

ALLEN & OVERY

Restructuring Across Borders

England and Wales:

Receivership | October 2020





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Introduction

In English insolvency law, when the term receiver is used, it is almost always taken to mean someone who is appointed to enforce security given by a company to those to whom it has obligations – normally its lenders.

In this context, the right to appoint a receiver is a contractual right agreed between a company and those to whom it grants security – and the relevant security document will set out this appointment right and the powers and duties of any receiver. These are in some instances supplemented by statute.

Receivers may be appointed over a particular asset of a company only (often real estate when they are usually referred to as “fixed-charge receivers” or “LPA receivers”) or over all assets of a company.

A receiver that is appointed over all or substantially all the assets of a company under a debenture secured by charges which include a floating charge is deemed an **administrative receiver**. Hence, only a floating charge holder can appoint an administrative receiver.

The significance of a receiver being an administrative receiver rather than an ordinary or fixed-charge receiver is two-fold. First, there are certain powers and duties specifically affecting an administrative receiver under the Insolvency Act 1986 (in particular, in Schedule 1 to the Act) and, secondly, where an administrative receiver has been appointed, no administrator may be appointed. Refer to our **“England and Wales – Administration” factsheet available here** for further information on administrations.

Receivership (including administrative receivership) is not a collective insolvency proceeding and therefore it is not listed in Annex A to the EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848).

Appointment

The appointment process is usually quick and relatively straight-forward. Assuming the right to appoint a receiver has arisen and any necessary demands and notices given, a receiver may be appointed by the charge holder in accordance with the terms of the security document pursuant to which the appointment is to be made, and legislative requirements. No particular form is required, although the security document must be complied with (for example where a **deed** of appointment is specified).



Prohibition on the appointment of administrative receivers and exceptions

The circumstances in which a floating charge holder may appoint an administrative receiver are restricted by statute (Enterprise Act 2002). Appointments are prohibited except where limited exceptions apply. The objective behind the legislation was to encourage greater use of the administration procedure and company rescues.

The **exceptions** to the prohibition on appointing an administrative receiver (and therefore the circumstances in which an administrative receiver may still be appointed) are as follows:

- The prohibition does not apply to a **floating charge created prior to 15 September 2003**. In most 'straight-forward' transactions, this will be the only possible exception to apply and is known as the grandfathering exception.
- An administrative receiver may be appointed in pursuance of an agreement which is or forms part of a **capital market arrangement** if a party incurs (or is expected to incur) indebtedness of at least GBP50 million under the arrangement and the arrangement involves the issue of a capital market investment.
- An administrative receiver may be appointed to a project company where the project is a **public-private partnership project** and involves step-in rights.
- There is also an exemption for **utility projects** which involve step-in rights for the secured creditor.
- There is also a more general **project finance** exception where the project company incurs (or is expected to incur) debt of at least GBP50m for the purposes of carrying out the project and the project creditor has step-in rights in respect of the project company.

- An administrative receiver may be appointed to a company which is a **registered social landlord** for the purposes of Part 1 of the Housing Act 1996.
- There is an exception for certain **market charges** falling under Part VII of the Companies Act 1989 or certain security falling within the Financial Markets and Insolvency (Settlement Finality) Regulations 1999.
- There is also an exemption for **urban regeneration projects** which involve step-in rights, where the project is for the development of land in designated disadvantaged areas.
- The prohibition does not prevent the appointment of an administrative receiver to a **water company** (appointed under the Water Industry Act 1991); a **protected railway company** under the Railways Act 1993; or a licence company (**air traffic services**) under s26 of the Transport Act 2000.

The consequence of the prohibition is that, in most cases where security is taken after 15 September 2003, the floating charge holder will no longer be able to appoint an administrative receiver and hence prevent the appointment of an administrator. However, the charge holder should be able to appoint an administrator. A simplified administrator appointment process, not dissimilar to the procedure for appointing an administrative receiver, exists specifically for floating charge holders who could have appointed an administrative receiver were it not for the prohibition.

Where an administrator has been appointed to a company, a fixed charge or non-administrative receiver may not be appointed. If one has been appointed and then an administrator is appointed, the administrator may require the fixed charge receiver to vacate office.

Refer to our **“England and Wales – Receivership” factsheet available [here](#)** for further information.





Role of the receiver

A receiver's primary duty is to realise the property and assets subject to the lender's security. An administrative receiver, who, by definition, is appointed over all (or substantially all) the assets of the company, effectively controls the company while appointed, although the assets do not actually vest in the administrative receiver. Such receivers deal with and dispose of the business and assets as agents of the company and in the exercise of their powers, and not as owner or trustee. The objective will usually be to sell the business as a going concern as this invariably maximises value.

The powers of an administrative receiver derive from the security pursuant to which the administrative receiver is appointed and Schedule 1 to the Insolvency Act 1986, and they are wide and enable such a receiver to continue and operate the business and affairs of the company. The administrative receiver may borrow working capital to continue the business and sell part or all of the business and assets. Generally, the administrative receiver has power to do all things necessary for the realisation of the company's property. Although the administrative receiver's primary duty is owed to the appointor, such a receiver does owe a secondary duty to the company (or anyone else entitled to the equity of redemption in the appointor's security such as a second chargee). So, when selling assets of the company, the administrative receiver is obliged to take reasonable care to obtain a proper price in the circumstances.

The same hierarchy of duties applies to a fixed charge receiver. Such a receiver will have only those powers set out in the relevant security document and will be appointed only to a single asset or limited pool of assets. The task of such a receiver will be to realise those specific assets only, rather than any broader involvement with the company and its affairs.

Once secured assets have been realised, repayments up to the amount of the secured debt are made to the appointor net of costs, expenses and remuneration of the receiver. In the case of floating charge assets, realisations will also be net of sums due to preferential creditors¹ and a percentage of funds which, by law, must be set aside (ring-fenced) out of floating charge realisations for the benefit of unsecured creditors (known as the "prescribed part"). The percentage varies depending on the amount of the floating charge realisations. The maximum amount of the prescribed part is GBP600,000 for floating charges created prior to 6 April 2020, rising to GBP800,000 in respect of floating charges created on or after 6 April 2020. However, the ring-fencing requirement does not apply where the administrative receiver is appointed under a floating charge created prior to 15 September 2003 (ie pursuant to the grandfathering exception to the prohibition on the appointment of administrative receivers), which is a rare occurrence these days.

¹ In respect of insolvency proceedings commenced on or after 1 December 2020, HMRC will be 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.

Effect of receivership

The appointment of a receiver does not affect the corporate existence of the company. However, the directors are divested of their authority as against the receiver. Subject to what parties may have agreed contractually, a company's existing contracts remain on foot despite the appointment of a receiver.

As regards contractual provisions entitling a party to terminate the agreement if the other party has a receiver appointed or automatically terminating the agreement in those circumstances (a so-called *ipso facto* clause), there is a difference between the appointment of an administrative receiver and that of a receiver who is not an administrative receiver. A contractual term that terminates (or entitles a party to terminate) the contract on the appointment of an administrative receiver to the other party is ineffective.² The contract is not terminated by, nor can be terminated in reliance on, such a clause. Further, the party in whose favour such a clause operates is not permitted to 'do any other thing' in reliance on the clause. However, an *ipso facto* clause that operates on

the appointment of a receiver other than an administrative receiver is effective and can be relied upon. For more information on the operation of the ban on certain *ipso facto* clauses, please see our **"England and Wales – Overview" factsheet available here**. Should the receiver not wish the company to fulfil a contract, the performance of which would involve assets under the receiver's control, the receiver may be able to cause the company to repudiate it without the receiver incurring personal liability (leaving the counterparty with a mere unsecured damages claim against the company).

An administrative receiver has an obligation to report to unsecured creditors on the company's position within three months of the appointment and unsecured creditors have the right to set up a creditors' committee – albeit with limited powers. The receiver does not deal with the claims of unsecured creditors (subject to the requirement to set aside the prescribed part of floating charge realisations for unsecured creditors as mentioned above).

Completion of the receivership

The receiver will vacate office when all the secured assets over which they have been appointed have been realised and/or the lender has been paid off (in full or in part). The company will then usually go into liquidation or may end up struck off the Companies Register and dissolved without going into liquidation.

² The appointment of an administrative receiver triggers the ban on the operation of *ipso facto* clauses contained in section 233B of the Insolvency Act 1986.

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If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.



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Further information

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