

A number of respondents identified either no, or no substantial, reform to the role of creditors, while some respondents identified reforms of varying magnitude, either generally or in relation to certain types of proceedings, including in some cases the introduction of new types of proceedings.

In Australia, it was noted that in bankruptcy there had been an increase in the debt threshold for creditor applications and, in 2017, a number of changes were introduced, including a requirement to give written notice to creditors of any proposal by the trustee to assign his right to sue; increased provisions for disciplinary action against trustees; and increased requirements for the provision of information to creditors. Changes have also been made to the rights of creditors regarding disclosure in relation to the trustee’s remuneration; the rights of creditors in relation to notice and conduct of meetings; and the introduction of new powers of the Inspector-General to requisition a creditors’ meeting.

In Egypt, although a new insolvency law was introduced in early 2018, it was noted that there had been minimal changes to the role of creditors in business insolvencies compared to the former regime. The new stand-alone insolvency law builds for the most part on the previous framework (which had been in place since 1999) but introduces a court supervised regime for pre-bankruptcy restructuring and a mediating role for the courts. In the bankruptcy procedure, the most notable change perhaps relates to judicial settlements as any interested party can now request the bankruptcy judge to play a mediating role towards reaching a settlement (previously one had to be proposed by the debtor) and their approval now requires the consent of all creditors (to vote, secured creditors are still required to relinquish their security). The newly introduced restructuring framework has not been tested yet but raises a number of issues. Importantly, the framework seems to require unanimous approval of the plan by creditors which as a practical matter can be very difficult to achieve. The framework also lacks techniques to deal with holdout creditors such as classification of claims and voting majorities, cram-down of dissenting creditors and minority protection. There have been no major changes to non-business insolvencies and there are no pending reforms.

In England and Wales, it was noted that an optional pre-procedure moratorium has been introduced in certain cases in company voluntary administrations; restrictions on the appointment of administrative receivers in most cases have been introduced but also the possibility of out-of-court appointments in administration, including by a qualifying floating charge holder; creditor meetings have been replaced by a statutory decision making procedure in bankruptcy, company voluntary arrangements, administration and liquidation; and communication and provision of information by electronic means has been introduced in bankruptcy, company voluntary administrations, administration and liquidation.

In France, it was noted that reforms in 2014 had reinforced the role of creditors in corporate insolvency by allowing creditors to propose a plan which might be different from that of the debtor in certain cases. In addition, a reform in 2018 introduces provisions for deemed consent in the *procédure de surendettement*.

In Germany, it was noted that the law had been subject to continuous reform: with particular regard to creditors, this included the strengthening of creditors' rights to participate by the introduction of a preliminary creditors committee with rights to make a proposal for the selection of the insolvency practitioner and to be involved in the making of decisions during the application stage of the proceedings.

In Italy, it was noted that the *accordi di ristrutturazione del debiti* proceedings had been introduced relatively recently (2005) and had been subject to reform almost every year. Their main weakness is the inability to bind non-participating and dissenting creditors, but a new special variant addresses this problem by allowing for a division of creditors into classes and cram-down in certain cases. The *concordato preventivo* proceedings were subject to major reform in 2005 and have been subject to reform almost every year since, with the most recent reforms relating to incentives for new finance. Reforms to the *fallimento* procedure have progressively strengthened the powers of the committee of creditors, and reforms to the *concordato fallimentare* have introduced provisions for the division of creditors into classes and cram-down. In relation to the *amministrazione straordinaria* procedure, an alternative form of proceedings known as *Marzano* proceedings has been introduced, which speeds up proceedings. Proceedings for over-indebted non-entrepreneurs have been introduced only recently (2012) and their attempt to mirror the corresponding procedures for entrepreneurs sometimes makes the provisions user-unfriendly. There are currently proposals for reform which would allow the simplification of insolvency and pre-insolvency proceedings and make the current regulations more consistent: in particular, in clarifying how creditors may be put into different classes; how cram-down mechanisms operate; what conditions are required for a creditor to become a preferential creditor; extending the discharge to companies and other legal bodies (discharge for insolvent entrepreneurs currently being restricted to individual debtors only); and introducing special prescriptions for group insolvencies. There is also a proposal which, along the lines of the French *procédures d'alerte*, would aim at incentivising some qualified creditors to officially communicate to an authority (which is still to be determined) that their creditors are distressed. There is, however, no timescale for these proposed reforms.

In Latvia, it was noted that in insolvency proceedings of a legal person, the role of the creditors' meeting had been reduced, although creditors still have the right to object to the officeholder's actions. Insolvency proceedings of a natural person were introduced only in 2008; in 2009, their costs were reduced, and in 2010 major changes were implemented guaranteeing greater protection of creditors' interests through the introduction of the bankruptcy procedure and the procedure for extinguishing obligations. There have been changes to the supervision of

proceedings in the case of legal protection proceedings and extra-judicial legal protection proceedings.

In New Zealand, it was noted that there has been little or no substantive change in relation to bankruptcy, proposals, summary instalment orders and compositions. The no asset procedure was introduced in 2006, but creditors have few rights. There have been no substantive changes in relation to receivership. In relation to liquidation, there have been some changes to voting at creditors' meetings. The voluntary administration procedure was introduced in 2007 and has the most creditor involvement. There are also proposed reforms regarding the regulation of insolvency practitioners, which as at July 2018 are currently before Parliament.

In Romania, it was noted that there had been no major changes to the role of creditors in relation to *ad-hoc* mandate or arrangement with creditors proceedings, but the position of creditors in general and simplified insolvency proceedings has been strengthened by provisions for the protection of secured and current claims and advantages granted to holders of state budget debt.

In Russia, it was noted that bankruptcy / insolvency law had been introduced only in 2002 and there had been several amendments to the law, including amendments to the role of secured creditors, the procedures for initiating insolvency proceedings, the procedures for nomination of the insolvency officeholder and the introduction of new provisions on director liability (including the right of creditors to pursue legal action against directors).

In Scotland, it was noted that the role of creditors / the creditors' committee in sequestration has gradually reduced over time, with a number of functions being taken over by the Accountant in Bankruptcy (a public official); the requirements for creditor consent in protected trust deeds has changed from positive consent to lack of objection; the requirements for creditor consent in debt payment programmes has been reduced in successive reforms; an optional pre-procedure moratorium has been introduced in sequestration and protected trust deeds and in certain cases in company voluntary administrations; restrictions on the appointment of administrative receivers in most cases has been introduced but also the possibility of out-of-court appointments in administration, including by a qualifying floating charge holder; creditor meetings have been replaced by a statutory decision making procedure in company voluntary arrangements and administration and are likely to be so replaced in liquidation in forthcoming reforms; there have already been other changes to the way in which creditors' meetings are held / communications with creditors in liquidation.

In Spain, it was noted that reforms have not been specifically targeted at the role of creditors and there have been minimal changes only in relation to the provisions for creditor participation. Restructuring agreements have been introduced only recently and the role of creditors is limited to one of consenting to the proposals (or not).

In the USA, it was noted that there had been minor changes to creditor rights in 2005 and the introduction of a requirement for creditors represented by organised groups to disclose that fact, but otherwise there had been no salient reforms or reform proposals in recent years.

14. Conclusions

The jurisdictions covered in this report, although a relatively small sample, represent a broad spectrum including common law, civil law and mixed legal systems. It

therefore seems possible to draw general conclusions about the role of creditors in insolvency procedures with a reasonable degree of confidence.

In terms of the different types of insolvency procedure available in each jurisdiction, these vary considerably: some jurisdictions offer a wide range of different procedures, while others have only a few, or in some cases only one (but with different possible outcomes). In most cases, there is a mix of different types of procedures (or outcomes), including traditional bankruptcy or liquidation aimed at distributing the debtor's estate, composition or compromise, and reorganisation or reconstruction. Many jurisdictions provide different procedures for different types of debtors, although the categories of debtors vary, for example individual *v* corporate debtors, business *v* consumer debtors. Those jurisdictions with one or few procedures appear simpler in contrast to those jurisdictions which have a plethora of procedures and therefore appear more complex, but this does not seem to have any direct impact on the role of creditors.

In terms of whether creditors have the ability to initiate insolvency procedures, it is perhaps not surprising that this largely depends on the nature of the procedure. In the case of formal bankruptcy or liquidation procedures, creditors generally have the right to commence the procedure in relation to both consumer and corporate debtors, although very often there are minimum thresholds or conditions for being able to do so. In the case of rescue or reorganisation procedures for corporate debtors, there is more disparity, while in the case of procedures which are an alternative to formal bankruptcy for consumer debtors, in most cases creditors do not have the ability to initiate these.

In terms of creditor consent or objection to insolvency procedures, in most cases creditor consent to the commencement of the procedure is not required, but creditors may object to or challenge the commencement of the procedure on specified grounds.

In terms of whether creditors have any input into the choice of insolvency officeholder (where relevant), this varies widely and may differ depending on the type of procedure. With regard to the initial appointment of the officeholder, in some cases the officeholder is chosen by the debtor (at least initially) and there is no creditor input as such; in some cases the appointment is made by the court or other authority and creditors *either* have (or may have) input at this stage, *or* have no input at this stage but may have a role in the subsequent replacement or removal of the officeholder; and in a few cases, the appointment is or may be made directly by a creditor or creditors. In all jurisdictions, creditors have or may have a role in the removal or replacement of the officeholder in some or all types of procedure: in some cases, the creditors confirm the appointment made by the court or other authority or may remove or replace the officeholder directly at that stage, or at a later stage, while in some cases creditors may (alternatively or in addition) apply to the court or other authority to remove or replace the officeholder. In very few cases do creditors not have any role at all in the removal or replacement of the officeholder.

In terms of creditor input to fixing the officeholder's remuneration, this generally takes one of two forms: creditors *either* have direct input by fixing the officeholder's remuneration or deciding on any increased or additional remuneration to that which is prescribed, *or* have indirect input through a right to challenge the amount of remuneration allowed where the officeholder's remuneration is prescribed or set by the court. In only a few cases do creditors have no input at all.

In terms of deciding on the release or discharge of the officeholder, very few respondents identified any role for creditors in this context.

In terms of managing the debtor's estate, there is wide variation in whether creditors' committees must or may be formed, and in the majority of cases where provision is made for a creditors' committee, this is optional, although in a few cases it is compulsory. The functions and powers of creditors' committees, where relevant, also vary, although they appear, with some exceptions, to be fairly limited. Whether or not there is provision for creditors' committees, provision is made for creditors' meetings in most jurisdictions and in nearly all procedures. The functions and powers of creditors' meetings also vary, and may depend on whether there is also a creditors' committee and that committee's functions and powers. In most cases, meetings means physical meetings, but in a few cases there is provision for remote attendance or decision-making by other means, such as a statutory procedure or postal vote.

In terms of creditors' rights to information, creditors are generally entitled to certain information about the relevant procedure in all jurisdictions. The amount of information and the form in which it is provided does, however, vary.

In terms of challenging prior transactions of the debtor, where relevant, there are very few cases where creditors have an independent right to challenge prior transactions of the debtor, although in some cases they may do so if the officeholder fails to do so or decides not to do so, or they may challenge the officeholder's decision.

In terms of making claims against the directors or other officers of a corporate debtor, where relevant, the rights of creditors vary. In some jurisdictions, creditors have a direct right to pursue such claims; in other cases, they may do so only if the officeholder fails to do so or decides not to do so; and in many cases they have no right to do so in any circumstances.

In terms of whether creditors have *locus standi* before the court, it would appear that in all jurisdictions, creditors have such standing where relevant in the context of the particular procedure, either generally in relation to any relevant matter or in relation to specified matters.

In terms of the creditors' role in relation to the discharge of the debtor (where relevant), in some cases the debtor's discharge will depend on the terms of any compromise or arrangement entered into as a result of the procedure, on which creditors will generally have voted. Otherwise, in most other cases, creditors may object to the debtor's discharge on specified grounds; in some cases they may ask for specific debts to be excluded from the discharge; and in other cases they have no input at all as to whether the debtor receives a discharge.

In terms of determining the outcome of insolvency procedures, the role of creditors largely depends on the type of proceedings involved, and where they do have a role in determining the outcome of the proceedings, it may be an exclusive role or subject to the control of the court or other authority. Where the procedure by its nature has more than one possible outcome, creditors will generally have a role in determining what that outcome should be, and where they determine that the outcome should be a compromise or plan, or where the procedure by its nature is a procedure for a compromise or plan, the creditors will generally determine the outcome in so far as they are asked to vote on the compromise or plan (subject to the control of the court or other authority in some cases). Creditors may also have the right to propose their

own plan. The provisions for voting vary, but in almost all cases, approval of a compromise or plan requires a specified majority rather than unanimity, although the majority required may vary depending on the type of agreement and there may also be additional requirements. In some cases, creditors may be divided into classes, and there may also be provision for cramdown. Creditors may also have a role in bringing a procedure, or any compromise or plan agreed as a result of a procedure, to an end.

In terms of cross-border insolvency procedures, nearly all respondents indicated that the role of creditors was no different to that of creditors in national or domestic proceedings, although the classification of creditors in foreign proceedings may impact on their role.

In terms of practical or other issues with regard to the role of creditors in insolvency procedures, a number of respondents identified such issues. Common themes in the responses included creditor apathy (often linked to the costs of initiating or participating in an insolvency procedure and / or the low returns to be expected and more marked in (consumer) bankruptcy or liquidation cases as opposed to (corporate / business) rescue cases); claims trading and related issues; and the excessive length and disproportionate costs of procedures. A variety of other issues were also identified by individual jurisdictions.

Finally, with regard to reforms, it appears that there has been either no, or no substantial, reform to the role of creditors in many jurisdictions, although in some jurisdictions there have been reforms of varying magnitude, either generally or in relation to certain types of procedure, in some cases the introduction of new types of procedure. It therefore seems that despite changes in insolvency laws, the role of creditors may not have been systematically appraised in many jurisdictions. The overall aim of this project to develop principles as to how creditor roles in different types of insolvency proceedings should be determined in the modern insolvency environment, may therefore be seen as a timely and useful one. The results of the comparative analysis presented in this report suggest that despite greater or lesser differences between jurisdictions with regard to the roles of creditors, there are many areas of commonality which may provide a useful starting point for the development of these principles at the next stage of the project.

Appendix 1

Dear Colleague,

An Evaluation of the Role of Creditors in Insolvency Proceedings (A Project in the Making)

Further to our previous e-mails regarding this project, thank you again for all of your comments on the draft questionnaire we sent you in May. No one told us that they thought proceeding to the next stage by way of a questionnaire was a bad idea, so we are proceeding on that basis. As a result of your comments, however, we have now adjusted the questionnaire by refining some of the questions, adding some topics, making provision for more detailed comments on certain topics and adding a specific question dealing with cross-border insolvency.

Below you will find the finalized / adjusted questionnaire which we hope will provide us with the data we need in order to complete the project. If you have any questions or queries about it, please let us know. Otherwise, we would appreciate it if you could now complete the questionnaire and submit it to us by **30 September 2017**. When submitting the completed questionnaire, it would be appreciated if you could send your e-mail to both of us. If you are unable to submit by the due date, please let us know. Please also let us know if you are happy for us to contact you after submission for any further follow up.

The final outputs of the project have not yet been determined, but we plan initially to collate and analyse the data by country after we have received the questionnaires. This we will do in the form of a report, which we will share with you prior to finalisation in order to obtain your views. The format of the report and where it is published will depend on whether or not we obtain any funding with which to finalise the project. We are hoping to share the results at the INSOL International Academics' Colloquium next year, wherever that may be.

Just one important note regarding the questionnaire: although the spaces provided for answers may appear to be quite small, there is no limit to the amount of text you can insert. The form has been designed to allow the spaces to scroll down as information is entered.

We look forward to hearing from you and would like to thank you all once again for your participation.

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QUESTIONNAIRE

1. Please specify the country / jurisdiction for which this questionnaire is being completed.

2. Please provide the details of the person(s) completing this questionnaire, including contact details.

3. Please list the insolvency procedures in your country / jurisdiction in respect of which this questionnaire is being completed (including, were appropriate, hybrid or pre-insolvency proceedings).

[For example, in England and Wales, the relevant procedures would be: bankruptcy; debt relief orders; individual voluntary arrangements; company voluntary arrangements under Part 1 of the Insolvency Act 1986; administration; receivership; liquidation.]

4. For EACH insolvency procedure listed, please provide brief details of the type of procedure, the circumstances in which it may be used and the type(s) of debtor to whom it applies.

[For example, in England and Wales, bankruptcy is a statutory procedure which provides for the transfer of the debtor's non-exempt assets and, where relevant, contributions from income to a trustee in bankruptcy for realisation and distribution to creditors where the debtor is insolvent. It applies to individual debtors whether consumers or traders.]

5. For EACH insolvency procedure listed under question 4, please provide brief details of the different roles of creditors in that procedure under the various headings below. If relevant, please distinguish between different types of creditor where they have different roles, e.g. secured creditors, unsecured creditors etc.

5.1 Ability to initiate the insolvency procedure

5.2 If able to initiate the insolvency procedure, any conditions that must be satisfied (e.g. the debtor's insolvency)

5.3 Is there a requirement for positive consent to the procedure, or an ability to object to the procedure?

5.4 If your answer to question 5.3 was in the affirmative, what are the requirements for consent / objection? [Please include details of requirements for unanimity / majority etc. and any cram-down provision, if relevant]

5.5 The existence and role of creditor committees, if relevant

5.6 Existence / role of creditors' meetings (including possibility of remote attendance)

5.7 Role in the selection and / or removal / replacement of the insolvency practitioner / supervisor, if relevant

5.8 Role in the supervision of the insolvency practitioner / supervisor if relevant, including the requirement for consent to transactions

5.9 Any other role in the administration of the procedure, if relevant

5.10 Ability to challenge prior transactions of the debtor

5.11 Role in fixing the fees / outlays of the insolvency practitioner / supervisor, if relevant

5.12 Role in the discharge of the insolvency practitioner / supervisor, if relevant

5.13 Role in determining the outcome of the insolvency procedure

5.14 Role in the discharge of the debtor, if relevant

5.15 Ability to seek the conclusion of the procedure and, if so, the circumstances in which this may be done

5.16 Rights of creditors to information

5.17 Standing of creditors before the court

5.18 Ability to sue directors of insolvent company

6. For EACH insolvency procedure listed, please provide brief details of any major changes in the roles of creditors in the last 20 years and the underlying reasons for this, with particular emphasis on any recent reform and any current proposals for reform. If you are aware of any significant changes outside of this period, feel free to add in such additional information.

7. Please identify any practical or other issues of which you are aware with regard to the role of creditors in the insolvency procedures in your country / jurisdiction, e.g. creditor apathy; costs of active participation in proceedings;

recovery rates; claims trading, naked position voting, buy-to-own strategies etc. pursued by hedge funds and other claims traders.

If there are such issues, please advise whether there are any relevant supporting studies or literature to which reference could be made.

8. **Do creditor roles differ in the case of cross-border insolvency proceedings (as opposed to national / domestic proceedings)?**

9. **Any other comments.**

THANK YOU FOR TAKING THE TIME TO COMPLETE THIS QUESTIONNAIRE

Appendix 2

The authors would like to express their sincere appreciation to the following persons who contributed to this project by completing the questionnaire for this project:*

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* While most contributors provided feedback on the accuracy of the information contained in this report in respect of their own jurisdictions, not all contributors were in a position to provide feedback in the short period of time made available for this. Any errors in the report as a result of a misinterpretation of information provided, remain those of the authors. Electronic copies of the completed questionnaires are available upon request from David Burdette (david@insol.ision.co.uk).

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