The Legal 500 & The In-House Lawyer
Comparative Legal Guide
New Zealand: Restructuring & Insolvency

This country-specific Q&A provides an overview of the legal framework and key issues surrounding restructuring and insolvency in New Zealand.

This Q&A is part of the global guide to Restructuring & Insolvency.

For a full list of jurisdictional Q&As visit **http://www.inhouselawyer.co.uk/index.php/practice-areas/restructuring-insolvency/**

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1. **What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?**

Immovable Property (real property/land)

In New Zealand, most land ownership is governed by the Torrens title system and security is generally taken by way of a registered mortgage over the freehold or leasehold interest in the land. Registration is not mandatory, and a failure to register a mortgage will generally not affect the validity of the mortgage security as against the mortgagor.

However, registered mortgage interests generally have priority over unregistered and subsequently registered interests, and failure to register may lead to postponement and potentially extinguishment of the secured party's mortgage interest in land.

Land Information New Zealand (LINZ) maintains the land register as an electronic record of all land ownership and registered interests in New Zealand land (including security). The LINZ register is publicly searchable.

Moveable property (personal property)

Security over personal property (including goods and chattels, inventory, shares and other investment instruments, bank accounts and intellectual property) typically constitute ‘security interests’ for the purposes of the Personal Properties Securities Act 1999 (PPSA).

As a general rule such security interests must be perfected either by: (i) the secured party taking possession of the collateral; or (ii) the secured party registering a financing statement in respect of any such security interests with the New Zealand Personal Property Securities Register (PPSR), within the relevant time periods. Failure to perfect the security will generally not affect the validity of security as against the grantor.

However, perfected interests generally have priority over unperfected interests, and failure to register may lead to postponement and potentially extinguishment of the secured party’s interest. The timing of any perfection (or failure to do so) can also affect the secured party’s priority in respect of other security interests.

The PPSR is publicly searchable by reference to a particular debtor

2. What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?

Secured creditor direct enforcement

If a registered mortgage has been granted over real property, and the mortgagor has defaulted under the mortgage, the mortgagee may be entitled to exercise its powers of enforcement, which may include taking possession of the real property and/or exercising its powers of sale. It is not necessary under New Zealand law for a mortgagee to enter into possession of the subject property in order for a mortgagee to exercise the power of sale.

A statutory default notice (in accordance with the requirements of the Property Law Act 2007) must be given to the relevant mortgagor and any other guarantors or parties with a subsequent registered interest in the land, and time must be given for the mortgagor to remedy the default (usually at least 20 business days), before any mortgagee powers of possession and/or sale can be exercised. Expiry of that default notice is also a pre-condition to the exercise of any power to accelerate amounts outstanding which are secured by a registered mortgage.

Mortgagee sale (and entry into possession where applicable) is a self-help method where Court approval is not required (other than in rare circumstances of a mortgagee sale conducted through a Court registrar process), and the powers of enforcement arise by virtue of the mortgage documents.

In addition Part 9 of the PPSA and the Property Law Act 2007 contain provisions that allow a secured party to exercise direct enforcement remedies (including taking possession and selling the collateral) against personal property collateral when a debtor is in default.

A receiver, mortgagee or secured party must act in good faith in relation to any sale it conducts and is subject to a statutory duty to obtain the best price reasonably obtainable as at the time of sale.

Receivership

Receivership is one of the main methods of enforcing security in respect of real and personal property in New Zealand and is discussed further in relation to question 4 below.

Almost all receivers are appointed by a secured creditor, pursuant to a contractual power to do so in a security agreement. No Court approval for such appointment by virtue of the security document is required, subject to compliance with the requirements of that security document for default by the relevant debtor to trigger the power of appointment.

As discussed above in the context of direct secured creditor enforcement, a statutory default notice (in accordance with the requirements of the Property Law Act 2007) may also be required to be given in a receivership context, before any receivers power of sale can be exercised. Where required, notice must be served upon the relevant obligor and any other guarantors or parties with a subsequent registered interest in the relevant assets, and time must be given for the obligor to satisfy the demand (usually at least 20 business days), before any receiver's power of sale can be exercised. This requirement is most commonly relevant in the context of a receiver's sale of real property.

Where the relevant obligor is a body corporate and the receiver is appointed pursuant to an all asset security agreement, then any required statutory default notices can be issued after the appointment of receivers (i.e. management of the relevant property by receivers in such circumstances is not restrained) however no sale of the subject assets can be completed by receivers until such time as the relevant default notices have been served and expired un-remedied. Where the debtor is not a body corporate (e.g an individual, unincorporated partnership or trust) the relevant notices must have been served and expire un-remedied as a pre-condition to acceleration of the subject debt and before any receiver's power of management or sale can be exercised.

3. **What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?**

Solvency Tests

The New Zealand Companies Act 1993 has two "solvency" tests concepts applied in different circumstances.

In the context of liquidation or voluntary administration the relevant question is whether the company "is able to pay its debts" when due. This is a cashflow solvency test having regard to a commercial assessment of overall liabilities measured against the resources available in order to meet those liabilities when due.

In the context of distributions to shareholders and amalgamations, there is a different "solvency test" which combines the same cashflow test as discussed above with a balance sheet test by reference to the value of assets being greater than the value of liabilities of the relevant entity.

Obligations and duties of directors

There are no circumstances in New Zealand which require a company or its directors to commence insolvency proceedings, nor is there any express prohibition on, or duty to avoid 'trading while insolvent'. However, there is a positive duty on directors in relation to reckless trading (as discussed further in Question 13 below), which can ‘force the hand’ of directors to place a company into voluntary administration or liquidation.

Directors owe their duties to the company to which they are appointed. Directors generally do not owe duties to creditors (or shareholders), and creditors and shareholders generally cannot take direct action against directors for a breach of duties. Remedy for a breach of duty by a director is to be sought by the company (or by a liquidator on behalf of the company under section 301 of the Companies Act 1993 as discussed below), or by a shareholder on behalf of the company (with the leave of the Court by a derivative action under section 165 of the Companies Act 1993.

Directors should, however, consider the interests of creditors when a company is or maybe operating in the ‘twilight zone’, namely, the time during which the company is or is nearing insolvency, as those interests are directly relevant to the interests of the company and are the subject of specific director's duties (as discussed in Question 13 below) regarding insolvent (reckless) trading and incurring obligations beyond a company's ability to perform. Not doing so does not, however, provide creditors with a directly enforceable right against directors for a breach of director’s duties or for the debt claimed by the creditor against the distressed company.

As discussed in the context of Question 13 below, post-liquidation of a New Zealand company, section 301 of the Companies Act 1993 can be invoked by a liquidator, a creditor or a shareholder of the company to bring actions against directors (and others) where, among other things, such directors (and/or others) have misapplied, retained, or become liable or accountable for money or property of the company, or been guilty of negligence, default, or breach of duty or trust in relation to the company. Many of the claims in New Zealand seeking redress for breaches of the relevant provisions relating to breach of director's duties in the twilight period prior to insolvency are brought by liquidators under section 301.

4. **What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?**

Liquidation

Liquidation is a statutory winding up process which can be initiated by the company’s shareholders, directors or by the Court (on the application by, among others, creditors if the Court is satisfied the company is unable to pay its debts).

Liquidation involves the realisation and distribution of a company’s assets in order to meet the claims of creditors. Liquidators are appointed and operate in accordance with Part 16 of the New Zealand Companies Act 1993. The commencement of liquidation brings about a moratorium on proceedings against the company or (with exceptions for secured creditors) its property.

Once appointed, the liquidator takes over the management of the company, realises its assets, pays its creditors and distributes the balance (if any) to the company’s shareholders. A liquidator has limited powers to carry on the business of the company. A liquidator is able to challenge insolvent transactions, or transactions at undervalue, terminate certain contracts, disclaim onerous property, compromise claims and sell the company’s assets and/or business. A liquidator is an officer of the Court, and is subject to supervision of the Court. There is no prescribed timeframe within which a liquidation must be completed.

Secured creditors generally stand outside the liquidation process and are entitled to separately realise their secured property. To the extent there is a shortfall, the secured creditor can claim in the liquidation as an unsecured creditor for that shortfall. Similarly, if there is a surplus after realisation the secured creditor must account to the liquidator for that surplus.

After realising the company’s assets, the liquidator must apply the proceeds towards their own fees and expenses, followed by paying preferential creditors (generally in the nature of employee payments and taxes) and then general unsecured creditors. Each creditor will share in the proceeds proportionately.

Receivership

In New Zealand, receivership is the most common form of enforcement procedure in respect of insolvent entities who have granted security over their assets. Receivership is initiated by a secured party in relation to some or all of the assets of the entity over which that secured party holds a security interest. The right to appoint receivers, and the scope of a receiver’s powers, are generally a matter of contract under the terms of the relevant security agreement. The appointment and conduct of receivers is also regulated by the New Zealand Receiverships Act 1993 and the common law.

The appointment of a receiver does not create a moratorium in relation to the debtor or its assets, and other creditors can continue to enforce their rights and remedies against the debtor or its assets subject to the prior ranking rights of the secured creditor.

A receiver has the right and power to manage the business and to realise the assets of the debtor in receivership. On appointment of a receiver, the directors of a debtor company remain in office but cease to have the power to manage and control the debtor company's assets. A receiver is the agent of the debtor in receivership (unless provided otherwise in the security agreement) and can contract on the debtor's behalf. The appointing secured creditor should not instruct or direct the receiver, however the secured creditor retains the right to dismiss and appoint an alternative receiver. The debtor in receivership retains ownership and possession of the security property. All pre-receivership contracts remain on foot (subject to any termination provisions set out in the individual contracts as discussed further in question 12 below).

A receiver is under a statutory duty to act: (i) in good faith and for a proper purpose; and (ii) must exercise his/her powers in the best interests of the appointing secured creditor. To the extent consistent with those duties, a receiver must exercise his/her powers with a reasonable regard to the insolvent company, others claiming an interest in the receivership property, unsecured creditors and guarantors of the insolvency company. Receivers are subject to Court supervision, and may seek directions from the Court as to the extent of a receiver's rights, powers and obligations.

The receiver owes residual duties to the debtor, its sureties, unsecured creditors and shareholders to have reasonable regard to the interests of those persons.

Statutory management

A statutory manager may be appointed to a New Zealand company pursuant to the New Zealand Corporations (Investigations and Management) Act 1989. Statutory managers are only very rarely appointed in cases of corporate insolvency.

Statutory managers are appointed where it is considered by the New Zealand Financial Markets Authority that the company is acting fraudulently or recklessly or that it is necessary to protect the interests of shareholders or creditors, or for any other reason in the public interest and such interests cannot be adequately protected in another way.

While a company is under statutory management, there is a moratorium which prevents any
proceedings or enforcement action being taken or continued by any person (including secured creditors) against the corporation without the statutory manager’s consent. There is also a prohibition on the transfer or removal of any assets of the company without the statutory manager’s consent.

A statutory manager has broad powers to manage and carry on the business of the company, challenge insolvent transactions, terminate certain contracts, disclaim onerous property, compromise claims and sell its assets and/or business.

A statutory manager is also entitled to suspend, in whole or in part, the payment of any debts or the discharge of any obligation. There is no limit on the period during which the moratorium or suspension may continue.

Voluntary administration – (as discussed further in Question 8)

As discussed further in Question 8, the New Zealand Companies Act 1993 provides for the appointment of a voluntary administrator to an insolvent company (or a company that may in the future become insolvent).

The New Zealand voluntary administration regime is generally modelled on the equivalent Australian regime and the relevant provisions of the New Zealand Companies Act are substantially the same as the equivalent provisions under Australian law.

Voluntary administration is intended to maximise the chances of a company (or its business) continuing in existence or, if that is not possible, providing a better return for creditors than immediate liquidation.

A company can be placed into voluntary administration by its directors, a liquidator, a secured creditor who has a security interest over substantially the whole of the company’s property or the Court on the application of a creditor or certain others.

On the appointment of an administrator a moratorium on enforcement action commences such that creditors cannot take steps to enforce any debts or security against the company without the consent of the administrator or the leave of the Court. The moratorium does not apply to secured creditors who hold a security interest over all or substantially all of the company’s assets, if those creditors elect to enforce their security interest within the 10 working days after the company goes into administration. Nor does the moratorium apply to secured creditors who have already taken steps to enforce the security interest prior to the administration.

During the administration, the administrator has control over the company’s business and property (except for company property in respect of which a secured creditor has appointed a receiver). The administrator can manage and dispose of any business or property and can perform any function and exercise any power on the company’s behalf that the company could perform if it were not in an administration. Administrators are subject to Court supervision, and can seek directions as to the extent of their rights, powers and obligations.

The moratorium will expire when the creditors vote (at the ‘‘watershed meeting’’) to return the company to its directors, to appoint a liquidator or to execute a deed of company arrangement (DOCA). The watershed meeting must be held within 25 working days after the commencement of the administration (or longer if the Court has approved an extension to the convening period). If a DOCA is approved by a majority in number representing 75% by value of creditors it is binding on all unsecured creditors, as well as on secured creditors who have voted in favor of the DOCA.

Creditors Compromise

As discussed further in Question 8, a creditors’ compromise is a binding arrangement between an insolvent company and its creditors concerning payment of the company’s debts other than in accordance with the strict legal rights of those creditors.

The compromise may involve the suspension or deferral of payments, the acceptance of a
lesser sum as full and final settlement or instalment arrangements, or the conversion of debt into equity.

Compromise arrangements are made under Part 14 of the New Zealand Companies Act 1993. The
directors, a receiver or a liquidator may propose a compromise as of right, and a creditor or a
shareholder may propose a compromise with the leave of the Court. Part 14 requires a distinction to be made between classes of creditors. Although each class of creditors vote on the proposal separately, the resolution must be the same for each class. Each class must approve the proposal by a majority in number and by 75% in value of creditors who voted in that class (there is no ability to cram down dissenting classes). Unless a proposal provides otherwise, the approval of the compromise is conditional upon all classes voting in favor of the proposal.

A compromise once approved by the required majority of creditors, will bind all creditors to whom notice of the compromise proposal was given, including even those that do not agree with it. However, a creditor who voted against the compromise may challenge the compromise by applying to the Court within 10 working days after notice of the result of the voting was given to the creditor. If the Court is satisfied that the compromise is unfairly prejudicial to that creditor or the class of creditors to which that creditor belongs, the Court may make an order that the creditor is not bound by the compromise.

Until the compromise is approved, there is no moratorium on creditors taking enforcement steps against the company.

Schemes of Arrangement

As discussed further in Question 8, creditors claims may also be varied or compromised via a Court-approved scheme of arrangement under Part 15 of the New Zealand Companies Act 1993.

Part 15 allows what is in effect a creditors compromise to be approved by the Court outside of the Part 14 process discussed under ‘‘Creditors’ Compromises’’ section above and below in Question 8.

A Court may, on the application of a company or any of its shareholders or creditors, order that a compromise, arrangement or amalgamation be binding on the company and on such other persons or classes of persons including creditors as the Court may specify. Any order may be made on such terms and conditions as the Court thinks fit.

However, as the Court has a duty to ensure that the rights of affected creditors are adequately protected, the Court is likely to order that the creditors vote on the proposed compromise before it considers whether to approve it.

5. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?

Liquidators are able to set aside, or apply to the Court to have set aside, the following transactions:

1. Voidable transactions – transactions that were entered into while the company was insolvent, within the two year period before the liquidation application was made, and which allow the creditor to receive more than it would have in the liquidation.
2. Voidable charges – charges that were given while the company was insolvent, within the two year period before the liquidation application was made and which did not secure money actually advanced or paid, or the actual price or value of property sold or supplied to the company, or any other valuable consideration given in good faith by the recipient of the charge.
3. Transactions at an undervalue – the liquidator may recover from the creditor the difference in value between the value given by the company and the value received by the company as a result of a transaction that occurred while the company was insolvent and within the two years before the liquidation application was made.
4. Transactions with directors or other related parties for inadequate or excessive consideration – the liquidator may claim back from a director or related party in relation to the transaction, the amount by which the consideration received by the company was exceeded by the consideration it gave, provided the transaction occurred within the 3 years before the liquidation application was made.

5. Securities and charges given by the company to a director or related party if the Court considers that it is just and equitable to set the transactions aside, taking into account the circumstances in which the charge was created, the conduct of the director or related party and any other relevant circumstances. There is no requirement to prove that the company was insolvent at the time the security or charge was given.
6. Dispositions that prejudice creditors– dispositions made without receiving reasonably equivalent value in exchange and with the intent of defeating creditors can be reclaimed from a creditor. A six-year limitation period applies from the date the disposition is made.
7. Distributions to shareholders that were made at a time when the company failed the solvency test.

A six year limitation period applies from the time when the distribution was made.

A transaction will not be set aside if the third party creditor received the payment in good faith, in circumstances when a reasonable person in the creditor's position would not have suspected and the creditor did not suspect that the company was or would become insolvent, and that the creditor gave value to the company (value can be given before or after the creditor received payment) or changed its position in the reasonably held belief that the transfer was valid and would not be set aside.

A similar good faith defence is available to shareholders who did not know that the company failed to meet the solvency test at the time that a distribution was made.

A liquidator also has the power to disclaim onerous property, which includes unprofitable contracts and property of the company that is unsaleable, or not readily saleable, or that may give rise to a liability to pay money or perform an onerous act. Persons suffering loss as a result of the disclaimer can claim for that loss in the liquidation.

6. Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties

impacted?

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(b) Voidable charges – charges that were given while the company was insolvent, within the two year period before the liquidation application was made and which did not secure money actually advanced or paid, or the actual price or value of property sold or supplied to the company, or any other valuable consideration given in good faith by the recipient of the charge.

(c) Transactions at an undervalue – the liquidator may recover from the creditor the difference in value between the value given by the company and the value received by the company as a result of a transaction that occurred while the company was insolvent and within the two years before the liquidation application was made.

(d) Transactions with directors or other related parties for inadequate or excessive consideration – the liquidator may claim back from a director or related party in relation to the transaction, the amount by which the consideration received by the company was exceeded by the consideration it gave, provided the transaction occurred within the 3 years before the liquidation application was made.

(e) Securities and charges given by the company to a director or related party if the Court considers that it is just and equitable to set the transactions aside, taking into account the circumstances in which the charge was created, the conduct of the director or related party and any other relevant circumstances. There is no requirement to prove that the company was insolvent at the time the security or charge was given.

(f) Dispositions that prejudice creditors– dispositions made without receiving reasonably equivalent value in exchange and with the intent of defeating creditors can be reclaimed from a creditor. A six-year limitation period applies from the date the disposition is made.

(g) Distributions to shareholders that were made at a time when the company failed the solvency test.

A six year limitation period applies from the time when the distribution was made.

A transaction will not be set aside if the third party creditor received the payment in good faith, in circumstances when a reasonable person in the creditor's position would not have suspected and the creditor did not suspect that the company was or would become insolvent, and that the creditor gave value to the company (value can be given before or after the creditor received payment) or changed its position in the reasonably held belief that the transfer was valid and would not be set aside.

A similar good faith defence is available to shareholders who did not know that the company failed to meet the solvency test at the time that a distribution was made.

A liquidator also has the power to disclaim onerous property, which includes unprofitable contracts and property of the company that is unsaleable, or not readily saleable, or that may give rise to a liability to pay money or perform an onerous act. Persons suffering loss as a result of the disclaimer can claim for that loss in the liquidation.

7. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors’ claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

Voluntary administration

In voluntary administration, a moratorium on claims is automatically imposed upon appointment of an administrator. The moratorium restricts any Court proceedings being taken against the company, without leave of either the administrator or the Court. The moratorium also prevents creditors (including lessors) enforcing charges, taking possession of the company's property, and enforcing guarantees given by directors (or relatives).

The moratorium does not, however, restrict a creditor that holds a general security interest over company property from enforcing its charge, provided that the creditor enforces its interest no later than ten working days after the administrator's appointment.

Deed of company arrangement (DOCA)
As discussed further in question 8, one of the potential outcomes of voluntary administration is the approval of a deed of company arrangement (DOCA) by the creditors of the company at the "watershed meeting" held to determine the future of the company.

If a DOCA is approved by the relevant majorities of creditors (majority in number and 75% in value of debt owed by the company) at the watershed meeting, all unsecured creditors (and secured creditors who voted in favour) are bound by the terms of that DOCA to the extent that the creditors' claims arose prior to the stipulated cut-off date. Any moratorium imposed by the terms of the DOCA is binding on all creditors that are bound by the DOCA, no Court approval is necessary.

The extent to which a moratorium imposed on creditors operates depends entirely on the terms of the DOCA in question. It is common for a DOCA to prevent creditors who are bound from taking any enforcement action against the debtor company. Whether a DOCA prevents security enforcement by creditors depends on whether the particular secured creditor(s) are bound by the DOCA. Similarly, the ability for creditors to exercise rights other than security enforcement depends on the terms of the DOCA.

Liquidation
Upon the commencement of liquidation of a company no person may commence or continue legal proceedings against the company or exercise or enforce a right or

remedy over or against the property of the company.

However the rights of a secured creditor to take possession of, realise or otherwise deal with the property of the company over which that creditor has security continue unabated by anything arising from the liquidation itself.

Accordingly a secured creditor may (for example) appoint a receiver over the relevant security assets notwithstanding the appointment of a liquidator.

Creditors Compromise

A Court may grant orders staying proceedings or enforcement for a ten day period from the date notice of the compromise is given.

Once a creditors compromise is approved (as discussed further in question 8), it is binding upon the company and all creditors that received notice of the compromise. Any moratorium imposed by the compromise is binding on the class of creditors that are bound by the compromise, no Court approval is necessary.

The extent to which a moratorium imposed on creditors operates depends entirely on the terms of the compromise in question. It is common for compromises to prevent creditors from taking any enforcement action against the debtor company. Whether a compromise prevents security enforcement by creditors depends on whether the particular secured creditor(s) are within the class of creditors that are bound by the compromise. Similarly, the ability for creditors to exercise rights other than security enforcement depends on the terms of the compromise.

Scheme of Arrangement

The terms of a Court approved scheme of arrangement may include some form of moratorium or restraint on creditor enforcement. Any moratorium imposed by a scheme of arrangement is binding on the class of creditors that are bound by the scheme of arrangement.

The extent to which a moratorium imposed on creditors operates depends entirely on the terms of the scheme of arrangement in question.

Statutory management
While a company is under statutory management, there is a broad ranging moratorium which prevents any proceedings or enforcement action being taken or continued by any person (including secured creditors) against the corporation without the statutory manager's consent. There is also a prohibition on the transfer or removal of any assets of the company without the statutory manager's consent.

Extra-territorial effect
The moratoriums which apply in respect of the insolvency processes referred to above are not expressed to be restricted in the territorial scope of their application.

However, the extra-territorial effect of such moratorium will depend upon the ability, under the law of the relevant foreign jurisdiction (in which the moratorium is sought to apply), for the insolvency official to obtain orders from a foreign court to stay proceedings or enforcement, as part of recognition and assistance of that insolvency process by the foreign court.

8. What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play?

Voluntary administration (also discussed in questions 4 and 7)

The purpose of voluntary administration is to allow companies that are under financial distress a chance to rehabilitate, by imposing a moratorium on creditors' claims while an administrator is appointed to investigate the company's affairs and evaluate its chances of survival. The voluntary administration procedure is governed by Part 15A of the Companies Act 1993.

Voluntary administration begins when an administrator is appointed. Where a company is likely to become insolvent, an administrator can be appointed by: a resolution passed by a company's board of directors; a liquidator; a creditor holding a charge over a substantial amount of a company's property; or the High Court of New Zealand (Court) following an application by a creditor, liquidator, or the Registrar of Companies (Registrar).

While a company is under administration, the administrator, as the company's agent, has control of the company's property and affairs until the watershed meeting is held to determine the future of the company. There is very limited involvement required by the Court. The administrator can, however, seek directions from the Court as to the extent of his or her statutorily proscribed powers and the manner in which those powers are to be exercised. An administrator can be replaced by the Court upon application of the Registrar or a creditor (or a liquidator, if the company is in liquidation). The company's creditors also have the ability, at the first creditors' meeting, to remove an administrator from office and appoint a replacement.

Following appointment, the administrator investigates the company's affairs and reports his or her findings to the company's creditors in order to determine whether the company should continue trading. The company can continue to trade during the period of administration, under the administrator's direction. The administrator is personally liable for debts incurred in the exercise of his or her functions and powers as administrator. The administrator is, however, entitled to be indemnified out of company property for personal liabilities incurred in due performance of his or her duties (excluding those incurred negligently or in bad faith).

As discussed above in Question 7, a moratorium on claims is automatically imposed upon appointment of an administrator.

The fate of a company in voluntary administration, is decided by creditors at what is known as the "watershed meeting".

The administrator must convene a watershed meeting within 20 working days of their appointment (unless an extension is granted by the Court). At least five working days before the watershed meeting, the administrator must provide a report to creditors outlining the company's business, property, affairs and the administrator's recommendation as to whether the company should be liquidated, returned to the directors, or enter a DOCA. The creditors must then elect between those options. All creditors are bound by a decision made by a majority of creditors in number (and 75% in value of debt owed by the company).

The effects of a voluntary administration on stakeholders depends entirely on what creditors resolve should happen to the company following the watershed meeting. If the company:

- Is to be returned to the management of the directors, then the status-quo prior to the administration is restored.
- Is to be liquidated, the formal liquidation process outlined above is adopted with the administrators as default liquidators.
- Enters a DOCA:
  - A deed administrator can be appointed at the watershed meeting, who oversees performance of the terms of the deed.
  - All unsecured creditors (and secured creditors who voted in favour of the DOCA) are bound by the conditions of the DOCA to the extent that the creditors' claims arose prior to the stipulated cut-off date. The DOCA also binds: owners/lessors of property occupied by the company that voted in favour of the DOCA; the company; its directors, officers, and shareholders; and the deed administrator.
  - Creditors are restricted from applying to liquidate the company and commencing or continuing proceedings against the company in accordance with the terms of the DOCA.
  - All creditors are to be repaid their debts (either in full or in specified proportions) in the manner specified in the DOCA which will be unique for each insolvency and could include (without limitation) distribution of the proceeds of sale of certain assets or the distribution of revenues over time or the one off distribution of equity injected by stakeholders. These arrangements often involve creditors taking a pro rata "haircut" on their original debt.

Voluntary administration ends once the requisite majority of creditors at the watershed meeting have decided that the company be returned to the directors, liquidated, or enter into a DOCA.

Creditors' compromise (also discussed in questions 4 and 7)

The purpose of a creditors' compromise is to allow a company that is under financial distress to cancel or vary certain debts owed to creditors, or to allow a company to alter its constitution in a manner that affects the likelihood of the company being able to pay some or all of its debt. Unlike voluntary administration, a compromise is not a reorganisation procedure where an administrator is brought in to run the company. Rather, control of the company remains with the directors. Creditors' compromises are governed by Part 14 of the Companies Act 1993.

A creditors' compromise can be proposed only if the proponent has reason to believe that the debtor company either is, or will be unable to, pay its debts. A creditors' compromise can be proposed by either the board of directors of a company, a receiver that has been appointed over the whole or substantially the whole of a company's assets, or the liquidator of a company. In some circumstances, creditors and shareholders of a company may propose a compromise, provided that the Court has given leave.

Day-to-day control of a company that has implemented a compromise remains with the directors. There is often little ongoing supervision required, because once a compromise is passed by achieving the requisite majority at a meeting of creditors, the process is usually at an end. The Court usually has no involvement in the process, except when leave is sought by a creditor or shareholder to propose a compromise, or when a creditor that did not support a compromise challenges its validity. The adoption of a compromise is entirely at the will of the creditors that are intended to be bound by it.

The first stage in the adoption of a creditors' compromise is for a compromise to be proposed. The proponent then compiles a list of creditors detailing the amount owed to each creditor, and the votes that each creditor is entitled to cast on a resolution. Certain information relating to the compromise must be provided to creditors. The Court has the ability to give directions in relation to, or waive or vary, any procedural requirements. A meeting of creditors is then held and if a majority in number (and 75% in value of) vote in favour of the compromise, it is binding on that class of creditors.

Once a compromise is approved, it is binding upon the company and all creditors that received notice of the compromise (such notice must be sent to every creditor entitled to attend the meeting, no less than five working days before the meeting). Any moratorium imposed by the compromise is binding on the class of creditors that are bound by the compromise, no Court approval is necessary.

Creditors that do not support a compromise under which they are bound may apply to the Court for orders that, inter alia, they be exempted from it. Such orders can be obtained if the Court is satisfied that: creditors received insufficient notice of the creditors' meeting; there was a material regularity in obtaining approval of the compromise; or if the compromise is unfairly prejudicial to any creditors.

While a compromise is being implemented, and after it has been passed, the debtor company continues to be operated by its directors. A compromise imposes no restriction on the debtor company continuing to operate its business, or to incur further debts.

As discussed above, certain information must be provided to creditors prior to the meeting where the compromise is being voted on. Specifically, the proponent must provide:

- Notice of the intention to hold a meeting of creditors.
- A statement:
  - Containing the name and address of the proponent and the capacity in which the proponent is acting.
  - Containing the address and telephone number to which inquiries may be directed during normal business hours.
  - Setting out the terms of the proposed compromise and the reasons for it.
  - Setting out the reasonably foreseeable consequences for creditors of the company of the compromise being approved.
  - Setting out the extent of any interest of a director in the proposed compromise.
  - Explaining that the proposed compromise and any amendments proposed at a meeting of creditors or any classes of creditors will be binding on all creditors, or on all creditors of that class, if approved at the meeting.

    - Containing details of any procedure proposed as part of the proposed compromise for varying the compromise following its approval.
  - A copy of the list or lists of creditors.

Although there is no requirement that a compromise provide a better outcome to creditors than they would receive in liquidation, if a compromise provides a worse result that may be unfairly prejudicial to creditors, and so form a basis upon which creditors can apply to the Court for orders that they are exempted from a compromise.

Scheme of Arrangement (also discussed in questions 4 and 7)

Under Part 15 of the Companies Act 1993, a company, shareholder or creditor may apply to Court for the approval of a scheme of arrangement, amalgamation or compromise (s236(1)).

A scheme can encompass a wide range of possible outcomes and can include a compromise with creditors, a reorganization of share capital, an amalgamation of two or more companies or any combination of such concepts which affects the rights and obligations of a company, its creditors and shareholders.

Once sanctioned by the Court, a scheme becomes binding on a company, its creditors and shareholders. The essence of a scheme of arrangement is that it is non-consensual and derives its authority from the Court's approval of the scheme, as opposed to approval by creditors (which is in contrast to the position in respect of a creditors compromise (as discussed above) and deeds of company arrangement (DOCA implemented under a voluntary administration (as discussed above)). However a Court in approving a scheme will typically make orders requiring that before implementation the scheme be approved by a meeting of creditors and/or shareholders.

A Court can approve a creditors compromise as a scheme of arrangement under Part 15 in circumstances where the Part 14 procedure could have been used (s238(b)), including in circumstances where a compromise proposal has been rejected by creditors under Part 14.

Schemes of arrangement are versatile and there is no requirement that a company be insolvent before a scheme of arrangement can be proposed or implemented. This is in contrast to the position in respect of a creditors compromise and commencement of voluntary administration.

Before granting orders to approve an application in respect of a scheme, the Court has power, either on application or on its own motion, to make a wide range of procedural orders, including orders (s 236(2)):

- at notice of the application, and information, be given to specified persons;
- that meetings of creditors, shareholders, or any class of them be held to consider and, if thought fit, approve the arrangement;
- that a report on the proposal be prepared for the Court, and such other persons as the Court orders;

as to costs; and

- as to who is entitled to be heard on the application for approval.

When an order is made approving the application in respect of a scheme, the Court may, at the time of that order or subsequently, for the purpose of giving effect to the arrangement, amalgamation, or compromise, make orders relating to (s 237(1)):

- the transfer or vesting of real or personal property, assets, rights, powers, interests, liabilities, contracts, and engagements;
- the issue of shares, securities, or policies of any kind;
- the continuation of legal proceedings;
- the liquidation of any company; and
- the provisions to be made for persons who voted against the arrangement or amalgamation or compromise at any meeting called in accordance with any order made under subs (2)(b) of that section or who appeared before the Court in opposition to the application to approve the arrangement or amalgamation or compromise; and
- such other matters that are necessary or desirable to give effect to the arrangement or amalgamation or compromise.

9. **Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?**

A debtor in a receivership or voluntary administration process may agree arrangements (executed through the relevant receiver or administrator as applicable) for new or extended financing for a specific purpose or in connection with a rehabilitation strategy for continued trading (including pursuant to an approved deed of company arrangement (DOCA)), subject to appropriate limitations on the personal liability of the relevant receiver or administrator. Arrangements for additional finance are also possible as part of a Part 14 or 15 compromise/scheme of arrangement, However for the following reasons, the prospects for an insolvent entity to borrow further funds are usually limited.

New Zealand insolvency law does not have a process to provide priority to 'debtor in possession' (DIP) financing (as is the case, for example, under the US Chapter 11 bankruptcy process). DIP financing will not have priority to existing indebtedness unless all creditors agree voluntarily to subordinate their claims or such financing is part of a deed of company arrangement (DOCA) or Part 14 or 15 compromise/scheme of arrangement (which is approved by and binding on creditors).

10. **Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?**

It is not unusual for a deed of company arrangement (DOCA) or Part 14 or 15 compromise/scheme of arrangement to purport to provide for the release of potential claims against directors or other related parties of a debtor.

The effectiveness, however, of any such release is an unsettled issue in New Zealand law because, in general, the creditors of a debtor entity cannot be bound through a DOCA, compromise or scheme, to give up claims against any entity other than the debtor in question. The New Zealand Courts whilst not expressing a view on the overall effectiveness of any such release, have indicated that a purported release of claims against parties owing duties to the debtor company, not to individual creditors, would be viewed differently from the release of valuable creditor rights against related companies, third party guarantors or even director guarantors.

11. Is it common for creditor committees to be formed in restructuring proceedings and what powers or responsibilities to they have? Are they permitted to retain advisers and, if so, how are they funded?

Creditors in a voluntary administration may resolve at the first creditors meeting to form a creditors committee. The function of such a committee is to consult with the administrator about matters relating to the administration and to receive and consider reports by the administrator. Only creditors or their agents may be members of the committee. Such a committee has no standing to give directions to or control the administrator and the power to require administrator reports is intended to ensure disclosure by the administrator of all matters relevant to the administration. The power to receive reports is not a power to control the administrator's investigations or a power to require the administrator to seek the opinion of third parties on matters respecting which the administrator has a duty to form an opinion.

The formation of creditors committees is not unusual in large New Zealand voluntary administration cases. Such committees and their members are free to seek advice as they see fit, however no provision is made in the laws of New Zealand for the funding of the cost of any such advice or advisors.

12. How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title

and set-off provisions in these contracts remain enforceable? Is there any an ability for either party to disclaim the contract?

General

In general, if a contract contains an ipso facto clause which allows a party to terminate in the event of the other party entering receivership, voluntary administration or liquidation, there is generally no restriction on the operation of that clause (there are limited exceptions for contracts for the provisions of essential services). Even in cases where there is no ipso facto clause in a given contract, it is possible, albeit in very rare circumstances, for a Court to imply a term that the duration of the contract was intended by the parties to only last while the (now insolvent) company was trading, meaning that the contract becomes frustrated upon one of the parties entering receivership, voluntary administration or liquidation.

Pre-existing contracts – Receivership

Contracts that existed prior to appointment of a receiver are not automatically brought to an end by the occurrence of receivership, other than where the contract provides for that as an "ipso facto" termination event. Subject to available funding, a receiver may elect to allow the company to continue to perform contracts that the debtor company entered into pre-receivership, and those contracts would continue to subsist on the same contractual terms as agreed prior to the receiver's appointment. Otherwise, a receiver, acting as the debtor company's agent, may choose to cause the company to repudiate those contracts, which will typically leave the counterparties having to claim against the debtor company (in respect of any unpaid amounts, damages for breach or repudiation) as unsecured creditors. Claims by unsecured creditors in this context are often not worth pursuing, both because their claims are subordinate to that of the secured creditor that appointed the receiver, and because (subject to the exceptions described below) a receiver is not personally liable for pre-receivership contracts in his or her personal capacity, unless the receiver acts in bad faith or expressly adopts or assumes personal liability for those contracts (or holds itself out in a manner which prevents the receiver from denying personal liability). A receiver is, in general, personally liable for any contracts entered into by the receiver on behalf of the debtor during the receivership, but the receiver may expressly limit or exclude personal liability by contract.

There are two statutory exceptions to the rule that a receiver is not personally liable for contracts that the debtor entered into prior to the receiver's appointment, namely: employment contracts and those relating to property that was leased before, and continues to be leased after, the appointment of a receiver. The Receiverships Act 1993 provides that if a receiver does not give lawful notice terminating an existing contract of employment within 14 days of the receiver's appointment, he or she becomes personally liable for the payment of wages or salary which accrue to the employee from the date of receivership. In complex cases where a receiver is unable to determine within 14 days whether certain employees should be retained or dismissed, he or she is able to apply to the Court for an extension of the 14 day time period.

Similarly, the Receiverships Act 1993 also stipulates that a receiver is personally liable for rent and other payments accruing during the receivership that relate to property leased or rented by the debtor pursuant to a pre-receivership contract . The receiver's personal liability in relation to such payments begins 14 days after the receiver's appointment and continues until such time as the debtor company no longer uses or occupies the property, or until the receivership ends.

Pre-existing contracts – Voluntary Administration

Similarly unless there is a specific provision in the contact allowing for an "ipso facto" termination, contracts that existed prior to appointment of an administrator are not automatically brought to an end by the occurrence of voluntary administration. Subject to available funding, an administrator may elect to allow the company to continue to perform any of the contracts that the debtor company entered into pre-administration and those contracts would continue to subsist on the same contractual terms as agreed prior to the administrator's appointment. Otherwise, an administrator, may choose to cause the company to repudiate those contracts, leaving the counterparties having to claim against the debtor company as unsecured creditors.

An administrator is liable for debts of the company in administration that the administrator incurs in the performance of the functions and powers of an administrator, including for the purpose of funding the company in administration, for services rendered, for goods bought or for any property, hired, leased or occupied. Accordingly personal liability of an administrator can extend to pre-administration contracts in respect of debts incurred under such contracts during the period of administration without any requirement for "adoption" of such contracts by the administrator. This general rule as to personal liability is subject to particular rules for lease and employment obligations as discussed further below.

In addition to the moratorium that is imposed upon the appointment of an administrator (as discussed above in question 7), there is a further restriction in relation to transactions affecting the property of a company in administration. Any transaction entered into, or dealing made by a company in relation to its property is void unless personally authorised by the administrator or an order of the Court.

Unlike a liquidator or statutory manager, an administrator does not have the ability to disclaim contracts entered into by the company in administration prior to his or her appointment.

As to employment contracts, a regime similar to that of receivership exists in the case of voluntary administration. While the appointment of an administrator does not automatically terminate any employment contract(s), there exists a 14 day window in which an administrator may give lawful notice of termination to any given employee(s) so as to avoid being personally liable for wages or salary that accrue during the administration of the company under those contracts.

As to leases, a regime similar to that of receivership exists in the case of voluntary administration. While the appointment of an administrator does not automatically terminate any lease contract(s), there exists a 7 day window in which an administrator may give a "non-use notice" that states that the company does not propose to use the property or otherwise exercise any rights in relation to it, to any given lessor so as to avoid being personally liable for any obligation of the company under those contracts. After the expiry of the 7 day period, the administrator will be personally liable for rent in respect of all leased property during the administration for so long as the company continues to use, occupy or be in possession of the subject property.

Pre-existing contracts – Liquidation

The Companies Act 1993 does not specifically provide that pre-liquidation contracts come to an end solely by virtue of a company entering liquidation.

In general, unless there is a specific provision in the contract allowing for an "ipso facto" termination, contracts that existed prior to appointment of a liquidator are not automatically brought to an end by the occurrence of liquidation. Subject to available funding, a liquidator may elect to allow the company to continue to perform any of the contracts that the debtor company entered into pre-liquidation and those contracts would continue to subsist on the same contractual terms as agreed prior to the liquidator's appointment. Otherwise, a liquidator, may choose to cause the company to repudiate those contracts, leaving the counterparties having to claim against the debtor company as unsecured creditors.

A liquidator has the power to disclaim onerous property, which includes unprofitable contracts and property of the company that is unsaleable, or not readily saleable, or that may give rise to a liability to pay money or perform an onerous act. In order for a contract to be determined to be "unprofitable" so as to be capable of disclaimer, the liquidator would need to be able to establish that such contract is a burden on the company in terms of prospective liability, detrimental to creditors as a whole and not simply a "bad bargain".

In accordance with section 269(3) of the Companies Act, a disclaimer by a liquidator:

1. brings to an end on and from the date of the disclaimer the rights, interests, and liabilities of the company in relation to the property disclaimed; and
2. does not, except so far as necessary to release the company from a liability, affect the rights or liabilities of any other person.

Persons suffering loss as a result of a disclaimer can claim for that loss in the liquidation.

Contracts that grant a counterparty an interest in real property owned by the debtor in liquidation may not be able to be effectively disclaimed.

Pre-existing contracts – Statutory management

When a corporation enters statutory management, many of the rights that contracting counterparties would have otherwise been able to exercise are subject to a comprehensive moratorium (as discussed in question 7) which both restricts creditors from exercising rights against the corporation and allows the statutory manager to suspend obligations and terminate certain contracts that the corporation is party to. There are only very limited exceptions to the moratorium that is imposed following a corporation entering statutory management. Those exceptions include certain rights of set-off and the commencement or continuation of proceedings for the purpose of determining whether any right or liability exists (provided that leave of either the statutory manager or the Court is first obtained). Additionally, a statutory manager also has the ability to suspend the repayment of any deposit, payment of any debt, or the discharge of any obligation. Critically, the Corporations (Investigation and Management) Act 1989 ("CIMA") also provides that when this power is exercised by the statutory manager, it does not amount to either a breach or a repudiation of the contract on the part of the corporation being managed.

Whether many executory contracts survive statutory management depends largely on the actions of the statutory manager. The CIMA confers a discretion on a statutory manager that allows him or her to terminate, at any time, any contract of service or agency that the corporation being managed is party to. The discretion may be exercised even in circumstances where, but for the appointment of a statutory manager, the contract could not have been terminated until a later date or without cause. Termination of contracts by the statutory manager both discharges the corporation from future performance and all liability for subsequent non-performance. Like contract counterparties that have had their contracts disclaimed by a liquidator, those that have been terminated pursuant to a statutory manager's discretion to do so are entitled to apply to the Court for compensation within six months of receiving notice of their contract being terminated. In making a determination as to whether a contract counterparty is entitled to compensation, the Court is to have regard to the value of the consideration provided by the counterparty, all amounts and benefits that the counterparty has received under the contract, and the conduct of the parties.

Sale of Assets/Business

In general an enforcement sale can be conducted by a receiver, liquidator or administrator in respect of the assets of a company.

The terms and conditions of any sale in an insolvency process will be the subject of commercial negotiation in each case. However, generally assets are sold on an "as is where is" basis without any representation or warranties and without any assumption of personal liability by the relevant receiver, administrator or liquidator negotiating the sale on behalf of the insolvent vendor.

Where a receiver completes a sale of assets, section 30A of the Receiverships Act 1993 provides that all security interests in property which are subordinate in priority to the security interest pursuant to which the receiver was appointed will be extinguished on sale (without any requirement for the consent of the relevant secured creditor(s) whose interests are so extinguished). Accordingly a receiver is able to complete a sale of assets free and clear of all subordinate security interests provided that the security interest they were appointed pursuant to is first ranking. Specific releases will typically need to be obtained in respect of any prior ranking security interests in respect of assets a receiver wishes to sell.

Where an administrator or liquidator completes a sale of assets, specific releases will need to be obtained in respect of any security interests over assets an administrator or liquidator wishes to sell. There is no provision for any automatic extinguishment of any security interests in a sale by an administrator or liquidator.

Additionally for any sale of real property, owned by an insolvent debtor, a receiver, administrator or liquidator must obtain discharges from all registered mortgagees regardless of order of priority, in order to complete a sale free and clear of all such security, as there is no automatic extinguishment of prior or subordinate interests.

In some situations a first ranking secured creditor in respect of real property (first mortgagee) can carry out a mortgagee sale by way of direct enforcement (as an alternative to a sale by a receiver, administrator or liquidator) and this will have the effect of automatically extinguishing (without any requirement for the consent of the relevant parties whose interests are so extinguished) most types of subordinate interests on settlement so that the purchaser in a mortgagee sale can take title to the relevant real property free and clear.

Credit bidding

Under New Zealand law a mortgagee exercising its power of sale in respect of real property may not sell the property to itself (other than by using a mortgagee sale conducted through a Court registrar process, which a rarely used process) or foreclose on real property in satisfaction of the secured debt. However, the scope of this rule is fairly narrow in practice, as it does not prevent a sale by the mortgagee to its subsidiary and does not apply to sales by receivers, administrators or liquidators, albeit that in respect of such sales the mortgagee or receiver or administrator (as the case may be) must still comply with their statutory duties in undertaking that sales process.

Section 120 of the PPSA, which applies to security over personal property, allows a first ranking secured creditor to retain the relevant collateral in satisfaction of the secured indebtedness (which is a form of voluntary foreclosure). The application of section 120 can be contracted out of. If that power is exercised it will satisfy the relevant debt in whole, irrespective of the value of the asset concerned, which may produce a windfall if the asset value is in excess of the debt concerned (or a shortfall as the case may be). For this reason, section 120 requires notice by the enforcing secured party to the debtor and other interested parties before the exercise of such power, and those parties are entitled to object if they would be adversely impacted by the retention of the asset. If a valid objection is received within the required time the secured party cannot retain the collateral and is bound to sell the collateral in accordance with the requirements of enforcement sale under the PPSA.

There is no formal recognition of 'credit bidding' (as an enforcement or restructuring procedure) under New Zealand law, although a credit bid can effectively be achieved through transaction structuring (in the right circumstances). It is generally possible for a secured creditor to bid for an asset (either directly or indirectly through a newly formed company) being sold through an insolvency process. If the secured creditor has first ranking security over the asset then the secured creditor could normally expect that most, if not all, of the sale proceeds would be paid to it from the sale process in satisfaction of the secured debt (for example costs, expenses, prior ranking preferred creditors and taxes may still need to be deducted). In some circumstances it can be possible to structure this money flow to occur without requiring actual cash payments (other than to meet amounts payable to third parties). In structuring any sale to a creditor particular consideration must also be given to the duty on receivers and mortgagees when exercising a power of sale to obtain the best price reasonably obtainable as at the time of sale.

Such 'credit bids' are not particularly common in New Zealand, although they have attracted more attention in recent years due to larger numbers of distressed investment funds pursuing the possibility of 'loan to own' strategies in the New Zealand market.

Pre-Packaged Sales/Restructuring

Pre-packaged insolvency sales (as practiced in United Kingdom and elsewhere) are possible but relatively uncommon in the New Zealand market for a number of reasons, including:

- that receivers (and mortgagees) are subject to a statutory duty to take all reasonable care to sell the property for 'the best price reasonably obtainable as at the time of sale'. This has been interpreted by the Courts as requiring a focus on the process followed by the receiver (or mortgagee) to value and market the property (rather than on the price necessarily obtained); and
- that administrators and liquidators are subject to duties of independence, which prevent them from having a 'substantial prior involvement' with companies prior to their appointment.

It is possible in New Zealand for a majority of the relevant group of creditors and the company to pre-agree a restructuring to be effected by way of a scheme of arrangement or creditors' compromise. Typically this would be done by agreeing the substantive terms of a proposed scheme or compromise in advance, to put together a proposal that is likely to achieve the requisite majority approvals of creditors when formally proposed (75% (or more) in value and a majority in number of the relevant creditors). In practice it may be difficult to secure the majority in number of creditors if there is a large number of small creditors.

There can also be a degree of pre-planning involved in formulating a deed of company arrangement to be proposed by a director or creditor in a voluntary administration. Typically however this is less formal than the practice involved ahead of schemes of arrangement or compromises, in part because it is not possible to propose or approve a deed of company arrangement immediately at the outset of a voluntary administration, but instead this must wait for the second 'watershed' meeting of creditors (which is no sooner than between 20 to 25 days after the administrator is appointed).

13. What conditions apply to the sale of assets/the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets “free and clear” of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

Directors Duties and Liabilities

The Companies Act 1993 imposes high standards on directors to avoid reckless trading. The key duties that a director should most bear in mind when a company is in a position of financial difficulty are those in sections 135 and 136 of the Companies Act 1993 which are commonly referred to as the reckless trading or 'insolvent trading' provisions.

Under both sections 135 and 136 the duty owed by the director is to the company, and not to the shareholders or creditors. The liability of directors under these provisions is civil. Any damages or compensation awarded for breach of such duties must be paid by the directors to the company in insolvency for distribution to all creditors in accordance with their statutory priorities. The prospect of liability for reckless trading claims is a common catalyst for directors to place a company into voluntary administration or liquidation.

Section 135 states that a director has a duty to the company not to trade recklessly. It provides that a director must not:

- Agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company’s creditors; or
- Cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company’s creditors.

Section 135 is not intended to penalise directors merely for taking legitimate business risks. In fact, the preamble to the Companies Act 1993 reaffirms the economic and social value of a company “taking business risks”. It is only the taking of illegitimate business risks which will warrant a finding of reckless trading.

Section 136 sets out a director's duties to the company in relation to incurring obligations. It provides that a director of a company must not agree to the company incurring an obligation unless the director believes at the time on reasonable grounds that the company will be able to perform the obligation when it is required to do so. A director's belief under section 136 must be held on reasonable grounds. The director’s belief at the time is a subjective test, although the decision must be made on reasonable grounds, which is an objective test.

In a Court application relating to a breach of director's duties a shareholder or creditor cannot in the normal course obtain compensation payments directly. Remedy for a breach is to be sought by the company, or by a shareholder on behalf of the company (with the leave of the Court by a derivative action under section 165).

However, post-liquidation of a company, section 301 of the Companies Act 1993 allows a liquidator, a creditor or a shareholder of the company to bring actions against directors (and others) where, among other things, such directors (and/or others) have misapplied, retained, or become liable or accountable for money or property of the company, or been guilty of negligence, default, or breach of duty or trust in relation to the company.

The Court may grant relief directly against the directors in their personal capacity with the liability of the directors usually extending from the time that the company was in peril and the reckless actions were taken by the directors. The Court is given a wide discretion under section 301(1)(b)(ii) to order the director to “contribute such sum to the assets of the company by way of compensation as the Court thinks just”.

Shadow Directorship

Section 126 of the Companies Act provides that a director includes (in addition to someone occupying the position of director, by whatever name called) a person in accordance with whose directions or instructions a director of the company may be required or is accustomed to act, and a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act.

However, a professional advisor will not be a shadow director if the person provides advice only in a professional capacity. A receiver is also excluded from the definition of a director.

Shadow directors will owe the same duties as are imposed by the Companies Act on directors, including the duties relating to reckless trading. Penalties associated with a breach of those duties will also apply.

Related company liability in liquidation

A liquidator may seek an order of the Court under section 271 of the Companies Act 1993 that a company related to a company in liquidation, but not itself in liquidation, pay all or part of the claims made in the liquidation (a contribution order). The definition of 'related company' is broad and includes majority shareholders, subsidiaries, companies which are both related to a third company or companies where the businesses of the two companies are carried on such that the separate businesses of each company are not readily identifiable.

In determining whether to grant a contribution order the Court will have regard to the extent to which the related company took part of the management of the company in liquidation, the conduct of the related company towards creditors of the company in liquidation, and the extent to which the circumstances that gave rise to the liquidation are attributable to the actions of the related company.

14. **What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other**

parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?

Directors Duties and Liabilities
The Companies Act 1993 imposes high standards on directors to avoid reckless trading. The key duties that a director should most bear in mind when a company is in a position of financial difficulty are those in sections 135 and 136 of the Companies Act 1993 which are commonly referred to as the reckless trading or 'insolvent trading' provisions.

Under both sections 135 and 136 the duty owed by the director is to the company, and not to the shareholders or creditors. The liability of directors under these provisions is civil. Any damages or compensation awarded for breach of such duties must be paid by the directors to the company in insolvency for distribution to all creditors in accordance with their statutory priorities. The prospect of liability for reckless trading claims is a common catalyst for directors to place a company into voluntary administration or liquidation.

Section 135 states that a director has a duty to the company not to trade recklessly. It provides that a director must not:

- Agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company's creditors; or
- Cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors.

Section 135 is not intended to penalise directors merely for taking legitimate business risks. In fact, the preamble to the Companies Act 1993 reaffirms the economic and social value of a company "taking business risks". It is only the taking of illegitimate business risks which will warrant a finding of reckless trading.

Section 136 sets out a director's duties to the company in relation to incurring obligations. It provides that a director of a company must not agree to the company incurring an obligation unless the director believes at the time on reasonable grounds that the company will be able to perform the obligation when it is required to do so. A director's belief under section 136 must be held on reasonable grounds. The director's belief at the time is a subjective test, although the decision must be made on reasonable grounds, which is an objective test.

In a Court application relating to a breach of director's duties a shareholder or creditor cannot in the normal course obtain compensation payments directly. Remedy for a breach is to be sought by the company, or by a shareholder on behalf of the company (with the leave of the Court by a derivative action under section 165).

However, post-liquidation of a company, section 301 of the Companies Act 1993 allows a liquidator, a creditor or a shareholder of the company to bring actions against directors (and others) where, among other things, such directors (and/or others) have misapplied, retained, or become liable or accountable for money or property of the company, or been guilty of negligence, default, or breach of duty or trust in relation to the company.

The Court may grant relief directly against the directors in their personal capacity with the liability of the directors usually extending from the time that the company was in peril and the reckless actions were taken by the directors. The Court is given a wide discretion under section 301(1)(b)(ii) to order the director to “contribute such sum to the assets of the company by way of compensation as the Court thinks just”.

Shadow Directorship
Section 126 of the Companies Act provides that a director includes (in addition to someone occupying the position of director, by whatever name called) a person in accordance with whose directions or instructions a director of the company may be required or is accustomed to act, and a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act.

However, a professional advisor will not be a shadow director if the person provides advice only in a professional capacity. A receiver is also excluded from the definition of a director.

Shadow directors will owe the same duties as are imposed by the Companies Act on directors, including the duties relating to reckless trading. Penalties associated with a breach of those duties will also apply.

Related company liability in liquidation
A liquidator may seek an order of the Court under section 271 of the Companies Act 1993 that a company related to a company in liquidation, but not itself in liquidation, pay all or part of the claims made in the liquidation (a contribution order). The definition of 'related company' is broad and includes majority shareholders, subsidiaries, companies which are both related to a third company or companies where the businesses of the two companies are carried on such that the separate businesses of each company are not readily identifiable.

In determining whether to grant a contribution order the Court will have regard to the extent to which the related company took part of the management of the company in liquidation, the conduct of the related company towards creditors of the company in liquidation, and the extent to which the circumstances that gave rise to the liquidation are attributable to the actions of the related company.

15. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?

As discussed in question 10 above, New Zealand insolvency processes do not make any provision for the release of directors or other stakeholders from liability for previous actions and decisions, as claims against such parties are often valuable potential avenues of recovery for creditors when insufficient assets are available.

16. Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Has the UNCITRAL Model Law on Cross Border Insolvency been adopted or is it

under consideration in your country?

New Zealand law recognition of foreign restructuring or insolvency proceedings over local debtor

In relation to both personal and corporate insolvency, section 8 of the Insolvency (Cross-border) Act 2006 allows the Court, if it thinks fit, to act in aid of and be auxiliary to a foreign Court in an insolvency proceeding, where the foreign Court has requested assistance. This power is in addition to the Court's jurisdiction, at common law, to provide aid and assistance in respect of a foreign liquidation.

UNCITRAL Model Law

The UNCITRAL Model Law on Cross Border Insolvency (“Model Law”) has been adopted in New Zealand pursuant to the Insolvency (Cross-border) Act 2006, with the Model Law set out in Schedule 1 of that Act.

Some amendments have been made to the form of the Model Law adopted in New Zealand. Some of these amendments, such as the additional definitions included in relation to Article 2 of the Model Law, have been made for the application of the Model Law in the New Zealand context. Other amendments include, for example:

- The exclusion of registered banks that are subject to statutory management from the operation of the Model Law.
- A requirement, in relation to Article 6, that the Court consider whether the Solicitor-General should be heard on questions of public policy.
- The partial adoption of alternative wording in relation to Article 13.
- The provision, in relation to Article 20, for the Court to make an order that an automatic stay under that Article does not apply in respect of any particular action or proceeding, execution, or disposal.

17. Can debtors incorporated elsewhere enter into restructuring or

insolvency proceedings in the jurisdiction?

Section 342 of the Companies Act provides for overseas companies (being a body corporate incorporated outside New Zealand) to be put into liquidation under New Zealand law by the Court. An administrator may be appointed to an overseas company, and a receiver may be appointed under a security agreement, in respect of the assets of an overseas company.

18. How are groups of companies treated on the restructuring or insolvency of one of more members of that group? Is there scope for cooperation between office holders?

Separate legal personality

In an insolvency proceeding involving corporate groups, the members of the group are not considered as a single entity. The starting legal position, is that the 'separate legal personality" principle prevents creditors of an insolvency company from gaining access to the funds of other group companies for payment of the debts of the insolvent company. The common exception to this principle is where guarantees are granted which commit one or more related company of a debtor to pay particular debts of that debtor.

Pooling orders in liquidation

A liquidator may seek an order of the Court under section 271 of the Companies Act 1993 that the liquidation of two related companies proceed as if they were one company (a pooling order).

The definition of 'related company' is broad and includes majority shareholders, subsidiaries, companies which are both related to a third company or companies where the businesses of the two companies are carried on such that the separate businesses of each company are not readily identifiable.

In determining whether to grant a pooling order the Court will have regard to the extent to which any of the companies took part in the management of any of the other companies, the conduct of any of the companies towards creditors of any of the other companies, and the extent to which the circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of any of the other companies.

Pooling orders in voluntary administration

A administrator or creditor may seek an order of the Court under section 239AER of the Companies Act 1993 that the administration of two or more related companies proceed as if they were one company (a pooling order).

The applicable definition of 'related company' is the same in administration as that discussed above in the context of liquidation and the Court will have regard to the same factors as for liquidation in determining whether to grant a pooling order in an administration situation.

Cooperation between office holders

It is not unusual in New Zealand for receivers and liquidators or receivers and administrators to be appointed to the same company. In situations of parallel appointment, there is scope for cooperation between office holders with the receiver typically responsible for the realisation of assets subject to relevant security, whilst the relevant liquidator or administrator undertakes meetings of creditors, administration of unsecured claims and reporting.

19. Is it a debtor or creditor friendly jurisdiction?

New Zealand is generally considered to be a creditor friendly jurisdiction. Whilst there are some procedural limitations in place on enforcement and recovery in respect of consumer debt and security over real property, in general New Zealand's insolvency regime is focused towards protecting the rights and interest of creditors over the interests of insolvent debtors.

20. **Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?**

There is very little involvement or intervention by the New Zealand government in respect of distressed businesses in New Zealand. The key exceptions are where the relevant entity is partly or wholly state owned or in the extremely rare instances where the New Zealand government considers that the distressed business is systemically significant or otherwise meets the public interest criteria so as to engage the statutory management procedure (as discussed above at questions 4 and 7).

The preferential creditor regime (as discussed in question 5) provides a statutory super priority for certain classes of creditor such as the Crown (in respect of certain unpaid taxes) and employees up to a statutory cap.

Any sale of substantial New Zealand assets (value NZ$100m+) and/or 'sensitive land' (which includes most rural land and large holdings) to overseas persons requires the approval of the New Zealand Overseas Investment Office (OIO) in accordance with the Overseas Investment Act 2005. These rules also apply to distressed and/or enforcement sales of such assets. In recent years the sale of New Zealand assets to offshore investors has become a politically sensitive issue and recent changes in policy settings indicate that it will become more difficult for overseas purchasers to satisfy the necessary tests in order to obtain consent.

21. **What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?**

In general, there are no significant barriers to efficient and effective restructurings and insolvencies in New Zealand. However, the absence of a strict regime for the qualification or licensing of insolvency practitioners in New Zealand is a significant ongoing challenge to public confidence in the transparency and legitimacy of insolvency processes in New Zealand. At present, provided an insolvency practitioner is over age 18 and not otherwise disqualified (e.g not be a creditor, shareholder, undischarged bankrupt or mentally ill), they can accept an appointment as a liquidator, receiver or administrator. There is otherwise currently no 'fit and proper' person test or qualification requirement which must be met.

In 2015, the New Zealand government formed an 'Insolvency Working Group', to give advice to the government on a wide ranging review of insolvency law.

The Insolvency Working Group had a broad scope of reference (including reviewing the law in relation to phoenix companies, voluntary liquidations, voidable transactions and any other potential improvements to New Zealand insolvency law), but a key part of the mandate of the Insolvency Working Group was to advise on the adequacy of the Insolvency Practitioners Bill, which was introduced into the New Zealand Parliament in April 2010 but has not progressed significantly in the period since. The Bill proposed a light touch regulatory scheme for insolvency practitioners in New Zealand without any requirement for formal qualifications, in order for a practitioner to accept appointments.

The Insolvency Working Group has now produced two reports. The first report issued in July 2016 addressed the question of the regulation of insolvency practitioners and voluntary liquidations. The Government in October 2016, accepted all recommendations of the first report of the Insolvency Working Group and publicly stated its intent to amend legislation to introduce a co-regulatory licensing regime for insolvency practitioners, alongside a number of additional amendments aimed at further raising the practice standards of insolvency practitioners and ensuring they act in accordance with their statutory duties. These statutory proposals remain pending for implementation by the new Government of New Zealand elected in September 2017.

The second report of the Insolvency Working Group was issued in May 2017 and focused on voidable transactions, Ponzi schemes and other corporate insolvency matters. The report made a number of recommendations but most notable are the changes suggested in respect of the law relating to voidable transactions. These proposals include the reduction of the period in which transactions are vulnerable to a voidability challenge from 2 years to 6 months prior to liquidation and removing the "gave value" element of the creditor defence to a voidable transaction claim. The second report went through a process of consultation in late 2017. The new government elected in September 2017 has not yet made any statements as to whether any of the recommendations of the second report will be implemented.