ALLEN & OVERY

Restructuring across borders

England and Wales

Administration | February 2024

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Contents

Introduction

Administration is the collective rehabilitation procedure under which a company may be rescued, reorganised or its business or assets realised under the protection of a statutory moratorium, providing a protective breathing space from creditor action. It is loosely modelled on the U.S. Chapter 11 procedure, but it is dangerous to take this analogy too far. Each company in a group must be dealt with individually.

For the duration of the administration, the affairs, business and property of the company are managed by one or more licensed insolvency practitioners, known as administrators.

Appointment

There are three ways to appoint an administrator:

– by application to the court;

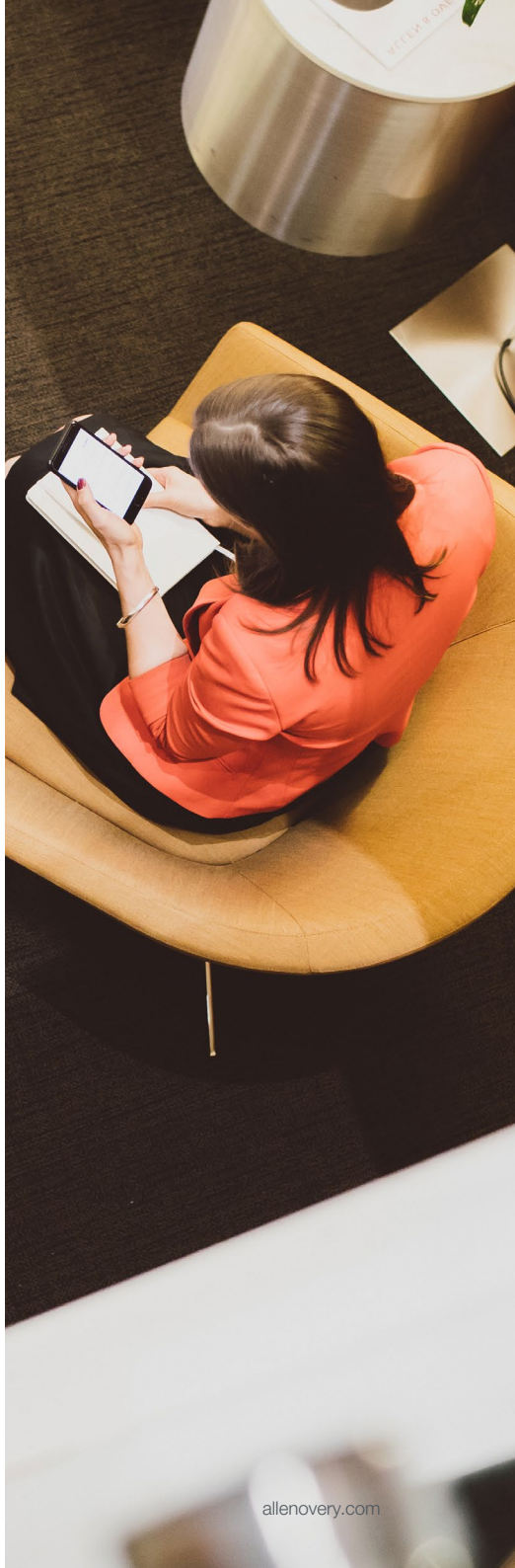
– out of court, by the holder of a "qualifying floating charge"; or

– out of court, by the company or its directors.

A "qualifying floating charge" means security, which includes a floating charge, over the whole or substantially the whole of the assets of the company and which meets certain drafting requirements.

The effect of the appointment is the same in each case.

While a company is subject to the statutory moratorium under Part A1 of the Insolvency Act 1986, no administration application may be made (except by the directors) and no out-of-court appointment can be made by anyone.



Court appointments

An administrator may be appointed by the court on the application of one or more creditors (including a creditor who is a qualifying floating charge holder), the directors of the company and/or the company itself. The application (except an application by a holder of a qualifying floating charge) must state that the company is or is likely to become unable to pay its debts and be supported by, among other things, a witness statement evidencing the company's insolvency and a statement by the proposed administrator, consenting to act. An application by the holder of a qualifying floating charge need only show that the floating charge is enforceable in accordance with its terms.

The court may make an administration order only if it is satisfied that the company is or is likely to become unable to pay its debts (or that the floating charge is enforceable, if applicable) and that the administration order is reasonably likely to achieve the purpose of the administration (see below).

Once made, the administration application must, as soon as reasonably practicable, be notified to, among others, any person who has appointed or may be entitled to appoint an administrative receiver – refer to our **"England and Wales – Receivership" factsheet available here** – and any qualifying floating charge holder who is or may be entitled to appoint an out-of-court administrator.

This gives the floating charge holder the opportunity to appoint an administrative receiver (if not prohibited) or an administrator of its choosing out of court. If the notified charge holder does not appoint an administrative receiver or administrator of its own choosing, or acquiesces to the making of the administration order, the right to appoint an administrative receiver or administrator is lost once the administrator assumes office.

Out-of-court appointments

It is possible for the company, its directors, or the holder of a qualifying floating charge to appoint an administrator without going to court. The appointment is effected by filing certain documents with the court (a purely procedural matter). No court hearing is necessary and, apart from receiving the relevant appointment documents and placing them on the court file, the court is not otherwise involved in the appointment process. Since 25 April 2017, many out-of-court appointments (including all of those made in London where e-filing is now mandatory) are made online using the court's e-filing system. Provision has been made for emailing or faxing the relevant appointment documents to court when the court itself is not open for business to effect an urgent out-of-court appointment by a qualifying floating charge holder[1].

Before making the appointment, notice of the intention to appoint must be given to the following prescribed persons:

a) in the case of an appointment by a qualifying floating charge holder, two business days' notice must be given to any prior-ranking floating charge holder. This then gives the prior-ranking floating charge holder the opportunity to appoint an administrator of its choice or, if not prohibited, to appoint an administrative receiver; and

b) in the case of an appointment by the company or its directors, five business days' notice must be given to any person who is or may be entitled to appoint an administrative receiver and any qualifying floating charge holder who is or may be able to appoint an administrator via the out-of-court route. Again, this then gives such persons the opportunity to appoint their own administrator or administrative receiver, as appropriate.

If no one is appointed, the second ranking floating charge holder, the company or directors can proceed with appointing their own choice of administrator.

The appointment documents filed by a qualifying floating charge holder must include a statutory declaration that the person is the holder of a "qualifying floating charge" and that the charge is enforceable, whereas the appointment documents filed by the company or its directors must include a statutory declaration that the company is or is likely to become unable to pay its debts.

In each case, the notice of appointment must be accompanied by a statement by the administrators that in their opinion the purpose of administration is likely to be achieved.

[1] The Insolvency (England & Wales) Rules 2016, r3.20 -3.22. Note that an electronic filing of the necessary documents must also be made. Notwithstanding some unclear wording in Practice Directions of the court and conflicting decisions at first instance, it seems that neither a company nor its directors can file an administration appointment outside normal court opening hours.

Effect of administration

An important feature of administration is that, on the presentation of an administration application in court or the filing in court of a notice of intention to appoint an administrator, an interim statutory moratorium on creditor action comes into effect. The statutory moratorium is continued in nearly identical terms if the company goes into administration. The moratorium prevents peaceable re-entry by a landlord, distraint, the levying of execution, the repossession of leased goods and the taking or continuing of proceedings including the enforcement of security[2]. Pending the actual appointment of an administrator, the only enforcement of security which may take place is that a creditor entitled to appoint an administrative receiver (subject to the restrictions referred to in our **"England and Wales – Receivership" factsheet available here**) or an administrator may do so. If an administrative receiver is appointed, this has the effect of preventing the appointment of an administrator.

If an administrative receiver is not appointed before the administrator has been appointed, no enforcement of security (including the appointment of an administrative receiver) may take place. Effectively, the secured creditor has one chance to appoint an administrative receiver (if not prohibited from so doing) or to choose who is appointed as administrator. If the company enters administration whilst subject to the statutory moratorium under Part A1 of the Insolvency Act 1986, the commencement of the interim administration moratorium or the entry into administration both trigger the end of the Part A1 moratorium, which is replaced by the specific administration moratorium described here.

Once appointed, the administrator takes all the property of the company into their control, but the company remains the beneficial owner of its property. Although the directors remain in office, the administrator effectively displaces the directors in the running of the company.

The administrator is an officer of the court, whether appointed by the court or out of court. They are also deemed to act as agent of the company in the exercise of their powers. The administrator is not personally liable for contracts that they cause the company to enter into.

Entry into administration triggers the ban on the operation of *ipso facto* clauses contained in section 233B of the Insolvency Act 1986, more detail on this can be found in the **"England and Wales – Overview" factsheet available here**.

[2] Security created or otherwise arising under a "financial collateral arrangement" under the Financial Collateral Arrangements (No.2) Regulations 2003, (broadly, security over cash, shares, bonds and certain loans) may still be enforced and is not subject to the general moratorium.

Role of the administrator

Regardless of who appoints the administrator, there is a statutory three-stage purpose of administration. The primary objective is to rescue the company as a going concern, but the administrator may pursue the secondary objective-of achieving a better result for the company's creditors as a whole than would be likely if the company were wound up without first going into administration-if the administrator considers that the primary objective is not reasonably practicable or that the secondary objective would achieve a better result for the company's creditors as a whole. The third objective, which will only apply if neither of the other two objectives is reasonably practicable, is to realise property in order to make a distribution to one or more of the secured or preferential creditors but without unnecessarily harming the interests of the company's creditors as a whole.

The primary duty of the administrator is to seek to achieve the purpose of the administration.

The administrator must perform their functions as quickly and efficiently as is reasonably practicable. They owe their duties to all the creditors (secured and unsecured).

The administrator is required to produce proposals as to how the purpose of the administration is to be achieved within eight weeks of the company entering into administration and to put these proposals to a meeting of creditors within ten weeks of the company entering into administration. The proposals may not include any action which affects the right of a secured creditor to enforce its security unless the secured creditor consents (or pursuant to a court order), although the very fact that there is an administration in the first place prevents the secured creditor from enforcing its security without the consent of the administrator or the leave of the court. In practice, the administrator will need the consent of the secured creditors before putting together their proposals and putting these to the unsecured creditors. If approved by the creditors, the administrator must then manage the company in accordance with the proposals.

For the purpose of achieving and implementing their proposals, the administrator is entitled to do all such things as may be necessary for the management of the affairs, business and property of the company and may exercise all the powers set out in Schedule 1 of the Insolvency Act 1986. The administrator has various specific powers of an administrative nature including the power to deal with charged property – see further below – and the power to take action to avoid or unwind antecedent transactions (for example: transactions at an undervalue or preferences, otherwise known as "claw-back"). The administrator is also under a duty to investigate the conduct of the directors of the insolvent company and to report to the Secretary of State, who will consider whether to take action to disqualify that director from acting as such in the future.

In addition, an administrator has the power to make distributions to secured creditors, preferential creditors, unsecured creditors in respect of the prescribed part[3] and, with the leave of the court, otherwise to unsecured creditors (ie if it has not been possible to rescue the company as a going concern). An administrator has the power to assign the right to bring certain causes of action (and/or the proceeds of such an action) that arise on the company going into administration.[4]

Further, the administrator may use assets subject to a floating charge as if they were not subject to that charge, save only that any proceeds representing the floating charge assets are themselves again subject to the floating charge. With the sanction of the court, the administrator may also sell fixed charge assets free of the fixed charge, subject only to accounting to the fixed charge holder for market value or, if greater, the sale proceeds actually received (in each case not exceeding the obligations secured by such fixed charge). The effect for a secured creditor is, therefore, a loss of control. Lenders to a property company (for example) might wish to take a long-term view of the property market and simply refuse to release the security until paid out in full. An administrator who chooses to sell at a particular point will oblige the secured creditor merely to accept market value (or sale proceeds) at that chosen time of sale.

[3] A fund of an amount up to GBP800,000 which is ring-fenced from floating charge realisations. For some charges created prior to 6 April 2020, the maximum amount that may be ring-fenced is GBP600,000.
[4] An administrator may assign causes of action arising under the provisions of the Insolvency Act 1986 relating to fraudulent trading, wrongful trading, transactions at an undervalue, preferences and extortionate credit transactions.

Distribution

The administrator is required to distribute the assets of the company's estate in the following statutory order of priority:

- fixed charge holders/mortgagees from the proceeds of those assets;
- if the company entered administration within 12 weeks of the end of a Part A1 moratorium, any moratorium debts and priority pre-moratorium debts;
- expenses of the insolvent estate (including the administrator's remuneration and expenses);
- preferential debts: including occupational pension scheme contributions and four months' wages to employees, as well as certain unpaid taxes to HMRC;[5]
- prescribed part – funds ring-fenced from floating charge realisations for unsecured creditors on a *pro rata* and *pari passu* basis;
- floating charge creditors;
- unsecured creditors on a *pro rata* and *pari passu* basis;
- subordinated creditors pursuant to subordination agreements (although there are no classes of creditors who are subordinated as a matter of law, unlike in the United States). The degree of subordination and, therefore, where subordinated creditors rank in the order of priorities depends upon whether the contractual subordination in question is effective and also the terms of such subordination agreement;[6] and
- shareholders, according to their rights and interests in the company (although shareholders will receive nothing in an insolvent administration).

[5] In respect of insolvency proceedings commenced on or after 1 December 2020, HMRC are a secondary preferential creditor after ordinary preferential claims (which include certain employee claims) with respect to taxes collected by the company on HMRC's behalf. This includes VAT, PAYE income tax, employee's NIC's and construction industry scheme deductions.

[6] For example, it is possible for a subordinated creditor to have a floating charge but to agree to be subordinated to other floating charge holders only. Such a floating charge-holder would rank above unsecured creditors;

Pre-packs

Administration proceedings can also be used to effect what is known as a pre-packaged insolvency sale. The term "pre-pack" is used to describe a sale of the business of an insolvent company which is negotiated and agreed prior to the company entering formal insolvency proceedings. The intended insolvency practitioner will be involved in assessing the value of the business and agreeing the terms of a sale so that immediately upon, or very shortly after, their appointment they are able to execute a sale agreement transferring the business and assets to the purchaser. A "pre-pack" is thus a mechanism used to achieve a rapid sale where it is important to cause as little disruption to the business as possible. Administration proceedings are the main procedure used to effect a "pre-pack". The key issue in a "pre-pack" is value. An administrator will need to be comfortable that, in proceeding with a "pre-pack", they have obtained, for all creditor groups with an economic interest, the best price reasonably obtainable for the business. There has been an increase in the use of "pre-packs" in recent years and this has caused the process to come under greater scrutiny. In November 2015, the UK government introduced a number of voluntary industry measures in response to criticism of pre-packs. In 2020, following a review of the use of those voluntary measures, the UK government concluded that further scrutiny was required of pre-packs involving sales by insolvent companies to connected party purchasers and subsequently introduced the Administration (Restrictions on Disposals etc. to Connected Persons) Regulations 2021 (the **Regulations**). The Regulations require creditor consent for pre-pack sales that constitute a substantial disposal to connected parties, or that connected parties get an independent opinion in relation to such sales to justify the terms of the sale. The Regulations apply to any administrations starting on or after 30 April 2021. Please see our **dedicated publication on these Regulations**.

Completion of administration

The administration procedure will automatically come to an end after 12 months unless extended by the court or by consent of the creditors. There are a number of other exit routes from administration including creditors' voluntary liquidation. Alternatively, the administrator may seek the leave of the court to make distributions to unsecured creditors himself, in which case it is likely that the company would simply be dissolved at the end of the administration.

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at Allen & Overy, or email **rab@allenovery.com**

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Further information

Developed by Allen & Overy's market-leading Global Restructuring Group, "**Restructuring Across Borders**" is a free and easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, the Middle East, Asia and the U.S.

To access this resource, please **click here**.

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