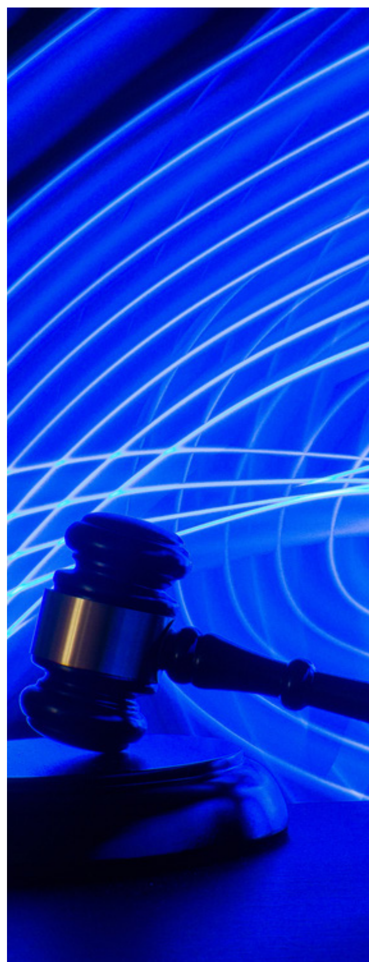
SQUIRE PATTON BOGGS

What Can We Expect in 2024 in UK Restructuring?

January 2024

There are a few things that we can be almost certain of in 2024, and others are things to add to the watchlist, but with a potential change in government on the cards, there are likely to be a few curveballs thrown into the mix that none of us can predict.



Development of Restructuring Plans (RPs)

During 2023, the court sanctioned 11 RPs – perhaps not the leap in numbers many had expected but still twice as many as 2022. Those operating in the SME market may have been dissuaded from proposing a plan after HMRC strongly opposed the plans proposed by Great Annual Savings and Nasmyths – both mid-market companies.

Although it was hoped that RPs would be a useful tool to assist with restructuring mid-market companies, given the position taken by HMRC (now enshrined in its guidance), this most likely takes RPs off the table for those companies where the ability to pay the secondary preferred element is not often possible.

We have not seen, nor do we expect to see any time soon, a streamlined RP process for mid-market companies. There was talk about dealing with the convening hearing on paper, which would have helped to keep a lid on costs, but as far as we know, that proposal has been shelved for the time being.

With costs being another major issue, challenges by dissenting creditors increasing those costs, the risks of an appeal and the fact that, in some cases, the courts are now extending timetabling for the sanction hearing, we wonder if – for the time being at least – RPs are out of reach for the mid-market. The McDermott case is a recent example of where the sanction hearing was moved from November 2023 to February 2024 and is now listed for a six-day hearing – the longest sanction hearing we have seen to date.

For 2024, it would not be surprising if mid-market practitioners decide to watch how RPs develop from the sidelines rather than risk further pushback from creditors and the court, and, of course, incurring the significant costs to test the judicial temperature.

For larger corporates/multinationals, HMRC is often of no concern, and the size of those companies justifies the costs of an RP. However, the outcome of the Adler appeal and the impact of that decision may change the dynamics for those companies too.

Where we may see RPs being used more prolifically is by foreign companies looking to take advantage of the flexibility and accessibility of an RP before the English court.

During 2023, we saw several foreign companies proposing either a scheme of arrangement or an RP in conjunction with parallel proceedings in their own jurisdictions – Cimolai used both an English RP and Italian Concordato proceedings to restructure. However, the outcome of the Adler appeal might change the reception RPs have received cross-border.

If the sanctioning of the Adler RP is overturned, trying to unwind an RP that has already been implemented in part could be problematic. It will, therefore, be interesting to see how the court deals with this if the sanction is overturned. It was hoped that the Adler appeal judgment would be handed down before the end of 2023. It was not, but it is likely to arrive imminently.

What Can We Expect in 2024 in UK Restructuring?

Increasing Insolvencies

For one thing, trading conditions remain difficult – although inflation has fallen, interest rates rose steadily during 2023, making borrowing and repayments more expensive. Consumer confidence is low and economic growth during 2024 is projected to be weak. There are no longer any props from the government to support businesses, interest costs remain high and with HM Revenue and Customs (HMRC) now taking a robust approach to recovering tax debts and an increase in winding up petitions, we can expect 2024 to be a financially difficult year for many businesses.

During 2023, we saw company insolvencies exceeding pre-pandemic numbers, and with reports in the press often citing the pandemic as one of the reasons for a business failing, are we only now starting to see the real fallout from 2020 and 2021?

With insolvencies expected to increase in 2024 to around 7,000 per quarter,[1] restructuring professionals can expect to be busier – although as the insolvency figures for 2023 show, the bulk of insolvencies (over 80%) tend to be liquidations, and this is unlikely to change.

Use of Corporate Moratoria

It is still debatable when and in which circumstances the moratorium can be usefully used. There were only a handful in 2023, a decline in numbers compared to 2022, but interestingly in 2023 the insolvency practitioners (IPs) appointed as monitor in each case were different. This is a change from 2022. Could this indicate that IPs are more comfortable to act as monitor? Possibly, but the fact that the process is rarely used suggests that it is only helpful in a limited number of cases, and this is unlikely to change in 2024.

In the Grove School case last year, we saw a moratorium used to support refinancing of a school. The fact that the lender was on board assisted – this was key, and is likely to be key, if moratoria are to be used more widely. However, we do not expect there to be a huge uptick in numbers this year based on the slow take up previously.

Regulation of IPs

There are plans to introduce legislation that extends insolvency regulation to firms offering insolvency services, but will we see it this year?

There seems to be a way to go before we see this legislation. With the government proposing to work with the regulating professional bodies (RPBs) before introducing it, and with a general election looming, it seems unlikely that this will be high on the parliamentary agenda this year. One to add to the watchlist.

Given that there is less to iron out before the matter goes to Parliament, we might see the proposed public register of IPs and firms (this will be mandatory and will be accessible by the public, who will also be able to view details of any sanctions issued) and legislation to allow a single regulator – although there are no plans to introduce one for now, they were shelved last year. However, given that it took two years to receive the government's response to the original consultation, we are not sure that this will be high on the agenda either. Perhaps one for the watchlist too – or even something to diarise for 2025!

1 Research by the Centre of Economics and Business Research

Compensation Scheme

The government has not dropped its plan to introduce a compensation scheme for persons aggrieved by the action (or inaction) of an IP, but there will be further consultation on this. Another for the watchlist this year.

Changes to the Insolvency Rules 2016 (Rules)

Following the theme of "when parliamentary time allows", you may recall that the Insolvency Service identified several changes that it intended to make to the Rules in its 2022 Rules Review.

The proposed changes (some of which are covered in more detail in our alert) would be helpful to practitioners, such as removing the need to specify a "date and time" of appointment in a Notice of Appointment of Administrators, which can (and does) create argument when an appointment is made. But, and perhaps more importantly, addressing the issue created by *Manolete Partners Plc v. Hayward and Barrett Holdings Ltd [2021] EWHC 1481 (Ch)* requires practitioners in certain cases to issue two sets of insolvency proceedings, adding additional and arguably unnecessary cost to the process.

We did not see those changes in 2023, but will we see them this year? Let's keep our fingers crossed. Unlike the proposed changes to IP regulation (that requires more engagement), the proposed changes should be relatively simple to implement.

Other Changes to the Insolvency Framework

Personal Insolvency

Changes to the personal insolvency regime are a bit further down the line than changes to the creditor voluntary liquidations (CVL) regime (see below). Following a call for evidence in 2023, we can expect the Insolvency Service to publish its proposals to reform the personal insolvency framework in early 2024.

These reforms are likely to touch on changes to the existing regime, changes to fees, funding and costs and changes to processes. Any major changes will take time to come to fruition, but we can at least expect to know what is likely to change once the proposals are issued.

Corporate Insolvency

An overhaul of the CVLs regime is expected, but we are yet to see a consultation paper. There has been limited noise about this since the Insolvency Service announced that it intended to consider whether the CVL regime is fit for purpose and whether the legislation needs to be amended. Perhaps the quietness reflects that we are unlikely to see any developments in this area in 2024.

What Can We Expect in 2024 in UK Restructuring?

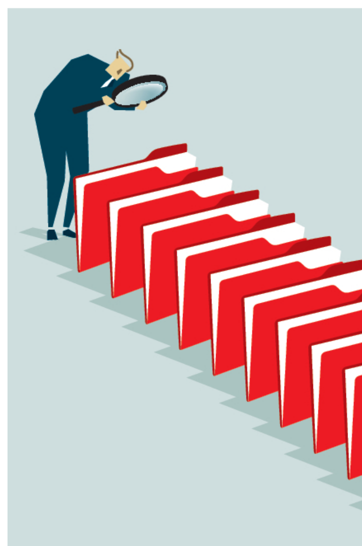
Impact of the FCA Consumer Duty on IPs

The FCA Consumer Duty came into effect at the end of July 2023. It applies to financial services firms, which need to comply with the FCA rules and guidance.

The FCA expects IPs who are appointed over financial service firms to act in a way that is compatible with the duty. When the duty applies, for example when the firm continues to trade or if the IP is considering a sale of the data, IPs need to make sure that the insolvent firm continues to comply with the FCA rules and guidance.

With effect from 31 July 2024, the Consumer Duty will also apply to "closed" products – currently, it applies only to new or existing products. This will widen the circumstances when an IP needs to comply.

The FCA has indicated that it may publish revised guidance concerning compliance with the Consumer Duty – but the new duty and change in July 2024 should be high up the list of considerations in 2024 and beyond for IPs appointed or considering an appointment over a regulated firm. It is certainly worth keeping an eye on the FCA's website for any updates.



Concerns About Insolvency Searches

Nowadays, it is not uncommon for a notice of intention to appoint administrators (NOI) or a winding up petition to be reported in the press almost immediately after it has been filed, and there can be several consequences that flow from this, both positive and negative.

The reason for this earlier awareness comes, it seems, as a consequence of the ease by which that information can now be obtained. We do not expect that to change in the foreseeable future, although we know that R3 and others are aware of, and in conversations with, various parties about this. Given that this is unlikely to change, much of what we have written in our alerts below will continue to impact corporates, restructurings and lenders throughout 2024.

Lenders: Be Aware of Early Publication of Winding Up Petitions

What Do You Do if You Receive a Threat of a Winding Up Petition?

Director Administration Appointments: Does the Company Really Need a Moratorium?

Concerns were raised in 2023 (and before that) about using ce-file to carry out insolvency searches given that the search results are not always accurate. Unless and until there is a change to the system or further guidance given about conducting insolvency searches on ce-file (which was rumoured), practitioners should be mindful that this issue is likely to continue throughout 2024 and, therefore, they should consider putting alternative checks in place.

Directors' Duties

Looking back to 2022, we all held our breath waiting to see what the decision in Sequana might say about directors' duties. It was not terribly exciting, but what we can expect is to see this area of law further develop in 2024. In 2023, the decision of *Hunt v. Singh* (applying Sequana at the Court of Appeal level) indicated that it was necessary for directors to have actual or constructive knowledge of insolvency before the creditor duty applied. Hopefully, 2024 will shed further light on how the courts will approach this knowledge requirement, which, in turn, will help inform IPs about the strength of possible claims against former directors.

What Can We Expect in 2024 in UK Restructuring?

HMRC

HMRC was in the insolvency headlines a few times last year, not least with its opposition to some of the RPs already mentioned. The messaging then, and reflected in the RP guidance, is notable in terms of the strong stance and view that HMRC takes about its secondary preferential status.

We can certainly expect HMRC to continue with petitioning in 2024 and taking steps to protect its preferential status (and not budging on that) – although we hope we can add to that, more willingness and engagement with the industry on things that matter, such as voting.

Streamlining Block Transfer Orders

For those who make block transfer orders, it is helpful to note that we expect to get guidance from the judiciary regarding those applications in 2024, to help reduce the amount of time spent dealing with them.

QFCH Out of Hours Administration Appointments

We have always found the judiciary responsive to issues that practitioners face, and although this practice notice was issued last year (to a degree as a consequence of our firm raising the issue with the local court – credit where credit is due), this is likely to encourage confidence to use the out of hours QFCH appointment process moving forward. Will we see more QFCH-driven appointments in 2024? Perhaps not, but at least practitioners can have confidence in perfecting an out of hours appointment now, if and when it is necessary.

National Security and Investment Act (NSIA)

The government published a call for evidence on the NSIA regime in 2023, with responses due in January 2024.

Although it is not frequent that an insolvent company falls within one of the 17 sectors caught by the NSIA regime that can trigger a requirement to notify and obtain clearance of certain transactions (see our alert for further detail), the need to notify can be problematic in a distressed or insolvent scenario, particularly given that there are gaps in the exemptions available to IPs.

The government is considering extending the current exemptions (that apply to administrators and receivers) to the appointment of liquidators, official receivers and special administrators so that those office holders will also be exempt from the mandatory notification requirements.

Hopefully, with a push from industry in response to the call for evidence, we will finally see the exemption extended in 2024.

What Can We Expect in 2024 in UK Restructuring?

Overseas Entities – Who Is Exempt?

Another area where there is a gap in exemptions is in relation to office holders dealing with properties owned by overseas entries. There are certain restrictions on disposal of properties owned by an overseas entity (see our alert for more detail), but "specified insolvency practitioners" in "specified circumstances" are exempt from those restrictions.

Naturally, you would assume that an insolvency practitioner is a liquidator, administrator, etc., but the regulations expected last year to clarify who a "specified insolvency practitioner" is have never materialised.

We are not sure if they ever will, but we know that R3 have added this to its "to-do/follow-up" list and maybe we will get clarification in 2024. Unless and until then, and given the uncertainty, practitioners will likely need to rely on a court order to deal with a property owned by an overseas entity.

Managing Remuneration Approval and Administration Extensions

This might be more of a pipedream than a prediction because it is an issue that has caused difficulties in practice over many years – how do you get remuneration approval or extend an administration if creditors will not engage other than by going to court and adding another layer of expense that not all insolvencies can swallow and delaying progressing a case?

We know that this is on R3's radar, with plans to discuss whether there is a solution with the Insolvency Service. So, although we cannot say that this difficulty will be overcome in 2024, there may be a shift in the right direction to get concerns from industry on the table this year.

Insolvency Law, Digital Assets, Crypto-assets and Smart Contracts

Although digital assets, crypto-assets and smart contracts have been with us for some time, there is still relatively little clarity about how these interface with English insolvency laws.

Although it is largely acknowledged that crypto-assets are "property" rather than currency, and smart contracts are contracts, the position of digital assets is less clear.

At the end of last year, the UK Jurisdiction Taskforce launched a public consultation asking for input on several questions concerning the treatment of digital assets in insolvency.

In response to this consultation, we expect there to be a legal statement that will provide guidance on such questions as, are digital assets property? What obligations do office holders have in relation to those types of assets? How does an office holder recover those assets for the estate?

Although a legal statement does not carry the same clout as statue or regulation, it will help inform, for example, the judiciary when faced with questions about the treatment of digital assets in an insolvency. It is highly persuasive and will help practitioners inform their decisions when dealing with an insolvent estate that includes digital assets.

Dealing with digital assets and currency, however, is still likely to require an IP to appoint a specialist to ensure those assets are dealt with appropriately.

What Can We Expect in 2024 in UK Restructuring?

Strengthening Cross-border Cooperation?

In 2023, the government announced its intention to adopt the UNCITRAL Model Law on Enterprise Group Insolvency. The MLEG – as it is commonly referred to – will provide a framework that supports the management and coordination of cross-border enterprise insolvencies. We may well see this in 2024 given the government's intention to adopt the MLEG at the earliest opportunity. However, its use is likely to be limited, at least for the time being, because as one of the first countries to adopt this, the UK will have to wait for other jurisdictions to do the same before it will apply.

The implementation of Article X of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments is, however, still up for debate.

Article X is designed to facilitate cross-border recognition of insolvency-related judgments, but given the concern that adoption might have unintended consequences (such as undermining the Rule in Gibbs), there is still work for the Insolvency Service to do before a final decision is made about adoption.

There are arguments both for and against retaining the Rule in Gibbs – which broadly prevents foreign proceedings discharging English law governed debt unless the creditor agrees – and, therefore, discussion about the adoption of Article X is likely to rumble on throughout 2024.

Conclusion

There are probably more "watch this space" items on our list of projections for 2024 than definite changes, but if everything in this alert happens then 2024 could shape up to be a busy year, not only in terms of insolvencies, but also in terms of change.

Key Contacts

John Alderton
Partner
M +44 788 505 8896
E john.alderton@squirepb.com

Russ Hill
Partner
M +44 792 160 0409
E russ.hill@squirepb.com

Monika Lorenzo-Perez
Partner
M +44 778 572 0439
E monika.lorenzo-perez@squirepb.com

Charlotte Møller
Partner
M +44 788 180 4970
E charlotte.moller@squirepb.com

Devinder Singh
Partner
M +44 772 139 9625
E devinder.singh@squirepb.com

Vanessa Stuart
Director
M +44 7825 942711
E vanessa.stuart@squirepb.com

The opinions expressed in this update are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

squirepattonboggs.com

© Squire Patton Boggs. All Rights Reserved 2024

64289/01/24