

Restructuring & Insolvency 2021

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Restructuring & Insolvency 2021

Contributing editors**Catherine Balmond and Katharina Crinson**Freshfields Bruckhaus Deringer

Lexology Getting The Deal Through is delighted to publish the 14th edition of *Restructuring & Insolvency*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Ireland and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Catherine Balmond and Katharina Crinson of Freshfields Bruckhaus Deringer, for their assistance with this volume.



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Malta

Louis Cassar Pullicino

Ganado Advocates

GENERAL

Legislation

- 1 | What main legislation is applicable to insolvencies and reorganisations?

The Companies Act, 1995 (Cap 386 of the Laws of Malta).

Excluded entities and excluded assets

- 2 | What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

Companies that own ships or aircraft are regulated by specific laws, including the Merchant Shipping Act (Cap 234 of the Laws of Malta) and the Aircraft Registration Act (Cap 503 of the Laws of Malta) respectively, which contain particular insolvency rules.

Public enterprises

- 3 | What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

The Companies Act 1995 applies to the insolvency of government-owned enterprises, unless such entities are incorporated by statute or by other legal instruments not involving the traditional incorporation of a company. In that case, the relevant statute or instrument of incorporation would guide the insolvency.

Protection for large financial institutions

- 4 | Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

Not specifically, but it is relevant to point out that specific insolvency rules apply in the case of particular regulated entities in the financial services areas such as banks and insurance companies. In these cases, any special legislation would have to be applied together with the Companies Act.

Courts and appeals

- 5 | What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Insolvency proceedings fall within the jurisdiction of the Civil Court (Commercial Section). Recent decisions of the Court of Appeal have suggested that there is no right of appeal from a decision dealing with the insolvency or otherwise of companies.

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

- 6 | What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

In the event that a company is solvent, shareholders may pass an extraordinary resolution whereby the company is dissolved and put into liquidation. This is known as a members' voluntary winding up, and directors are under a duty to submit a detailed statement of affairs including a list of creditors together with a declaration of solvency. The winding-up process must be concluded within a year.

If, on the other hand, the company is insolvent, shareholders may by extraordinary resolution place the company into a creditors' voluntary winding up. In this case, a creditors' meeting must be convened within 14 days of the shareholders' resolution, during which time the creditors may nominate a liquidator, which will be given preference over any shareholders' nomination.

Voluntary reorganisations

- 7 | What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

A company is free to enter into any agreements or compromise if it is confident that such an arrangement will include the entire body of creditors.

Short of this, a company can opt for a company reconstruction procedure and apply to the court to:

- appoint a mediator whose task it will be to convene meetings between the creditors and the company with a view to reaching a compromise or arrangement that can then be submitted to the court for approval; or
- to sanction a compromise or arrangement that enjoys the approval of those creditors who represent two thirds in value of the claims against the company.

A compromise or arrangement approved by the court in such a manner will bind the entire body of creditors.

Alternatively, a company can opt to apply to the court for a company recovery order, in which case the court appoints a special controller to manage the company and grants a moratorium of four months in respect of any action that creditors can take against the company. For such an order to be granted, the court must be satisfied that the company has good prospects to survive as a viable going concern, or alternatively that the moratorium is conducive to the company reaching a compromise or arrangement with its creditors.

Successful reorganisations

- 8 | How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability and, if so, in what circumstances?

In a company reconstruction process, creditors are not classified in any particular manner and hence no distinction is made between lenders and suppliers or secured creditors and ordinary creditors. To obtain a compromise or arrangement under the company reconstruction provisions, the creditors representing two-thirds in value must approve. In a company recovery procedure, the law does allow for different classes of creditors to be recognised and their respective interests dealt with separately. Moreover, if such an application is filed by the creditors instead of the company, the creditors petitioning the court must represent at least more than half the value of debts of the company.

In any approved compromise or arrangement approved by the court, whether by way of a company reconstruction or a company recovery procedure, the court has various powers to issue orders leading to the transfer of the undertaking, or its assets and liabilities, to a transferee company, or orders considered supplemental or consequential to ensure an effective reconstruction of the company.

Involuntary liquidations

- 9 | What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Creditors wishing to trigger off an involuntary liquidation may apply to the court and request the issue of a winding-up order on a number of grounds, including on the basis that the company is unable to pay its debts (ie, it is insolvent). For the court to be satisfied that a company should be dissolved and put into liquidation based on the insolvency of the company, it must be satisfied that the applicant is a creditor and that the company is insolvent with due regard being given to the contingent and prospective liabilities of the company. There is a presumption of insolvency empowering the court to issue a winding-up order if it is shown that the petitioning creditor obtained the issue of executive measures against the debtor on the basis of an enforceable judgment or other executive title, and the debt remains wholly unsatisfied following the lapse of 24 weeks from the date of effective service of such executive measures.

Involuntary reorganisations

- 10 | What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Creditors can file applications to the court for a company reconstruction process if they represent two-thirds in value of the combined debts of the company. Alternatively, they can file for a company recovery order if they represent more than half in value of the company debts.

Expedited reorganisations

- 11 | Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

No.

Unsuccessful reorganisations

- 12 | How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

A proposed reorganisation is defeated if it fails to be approved by the required majority of creditors or if the court is not satisfied that the legal requirements for the approval of such a plan have been met. If such a plan is not approved, the likely effect is that the company concerned will need to consider filing for insolvency in court or for a creditors' voluntary winding up, unless some other informal out-of-court rescue is feasible with the assistance of third parties or creditors injecting funds into the company.

Corporate procedures

- 13 | Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

The members of a company can resort to the passing of a resolution whereby the company is dissolved and the winding-up process is regulated by the provisions regulating members' voluntary winding up, creditors' voluntary winding up or court-supervised winding up. Corporate procedures are naturally more cost- and time-efficient.

Conclusion of case

- 14 | How are liquidation and reorganisation cases formally concluded?

Invariably by the approval of a scheme of arrangement and the striking-off of the company from the Companies Register.

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

- 15 | What is the test to determine if a debtor is insolvent?

Maltese courts invariably apply a combined test based on a cash-flow analysis and balance sheet assessment. Specifically, a court must be satisfied that the company is unable to pay its debts, account being taken also of the contingent and prospective liabilities of the company.

Mandatory filing

- 16 | Must companies commence insolvency proceedings in particular circumstances?

Where company directors become aware that the company is unable, or is imminently likely to become unable, to pay its debts, they are under an obligation to convene a general meeting of the company to discuss the possibility of the dissolution of the company or the filing of a company recovery application with shareholders.

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent

- 17 | If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Directors can be exposed to liability on a number of fronts. Primarily, directors may be exposed to liability for breaching their general duties of care towards the company. Directors may also be exposed to wrongful trading liability where they knew, or ought to have known, that there was no reasonable prospect the company could have avoided being dissolved owing to its insolvency. In this instance, directors may be held liable to make a contribution to the company's assets at the discretion of the court. More grievously, if there is evidence that the business has been carried on with an intent to defraud creditors, then any individual knowingly party to the carrying on of business in that matter will be exposed to fraudulent trading liability. This liability constitutes a criminal offence and exposes those individuals to a fine of up to €232,937.34, imprisonment of up to five years, or both.

Directors' liability – other sources of liability

- 18 | Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

There are a number of fiscal debts for which company directors or officers are personally liable. Typical examples are claims in respect of unpaid value added tax, social security contributions and unpaid wages.

Directors' liability – defences

- 19 | What defences are available to directors and officers in the context of an insolvency or reorganisation?

Directors are not likely to be cited as defendants in the context of any insolvency or reorganisation proceedings. In the event that directors or officers are sued for fraudulent trading, the obvious defence open to those directors or officers would be that they had no intention to act fraudulently and that they had acted honestly, in good faith and the best interests of the company and of its creditors. In an action for wrongful trading, it would be open to any directors defending such a claim to show the court that despite the insolvency of the company, he or she took all reasonable steps to mitigate the losses of the company creditors.

Shift in directors' duties

- 20 | Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Directors' duties do shift to prioritise creditors' interests in such a situation. Directors have a duty to react to a situation where the company is insolvent or imminently likely to become insolvent; they must consider the future of the company, the likely prejudice that might be caused to the general body of creditors, and more importantly to decide whether the company should be dissolved and wound up, or alternatively whether recourse to a company recovery procedure should be commenced.

Directors' powers after proceedings commence

- 21 | What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Once a company is dissolved and put into liquidation, all powers of directors cease, and the appointed liquidator exercises the duties and powers envisaged in the law. Similarly, if a special controller is appointed in the context of a company recovery procedure, the directors' powers are suspended until such time as the court reviews the future of the company at the end of the statutory moratorium. Pending the hearing of a winding-up application, a court may also consider appointing a provisional administrator, in which case the court will determine its function and powers. The directors can continue to hold office and exercise their powers unless the court restricts or suspends their powers and grants the provisional administrator specific powers and functions in its order.

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria

- 22 | What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Upon the filing of a winding-up application, any creditor or the company itself can request a stay of proceedings, and the court enjoys a discretion whether to stay proceedings or not. If a winding-up order is issued by the court, any proceedings pending against the company, whether commenced prior to the order or to be filed, require the authorisation of the court to continue being heard and decided. The court enjoys similar powers to stay proceedings in the context of a reorganisation.

Doing business

- 23 | When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

In a liquidation process, the liquidator is permitted to carry on the business of the debtor company that is necessary or beneficial for the proper winding up of the company. Much will depend on the circumstances of each case and the particular business activity of the company. Similarly, and in the context of a reorganisation such as a company recovery, a company is likely to be authorised to carry out its business activity in line with its rescue plan under the direction of the court-appointed special controller. Both the liquidator and the special controller are accountable to the court and will regularly inform the court of the performance of their duties.

Post-filing credit

- 24 | May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

A liquidator appointed by the court is entitled to raise credit and offer company assets as security subject to court approval. Priority will be determined in accordance with the applicable legal rules on rights of preference and will depend to a large extent on the type of security agreed to. Otherwise, there is no rule whereby any loans or credit granted in such circumstances will enjoy priority over debts previously incurred.

Sale of assets

- 25 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

A liquidator is expected to sell company assets as part of the winding-up process. There is no rule whereby an asset would be sold to a buyer free and clear of claims in the event that specific rights of preference attach to the particular asset. Accordingly, the liquidator will need to negotiate with court approval the best terms for a suitable outcome. In the case of a company reconstruction, here again the sale of an undertaking or the transfer of specific assets and liabilities will require court approval and may involve assets being transferred subject to rights of unpaid creditors, unless agreement can be reached between the interested parties to allow for a sale free from such claims.

Negotiating sale of assets

- 26 Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

No such specific sale procedures apply in Malta. Generally, a liquidator will be inclined to sell privately after a tender process or alternatively sell by public auction.

Rejection and disclaimer of contracts

- 27 Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

Contracts are binding between the parties and remain so unless, as a result of the event of a liquidation or reorganisation, the performance of the contract is frustrated or very difficult to achieve. Otherwise, a debtor cannot assume that a contract can be rejected by the mere fact of insolvency unless specific terms and conditions in the contract provide otherwise.

Intellectual property assets

- 28 May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Such matters are likely to be regulated by the terms and conditions of the particular licence agreement, but in the absence of any such terms, an IP licensor or owner would be entitled to terminate the debtor's right to use IP on the basis of an implied resolutive condition given that in a liquidation or reorganisation, the continued use of the IP may be limited and not what was originally envisaged in the agreement.

Personal data

- 29 Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

Any transfer of personal information or customer data would be subject to and would need to be carried out in conformity with applicable data protection laws, an obligation that equally applies to both the company

in liquidation or reorganisation (as the transferor) as well as the purchaser (as the recipient of the information or data). In particular, the parties would need to ensure that they have and are able to rely on a lawful basis, as recognised under applicable data protection laws, that legitimises the transfer or sharing of the information or data concerned between them. Failing this, then the transfer would be without a lawful basis at law and, if carried out, could be adjudged to be a case of unlawful processing and potentially lead to fines or other sanctions or corrective measures being imposed on the company or the purchaser or both.

Arbitration processes

- 30 How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Liquidation and reorganisations are court-based proceedings and as such arbitration does not feature in the process. A liquidator is, once appointed, entitled to refer any disputes to arbitration, although in practice this seldom happens. Generally, all disputes of a civil or commercial nature are arbitrable.

CREDITOR REMEDIES

Creditors' enforcement

- 31 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

The general rule is that seizure of assets requires court authorisation. There are some instances where a creditor can take possession of an asset without court authorisation, such as in the case of a mortgagee taking possession of a ship upon an event of default, which is possible due to the special nature of the right in rem.

Unsecured credit

- 32 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Typical remedies available to unsecured creditors include a warrant of seizure, a garnishee order, a warrant of description, a warrant of arrest of a vessel or aircraft, etc. Such attachments can be obtained with relative ease and rather swiftly, within the same day of filing upon an ex parte application.

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

- 33 During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

Meetings should be held within the statutory period laid down at law. For instance, in the case of a liquidation, creditors' meetings must be held annually, and in the case of a company recovery procedure, a meeting must be held within one month of the appointment of a special controller. Information to be provided will vary from the general state of the winding up in the case of a liquidation, including a general picture

of the assets and liabilities and any expected recoveries or disposal of assets, whereas in the case of a company recovery procedure, the controller is to submit a comprehensive statement of the company's affairs, together with preliminary proposals on the future prospects and management of the company.

Creditor representation

- 34 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

A liquidation committee can be set up in the course of winding up, either in the case of a creditors' voluntary winding up or in the case of a liquidation by the court. The creditors may appoint not more than five representatives, and likewise the contributories may also appoint up to five persons on the committee. The committee is consultative. A joint creditors' and members' committee can be set up in a company recovery procedure.

Any advisers or external consultants to the committee would be paid by the creditors forming part of the committee unless there is agreement with the liquidator that any such expenses are to be borne by the liquidator on the basis of any direct benefit to be derived from him or her in the course of the winding up.

Enforcement of estate's rights

- 35 If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

Maltese law does provide a remedy whereby a creditor can pursue an action or remedy available to the debtor against a third party. In the event of a successful recovery, the proceeds would benefit the general body of creditors, and any claims of the creditor would rank on such proceeds in accordance with their ranking at law.

Claims

- 36 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

The period for the submission of claims is set by the liquidator and upon a review, the liquidator will either admit the claim or reject it. In the latter scenario, the creditor can file an action against the company in liquidation in order to obtain a judgment in support of its claim. Rights of action can be freely assigned to third parties and, provided notice of any such assignment is given to the debtor or company in liquidation, any such action can continue to be pursued by the assignee acquiring such claim.

Set-off and netting

- 37 To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Mutual debts, mutual credits and mutual dealings can be set off after insolvency provided they have arisen prior to the insolvency. Creditors cannot be deprived of this right.

Modifying creditors' rights

- 38 May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

No. Ranking and priority of claims are established by law and cannot be varied by the court.

Priority claims

- 39 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Fiscal claims such as claims in respect of unpaid value added tax, unpaid social security contributions and income tax are likely to rank with priority over claims of secured creditors. Other claims that are typically privileged are claims of financing banks and major suppliers such as contractors who may in certain circumstances enjoy privileged claims.

Employment-related liabilities

- 40 What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Employee claims are only partially privileged and up to a maximum amount that is equivalent to the statutory minimum wage payable to employees and spread over a period of 13 weeks. Any other claims beyond such an amount would rank without any priority or privilege.

Pension claims

- 41 What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

The remedies that apply would arise within the context of any contractual rights the employees may have against their employers, but in any event any such claims would not enjoy any special priority at law.

Environmental problems and liabilities

- 42 Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

There is no responsibility for remediating the damage caused and no liability imposed during or after the winding up.

Liabilities that survive insolvency or reorganisation proceedings

- 43 Do any liabilities of a debtor survive an insolvency or a reorganisation?

In the case of an insolvency, certain liabilities of a debtor may be passed on to a third party in possession of immovable property if that property is acquired by the third party without settling the liability secured by a special privilege or by a special hypothec. In such cases, the creditor can pursue a claim against the third party in possession of the property on the basis of the *droit de suite*.

Distributions

44 | How and when are distributions made to creditors in liquidations and reorganisations?

In the case of liquidations, once the assets are realised and the liquidator has a clear picture of the liabilities and their respective ranking at law, a scheme of distribution can be put to the creditors or the court for approval and, once approved, the distribution can be completed. In a reorganisation, much will depend on the context and the type of reorganisation involved; hence, in the case of a company recovery procedure, the outcome of such a process will either lead to the recovery of the company, the approval of a compromise with the creditors or alternatively the company being put into liquidation as a result of the failure of the rescue plan.

SECURITY

Secured lending and credit (immovables)

45 | What principal types of security are taken on immovable (real) property?

Special privileges or special hypothecs are the types of security that can be taken on immovable property.

Secured lending and credit (movables)

46 | What principal types of security are taken on movable (personal) property?

Pledges, title retention or security by title transfer are typical securities that are taken on movables generally. In the case of ships or aircraft, mortgages are often resorted to as security over the particular asset.

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

47 | What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

A transaction carried out within the six months preceding a company's deemed date of dissolution can be annulled if it constitutes a transaction at an undervalue or a fraudulent preference. A transaction at an undervalue would be one that is made either for no consideration or for a consideration that is lower than its estimated value. A fraudulent preference is given when the particular transaction is made with a creditor, surety or guarantor of the debtor, and has the effect of placing them in a better position than the one they would have been in had the debtor gone into insolvent liquidation. These transactions can be attacked by the liquidator or any creditor.

Equitable subordination

48 | Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

No.

GROUPS OF COMPANIES

Groups of companies

49 | In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

No specific legislation addresses this particular issue. There could potentially be remedies available to creditors on the basis of fraud, bad faith or improper purpose, but this would depend on the circumstances of each case.

Combining parent and subsidiary proceedings

50 | In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

Maltese law makes no provision for group insolvencies or winding up and hence each company forming part of a group of companies would have to be wound up separately.

INTERNATIONAL CASES

Recognition of foreign judgments

51 | Are foreign judgments or orders recognised, and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

Malta is a member of the European Union and as such judgments obtained before a court of a member state would be recognised in Malta in accordance with applicable European regulations, including the EU Insolvency Regulation Recast and the Brussels Regulation Recast. Otherwise, foreign judgments can be recognised and enforced locally in accordance with general remedies available in the Code of Organisation and Civil Procedure.

UNCITRAL Model Law

52 | Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

No.

Foreign creditors

53 | How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors receive equal treatment to any other creditor.

Cross-border transfers of assets under administration

54 | May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Yes, provided that any such transfer of assets is conducted properly during the course of a winding up or company reorganisation, and all necessary authorisations are given, whether from creditors of the debtor or from the court, as the case may be.

COMI

- 55 | What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The COMI test prescribed in terms of the EU Insolvency Regulation Recast is the one that is used. The presumption, therefore, is that COMI coincides with the place of the debtor's registered office. However, if sufficient evidence can be brought that the COMI is elsewhere, then this presumption can be rebutted.

Cross-border cooperation

- 56 | Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

Within the context of foreign insolvency proceedings within the EU, cooperation between a domestic court and a foreign court within the EU would be achieved in accordance with the applicable EU Insolvency Regulation. Otherwise, as regards any other foreign judgment obtained outside the EU, one would have to seek its recognition in accordance with domestic conflict-of-laws rules. Moreover, there is no provision at law for cooperation between domestic courts and the relevant foreign courts in this instance.

Cross-border insolvency protocols and joint court hearings

- 57 | In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

No.

Winding-up of foreign companies

- 58 | What is the extent of your courts' powers to order the winding-up of foreign companies doing business in your jurisdiction?

In accordance with the applicable EU Insolvency Regulation, a Maltese court may exercise its jurisdiction to wind up a foreign company in the event that its COMI is in Malta.

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UPDATE AND TRENDS**Trends and reforms**

- 59 | Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

Malta's insolvency laws generally are considered in need of updating, and there is increased recognition of the fact that the law is dissolution-focused rather than rescue-focused. In this context, the eventual implementation of EU Directive 2019/1023 on preventive restructuring frameworks is eagerly anticipated.

Coronavirus

- 60 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns?

In September 2020, the Maltese legislator enacted amendments to corporate insolvency laws that are aimed at relieving corporate entities of the effects of the covid-19 pandemic. In particular, these amendments:

- suspend creditors' rights to file for the dissolution of their debtors on grounds of insolvency, among others;
- counterbalance this by enabling a creditor to file a judicial letter against a debtor to the effect that it intends to file for their winding up, thereby establishing a date of deemed dissolution as at the date of that letter;
- stay winding-up proceedings filed on or after 16 March 2020; and
- suspend the wrongful trading rule that operates to establish the liability of directors of debtor companies that know, or ought to know, that there is no reasonable prospect that the company will avoid being dissolved owing to its insolvency.

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Malta	
Applicable insolvency law, reorganisations: liquidations	<ul style="list-style-type: none"> • Companies Act (Cap. 386 of the Laws of Malta)
Customary kinds of security devices on immovables	<ul style="list-style-type: none"> • Special Hypothecs • Special Privileges
Customary kinds of security devices on movables	<ul style="list-style-type: none"> • Pledges • Security by Title Transfer
Stays of proceedings in reorganisations/liquidations	<ul style="list-style-type: none"> • Can be requested upon filing for dissolution • Automatic upon a court winding-up order
Duties of the insolvency administrator	<ul style="list-style-type: none"> • To enhance the asset base of the debtor and have due regard for the interests of creditors; • To realise the assets of the company and distribute them according to the lawful ranking of creditors
Set-off and post-filing credit	<ul style="list-style-type: none"> • Set-off is available for mutual debts arising prior to the insolvency • Post-filing credit is available however does not attract any special ranking.
Creditor claims and appeals	<ul style="list-style-type: none"> • Determined by the liquidator Fully assignable
Priority claims	<ul style="list-style-type: none"> • Liquidation expenses • Fiscal claims including for VAT, social security, and income tax. -
Major kinds of voidable transactions	<ul style="list-style-type: none"> • Transactions at an undervalue carried out within six months preceding the deemed date of dissolution; • Fraudulent preferences carried out within six months preceding the deemed date of dissolution
Operating and financing during reorganisations	<ul style="list-style-type: none"> • Not prohibited
International cooperation and communication	<ul style="list-style-type: none"> • Within an EU context, this is provided for by the EU Insolvency Regulation • With regards to courts from third States, there is no law which provides for cooperation or communication between them and domestic courts.
Liabilities of directors and officers	<ul style="list-style-type: none"> • Breach of duty of care • Wrongful trading liability • Fraudulent Trading liability • Liability for unpaid VAT, social security contributions and unpaid wages
Pending legislation	<ul style="list-style-type: none"> • EU Directive on Preventative Restructuring

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