Neutral Citation Number: [2025] EWHC 3058 (Ch)

Claim No: CR-2025-007011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF FOSSIL (UK) GLOBAL SERVICES LTD
AND IN THE MATTER OF THE COMPANIES ACT 2006

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Monday, 10th November 2025

Before:

MR JUSTICE RICHARDS

- -

IN THE MATTER OF FOSSIL (UK) GLOBAL SERVICES LTD

- -
- -

MR DANIEL BAYFIELD KC and **MR MATTHEW ABRAHAM** (instructed by **Weil, Gotshal & Manges (London) LLP**) appeared on behalf of the **Claimant**

MR WILLIAM DAY (instructed by **McCarthy Denning**) for the **Retail Advocate, Mr Jon Yorke**

- -

Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR JUSTICE RICHARDS :

1. On 15 October 2025, Cawson J convened a meeting of a single class of creditors of Fossil (UK) Global Services Limited (the "Plan Company") to consider a plan under Part 26A of the Companies Act 2006 (the "Plan"). I am today asked to sanction the Plan which was passed by the statutory majority at that meeting.

Background

2. Cawson J gave a full judgment at the convening stage that was reported at [2025] EWHC 2741 (Ch) (the "Convening Judgment"). I am grateful to him for doing so because it has made my task considerably easier. I will use the defined terms set out in the Convening Judgment and will tend to use the expression "Plan Creditors" and "Noteholders" interchangeably since they are one and the same.

3. No-one suggests that I need to address any matters of background that were not set out in the Convening Judgment to decide whether to sanction the Plan. In those circumstances, I propose not to summarise the relevant background in any great detail, but simply to take the Convening Judgment as read and effectively to incorporate it into this judgment.

4. It is, however, relevant to emphasise that some 25% by value of the single class of Plan Creditors consist of retail Noteholders. The Plan Company has therefore very sensibly appointed Mr Yorke to be the Retail Advocate to look out for the interests of retail Plan Creditors and he, through his counsel, Mr Day, has made submissions today. Mr Yorke has confirmed in his report that he is independent and has had access to the necessary information from the Plan Company. He has confirmed that, in his opinion, retail Plan Creditors understood the choices that they could make in relation to the Plan.

5. Against that background, the meeting that Cawson J ordered (the "Plan Meeting") was held on 6 November 2025. At that meeting the Plan was approved by 99.99% by value of those Plan Creditors present and voting and it now comes back for today's sanction hearing. In fact, at the Plan Meeting only a single creditor voted against the Plan.

The matters that I must consider

6. As I have said, Plan Creditors voted as a single class following Cawson J's convening order and I am not asked today to impose any "cross-class cram-down". Since this is a Part 26A plan that involves no cross-class cram-down, I should follow the approach set out at [116] and [117] of the judgment of Snowden LJ in *Re AGPS Bondco Plc* [2024] EWCA Civ 24 ("*Adler*") and consider the familiar four questions that apply in the context of Part 26 schemes namely:

    i) whether there has been compliance with the statutory requirements;

    ii) whether the single class was fairly represented and whether the majority was acting in a bona fide manner and for proper purposes when voting at the class meeting;

    iii) whether the Plan is a fair plan which a creditor might reasonably approve; and

iv) whether there is any "blot" or defect in the Plan that would, for example, make it unlawful or in any way inoperable.

7. As to the third issue, whether the Plan is a fair one, the approach of courts in cases such as this is to tend to respect the commercial judgment of those voting in favour. That is why Snowden LJ, at [122] of his judgment in *Adler,* described the third issue as involving a "limited rationality test" that derives much comfort from the fact that the scheme or plan has been approved at meetings of creditors voting as appropriate classes.

8. In this Plan we have a single class of Plan Creditors. However, without doubting the proposition that this is a single class, it is possible to view it as containing two separate constituencies: one consisting of wholesale Plan Creditors and one consisting of retail Plan Creditors. I will explain later how that affects the assessment of the rationality test and the conclusions that I should draw from it.

9. Another point that I make in relation to overall approach is derived from paragraph 102 of the judgment of Miles J (as he then was) in *Re All Scheme Ltd* [2021] EWHC 1401. There are no special rules for schemes or plans that involve retail investors. Therefore, even though a good proportion of Plan Creditors are retail investors, I should still consider the same four considerations I have outlined above. However, the court's willingness to apply a "limited rationality test" in relation to the third issue described in paragraph 6.iii) above is predicated on Plan Creditors having been given sufficient information, in an accessible way, so that they are equipped to make rational voting decisions. That issue resonates given the presence of retail Plan Creditors since the material involved is complex and must be presented in a clear way, with alternative possible analyses also presented fairly, for retail Plan Creditors to make an informed decision.

10. Finally in terms of overall approach, when considering whether there is a blot or defect in the Plan, I will consider as a discretionary issue whether I should sanction it on the basis that it is sufficiently likely to have substantial effect in the US, recognising that in large measure this Plan seeks to adjust the terms of debt issued by Fossil Group Inc. ("FGI"), a US corporation.

Update on matters that occurred since the Convening Judgment

11. The Consent Solicitation has been approved and therefore the Notes are now governed by English law (rather than New York law), with disputes in relation to the Notes being within the sole jurisdiction of the courts of England and Wales (rather than the courts of New York). In his expert report, Judge Peck confirms that, in his opinion, these changes would be regarded as effective under New York law.

12. As mentioned in the Convening Judgment and the evidence, there has been a concerted attempt by FGI and its wider group to seek to effect exchanges of Notes consensually by means of the Exchange Offer. If 90% by value of Noteholders had accepted the Exchange Offer, FGI might have been prepared to tolerate the continued presence of a small rump of investors holding "old" Notes and concluded that there was no need for the Plan. However, in the event, the Exchange Offer has to date achieved only 82.67% take-up which FGI has concluded was insufficient commercially to preclude the need for the Plan.

13. The final, and most significant, update since the Convening Judgment is that the Plan Meeting has been held with Plan Creditors voting overwhelmingly in favour of the Plan.

Whether there has been compliance with statutory requirements

14. Under this heading, I consider the following matters:

    i) whether the terms of Cawson J's convening order were met;

    ii) whether other statutory provisions were satisfied: for example whether the jurisdictional threshold in s901A of CA 2006 is present and whether applicable statutory requirements relating to the Explanatory Memorandum have been satisfied;

    iii) whether the statutory majority was indeed achieved; and

    iv) whether the single class that voted at the Plan Meeting was properly constituted.

15. The third witness statement of Mr Greben and the second witness statement of Mr Arena between them satisfy me that the terms of the convening order were indeed met. I note that some quite strenuous requirements were imposed on the Plan Company to send documents to retail Plan Creditors.

16. The section 901A preconditions were considered at the convening stage and I respectfully agree with Cawson J's conclusion that they are met.

17. Cawson J also considered the Explanatory Statement at the convening stage. He considered that it was appropriately explained and suitable for the exercise in hand. I also note that the Retail Advocate also considered it was appropriately accessible and clear for the constituency of retail Noteholders. The Explanatory Statement contains the requisite statement of the interests of directors in the outcome of the Plan.

18. I see that there were some amendments to the Explanatory Statement from the version that was before Cawson J. However, none of those amendments affected the substance of the Explanatory Statement and therefore were entirely within the scope of paragraph 7 of Cawson J's convening order.

19. There was indeed a valid Plan Meeting at which more than two individuals were present. The statutory majority was amply achieved. Some 364 Plan Creditors attended either in person or by proxy, representing some 82.88% by value of the Notes. 363 of those creditors, representing some 99.99% by value of the Notes represented at the Plan Meeting, voted in favour of the Plan. That is obviously greater than the 75% majority required. Indeed, even if all of those Plan Creditors who did not attend the Plan Meeting had attended and voted against the Plan, the Plan would still have received the necessary majority.

20. Matters of class composition were considered in detail at [95] to [112] of the Convening Judgment. Those paragraphs considered expressly the position of one Noteholder who was opposed to the Plan to the effect that it was not right to have a single class when some creditors would be putting in New Money and so, in the

words of that opposing Noteholder, getting "special treatment" so that they would "agree with the restructuring plan". The Convening Judgment considered that issue and concluded that this difference in interests did not fracture the class. I respectfully agree with that conclusion.

21. Today I considered a slightly different formulation of the argument in my discussions with Mr Bayfield KC, namely whether it might be said that in reality, although all members of the class had the right to put in New Money, that right is somehow less available to retail Noteholders than it would be to wholesale Noteholders. I do not consider that this consideration should fracture the class either. The test remains a test of rights and not interests. As Mr Bayfield KC quite rightly pointed out, retail Noteholders have already shown themselves willing to invest in publicly-traded debt. While some might indeed not be willing (or able) to put in New Money, I am not satisfied that they, as a cohort, would be unable to invest New Money or would be unable to evaluate the benefits or risks of doing so.

22. I am quite satisfied that there was no problem with class composition at the Plan Meeting.

23. Overall, I conclude that the statutory requirements have indeed been met.

Fair representation at the Plan Meeting

24. I am reassured to see from the report of the chair of the Plan Meeting that, although the meeting took place online, there were no technological glitches or similar that prevented it from taking effect as a proper meeting.

25. There was a high turnout at the Plan Meeting: as I have noted, some 83% by value of the Notes were represented. It is right to look critically at that number, especially given the points that I have made about the presence of retail Noteholders in the class. I have, therefore considered whether, although there was a single class, in reality the Plan Creditors attending and voting were not representative. For example, I have considered whether the Plan Meeting might have been disproportionately attended by Supporting Holders who might be benefiting from the Backstop arrangements and payment of their legal advisers' fees and who might, therefore, have a different outlook on the Plan from retail Noteholders.

26. However, even acknowledging that possibility, it remains the case that at least 350 votes in favour of the Plan came from persons other than Supporting Holders. In fact, there was just a single vote against the Plan. That suggests that the Plan attracted broad and representative support at the Plan Meeting, with the support extending beyond Supporting Holders who were obtaining benefits from the Backstop arrangement and payment of their legal expenses.

27. Moreover, I am reassured to see that, taking matters at their absolute lowest, at least one quarter of retail Noteholders have voted in favour of the Plan. Mr Yorke, with all of his experience in this area, considers that to be a good level of engagement from a retail Noteholder constituency.

28. Finally, I have considered whether the votes in favour of the Plan might have been unduly skewed towards those providing the New Money. However, that is not the

case. The report of the chair of the Plan Meeting shows that some 88 votes at the meeting were from creditors who were not providing any of the New Money and 87 of those voted in favour.

29. Overall, I consider that this is a Plan that has been approved both by retail and by non-retail Noteholders, by Noteholders giving New Money and Noteholders not doing so, at a meeting with a very high turnout rate.

30. There is no suggestion that the majority were oppressing a minority, and I am quite satisfied that there has indeed been fair representation at the single class meeting.

Whether Plan Creditors could reasonably approve the Plan

31. I return to the points I prefaced at the beginning of this judgment. This question does, in the ordinary course, involve a "limited rationality check".

32. In his written and oral submissions, Mr Bayfield KC referred me to [125] to [127] of Snowden LJ's judgment in *Adler*. One can debate whether at [125] Snowden LJ was suggesting that one should in all cases look behind an ostensibly single class and seek to dissect out whether there are separate commercial "interests" within that class, as distinct from interests based on difference of rights that might fracture a class. It is quite possible, in my view, to read [125] as simply saying that the existence of a single class, comprising persons with similar rights, provides some reassurance that a "limited rationality test" is appropriate. However, whatever view one takes of [125] read in isolation, it is clear that in [125] to [127] of *Adler*, Snowden LJ is making the point that there are some preconditions to the appropriateness of a "limited rationality test". It is appropriate that I consider whether those preconditions are met when considering what weight to give to the positive vote at the Plan Meeting.

33. I have therefore considered whether the interests of those providing New Money might be different from those not doing so in such a way as to undermine the significance of the strong positive vote at the Plan Meeting. I have considered whether there has been clear communication of the issues to retail Noteholders in particular. I have also considered whether there might be a sense in which some constituency of the single class might be voting to support an extraneous interest that they have beyond their membership of the class.

34. It is quite clear that this is a Plan that a rational creditor could approve. It is certainly complicated. However, it gives a clear prospect of a better recovery than the relevant alternative affords. That obviously is a very important consideration under this heading.

35. When looking at communication and the ability of retail Noteholders to participate in the process, I note that Mr Yorke received some 42 emails from retail Noteholders. They were almost all asking for information on how to navigate the processes and there was just one objection. As Mr Yorke explains in his report, the degree of engagement from the retail Noteholders has been greater than or higher than he would expect in similar kinds of plans or schemes of arrangement.

36. I am greatly reassured by Mr Yorke's conclusion that retail Noteholders received satisfactory guidance. They also had access to him to help them navigate the process.

I am also reassured by his conclusion that the information was presented in a way that enabled retail Noteholders to understand the choices they were being asked to make.

37. This is not a case like *Re All Scheme Ltd* in which the retail creditors were customers of a pay-day lender who might be expected to be in a financially vulnerable state. As I have explained, the retail Noteholders in this case have, in the round, some degree of financial sophistication as they have already chosen to invest in publicly traded debt securities. It would be wrong for me to downplay that level of sophistication and form the view that the retail Noteholders have limited ability to understand the choices they needed to make.

38. The New Money aspect also deserves consideration when considering what weight to give to the positive vote of the single class. There have been cases where, in Part 26A plans, the provision of new money has resulted in significant benefits to those providing it. In many cases, that is justified. The new money might well be desperately needed to enable the company in question to carry on in business. So giving benefits to creditors providing that new money, whether in the terms of higher ranking or an attractive coupon, might well make good sense. However, there might be more scrutiny in cases where the provision of new money enhances, for example, the seniority of existing debt. Put very shortly, conceptually new money can be used as a device to provide benefits to certain classes, or constituencies of creditors over and above a normal commercial return on that money. If that were the position with this Plan, it might undermine the force of the positive vote at the Plan Meeting since Noteholders providing New Money might be voting for an extraneous interest of the kind referred to at [126] of *Adler*.

39. In this case, some comfort can be derived from the general proposition that the opportunity to provide New Money was open to everyone. However, if this were a cross-class cram-down situation, that would not be a complete answer. In *Re Petrofac Ltd* [2025] EWCA Civ 821, the Court of Appeal refused to sanction a Part 26A plan that involved a cross-class cram-down because of concern about the fairness of the terms on which new money was being provided even though the right to provide new money was ostensibly open to everyone.

40. This is not a case where there is a cross-class cram-down. However, it is still right, in my judgment, to consider whether the Plan might only make sense for Noteholders providing New Money. In that context, it is relevant to consider whether the New Money is some way of providing value to a separate constituency of the single class beyond the ordinary return that could be expected from the provisions of badly-needed liquidity to a borrower in some financial distress.

41. The first point to make in that regard is that the Plan is still modelled to produce an outcome in the relevant alternative that is better for all Plan Creditors whether or not they provide New Money (see [62] to [66] of the Convening Judgment). No Noteholder has challenged the Plan Company's analysis of the relevant alternative or returns that could be expected in that alternative. I see no reason, therefore, to doubt the Plan Company's analysis which counts for a lot when considering this issue.

42. Mr Bayfield KC also referred me to the significant market-testing exercises that took place in relation to FGI's debt as explained in the witness evidence of Roopesh Shah. There has been a rigorous attempt to ensure that the New Money represents a good

deal. That can be seen in FGI's considerable efforts to secure good pricing for the ABL Facility and the refinancing of the Notes. Moreover, this was not mere window-dressing. When, having put in lots of work on the market-testing exercise, FGI thought that its financial situation had improved, it took the opportunity to consider afresh whether the pricing it was being offered remained attractive even in the light of what looked like better market conditions. These, in my judgment are not the actions of a company that is seeking to do a "sweetheart deal" which operates to the benefit of the constituency of investors providing New Money. In my judgment, FGI has undertaken a genuine and rigorous exercise to price the New Money and is not seeking to provide disproportionate value to a particular constituency of Plan Creditors.

43. Further reassurance on this matter comes from the fact that the Backstop Providers are content only to backstop the New Money: if its terms really were disproportionately beneficial, they might have been expected to try to take it all up themselves.

44. Overall, I accept Mr Bayfield KC's four key points in relation to the New Money:

    i) While this is not a "fairness" issue, as it would be with a Plan involving a cross-class cram-down, it is appropriate to consider the terms of the New Money when deciding how much weight to give to the positive vote at the Plan Meeting.

    ii) There is some force in the point that everyone can participate in the provision of New Money and no barriers are placed in the way of particular Noteholders exercising their right to do so. However, that point may not be determinative on its own.

    iii) The Plan still provides a better outcome than the relevant alternative even for those who do not choose to provide the New Money.

    iv) Following rigorous evaluation, it is realistic to consider that FGI has obtained the best terms that it could for the New Money.

45. Overall, I consider that the pre-conditions referred to in [125] to [127] of *Adler* are satisfied in this case, such that it is appropriate to perform a "limited rationality check" when deciding whether Noteholders could reasonably approve the Plan. Applying that test, the positive vote at the Plan Meeting should be given real weight. In my judgment this is indeed a Plan that could rationally be approved.

Blots

46. Some potential blots were mentioned by Mr Bayfield KC in discharge of the Plan Company's duty to give full disclosure.

47. I see no problem with the fact that the Plan is proposed only with Noteholders and not with the Plan Company's creditors generally. There is clear precedent for that approach and a clear justification. Some of the creditors excluded from the Plan are those whose working capital and indulgence is necessary for FGI to continue in business. The Plan Company is entitled to decide, in those circumstances, that it does

not seek to compromise liabilities owed to trade creditors and similar. I am reassured to see that this approach was recently endorsed in the *Adler* case.

48. The Plan contains no release of directors' liabilities by the Plan Company. However, it does provide for Noteholders to release directors from personal liability to them to the extent such liability would otherwise arise in connection with the Plan. Cawson J considered this issue at [123] of the Convening Judgment and concluded that there was a good reason for this limited release. I respectfully agree with Cawson J's analysis. The release is intended to prevent Noteholders undermining the Plan by suing directors and advisers involved in proposing or implementing it. It is a common feature of plans such as this. I do not regard it as a blot.

49. I have noted that the Plan seeks to restructure the debt of FGI, a US corporation, albeit that the debt in question is, following the Consent Solicitation, governed by English law. The restructuring of that debt could conceivably have been done consensually if the Exchange Offer had been successful. However, given that the Exchange Offer has not been accepted to the extent that FGI wished, it is fair to say that the Plan achieves a result that could not straightforwardly have been achieved under a Chapter 11 process in the United States.

50. Moreover, the result is achieved by a route that could, at a high level, be described as "artificial". The Plan Company has been formed expressly for the purpose of accessing the UK's restructuring regime in Part 26A of CA 2006. The Plan Company has executed the deed of contribution expressly to enable the "established technique" described at [124] to [128] of the Convening Judgment to be used to enable debt issued by FGI to be restructured by means of a Part 26A plan. It is right, therefore, that this court should be vigilant since the process adopted has the potential to amount to an abuse. Judge Peck notes that the bankruptcy court of the Southern District of New York has made similar observations in the case of *Mega Newco Limited* (Case No. 24-1203-MEW (Bankr. S.D.N.Y. Feb. 24, 2025; 2025 WL 601463)).

51. It is in my judgment important that the plan does not violate any public policy considerations that underpin US bankruptcy law. Judge Peck's very clear, readable and scholarly opinion expresses the strong view that not only does the Plan not violate any public policy considerations but that it would be likely to be considered favourably by a US court asked to recognise it. Judge Peck's opinion addresses head-on potential contrary arguments, for example, the notes of caution sounded in the *Mega Newco* case, and it is all the more impactful for doing so. Overall, Judge Peck reaches the clear conclusion, speaking as a judge of many years' experience in this specialist area, that a US bankruptcy court would be likely to recognise and give effect to any order that the English court makes. That indeed is what happened in the *Mega Newco* case, which unlike this one involved a cross-class cram-down.

52. Judge Peck reaches his conclusion because he considers this Plan would be seen as producing a good and favourable outcome for creditors generally and would therefore be going with the grain of US bankruptcy legislation rather than violating any public policy considerations that underpin it. Ultimately I need only be satisfied that there is a reasonable prospect of recognition. Judge Peck's opinion, engaging as it does with the contrary issues, gives me clear comfort on that point.

53. That in turn allays concerns about the "artificiality" of the deed of contribution arrangement and the possibility that it could be regarded as forum shopping. Judge Peck considers that a US bankruptcy court would be likely to look favourably on the Plan on the basis that it achieves a beneficial outcome for Plan Creditors generally. That is also my view on the Plan and indeed no-one has attended the sanction hearing to articulate a different view.

54. The final issue on potential blots is that I should be slow to sanction the Plan if I thought the court would be acting in vain by doing so. Here there are some conditions outstanding to the Plan taking effect. However, having seen the explanation of what those conditions are in the third witness statement of Mr Greben, I am quite satisfied the court would not be acting in vain by sanctioning this Plan.

55. I will therefore sanction the Plan.

- - - - - - - - - -

Outlook

FSB report warns over private credit vulnerabilities (9fin)

From Sandy Yeung <sandyrieyeung@gmail.com>
Date Sat 9 May 2026 10:15 PM
To Wai Ting Sandy YEUNG <sandyrieyeung@gmail.com>

Read on 9fin.com

9fin

FSB report warns over private credit vulnerabilities (9fin)

Ryan Hesketh

The **Financial Stability Board** (FSB) has warned that private credit's opacity, rising leverage, and deepening ties to mainstream finance are creating vulnerabilities capable of amplifying stress across the financial system.

In a wide-ranging report published on Wednesday (6 May), the international watchdog, which is based in Switzerland, also highlighted the sector's growing exposure to the AI boom and its paucity of the data needed for oversight.

The FSB now estimates the size of the private credit market at $1.5-$2trn as of end-2024, roughly comparable to the institutional leveraged loan market or the high yield public debt market. Despite its size, the body said it remained "untested in a prolonged economic downturn," and that this meant the sector warranted close attention.

Regulators are giving private credit that attention. The Bank of England is conducting a stress test focussed on private markets. In January, the UK's House of Lords concluded that it doesn't know what degree of risk private markets pose to the UK economy. Just after the publication of the FSB report, Governor of the BoE and FSB Chair Andrew Bailey published an article in the FT addressing the risks of private credit.

All of this, taken together with the very public collapse of companies like **First Brands**, **Tricolor Holdings**, and **Market Financial Solutions**, covered in detail by *9fin*, has dramatically increased the scrutiny on private credit.

Concentration and AI concerns

The FSB report cites research showing that private credit borrowers are concentrated around the single-B credit rating bucket, with around 75% carrying EBITDA below $100m. Headline leverage sits at 5x-6x debt-to-EBITDA, already above the approximately 4x observed in the broadly syndicated loan market, according to the report. But the FSB warned this figure may be understated, with true leverage potentially closer to 7x.

PIK usage has risen sharply since 2022 and now features in around 12% of loans, according to the report, with toggles accounting for roughly half of those cases. The report claims that borrowers now frequently rely on PIK toggles to substitute their revolving credit facilities. The FSB cited research finding that the use of PIK toggles is associated with a 1–2 percentage point increase in the probability of a loan becoming delinquent in the following quarter.

Outright default rates remain low at approximately 1%, but rise to around 5% selective defaults are added, comparable to the US high-yield market. Other measures of default, according to the report, can show a default rate as high as 8%.

Sector concentration is also a worry for the FSB. Technology, healthcare, and services account for the largest share of private credit borrowing, and AI-related companies have dramatically increased their footprint. AI infrastructure accounted for 34% of private credit deals in 2025, up from a 17% average over the prior five years, according to the report. The FSB warned that a sharp correction in AI asset valuations "could lead to sizeable credit losses to private credit investors," and could be triggered by electricity supply constraints affecting data centre construction, or overcapacity if infrastructure development outpaces demand for AI services.

Retail exposure

While most private credit funds operate as closed-end structures, the shift toward semi-liquid vehicles is accelerating, according to the report. In the euro area, around 20% of private credit funds are open-ended, with roughly 75% of those allowing monthly or more frequent redemptions. In early 2026, **Blue Owl** and other funds capped redemptions from their BDCs as investors tried to withdraw more than $5bn over the first three months of the year.

Retail investor participation has risen from virtually zero to approximately 13% of AUM in the US over the past decade. The FSB warned that retail investors "may not fully understand the illiquidity of the asset class, which may amplify redemption requests during stress episodes."

Interconnections with insurers present a further vulnerability, according to the report. PE-backed insurers now control nearly $900bn in US insurance liabilities, up from $67bn in 2012. Structured securities now account for approximately 27% of these insurers' portfolios against around 12% for other non-PE backed outfits. Funded reinsurance chains, which can route risk through offshore vehicles and back into the same financial group, compound the opacity.

Leverage exists simultaneously at the portfolio company level, the fund level, the sponsor level, and the investor level, a layering the FSB said could amplify losses during market stress.

Synthetic risk

Private credit funds have become the dominant buyers of synthetic risk transfer instruments in Europe, which, according to the report, is a growing source of interconnection risk.

Under an SRT, a bank transfers the credit risk of a loan pool to investors via financial guarantees or credit-linked notes while retaining the underlying assets on its balance sheet. European and UK assets account for around two-thirds of the global SRT market, stated the report, with corporate loans the main underlying asset class in Europe.

The FSB's specific concern is what it terms "circles of risk." In many cases, banks are also providing the financing that enables private credit funds to purchase the SRTs in the first place. If the fund's SRT investment sours, the loss does not remain contained within the fund, it circles back to the bank that provided the funding.

Some funds compound this dynamic through repo or collateralised financing, pledging purchased credit-linked notes as collateral to borrow from a separate bank and deploying those proceeds into further SRT transactions. High haircuts are applied given the illiquidity and credit risk of the collateral, but the structural risk remains. The leverage chain connects the originating bank, the fund, and a third institution in a triangle of exposures that none of the three may have full visibility across.

The FSB has included SRT holdings as a share of private credit fund NAV in its proposed core surveillance metrics, an implicit acknowledgment that this channel has moved from a theoretical concern to an active monitoring priority.

Data dearth

The report is candid about the limits of what regulators can currently see. There is no harmonised global definition of private credit, no granular fund- or loan-level data in most jurisdictions, and limited visibility into leverage at the fund and investor levels. The FSB has proposed a core set of comparable surveillance metrics covering market size, bank and insurer linkages, leverage, liquidity features, concentration, cross-border activity, and borrower credit quality, including SRT holdings as a standalone indicator.

The FSB said it would carry out further work across four areas: assessing nonbank interlinkages and liquidity mismatch vulnerabilities; mapping and defining the ecosystem; facilitating supervisory discussions across authorities; and addressing data gaps.

DUBLIN

IWIRC 2026
Leadership Summit &
International Conference

The Evolving Landscape of Liability Management Transactions

The Evolving Landscape of Liability Management Exercises & Alternatives

June 4, 2026 11:45 AM-12:45 PM GMT

Trinity College Dublin - Edmund Burke Theatre

This panel will explore the surge in liability management exercises (LMEs) as a critical tool in distressed situations, moving beyond their traditional role in US restructurings to examine their increasing adoption across global markets. Once a distinctly American restructuring strategy, LMEs are now making their way into the European market. We will analyze the various forms these transactions take, including uptier and drop-down structures, their impact on creditor rights, the rise of "creditor-on-creditor violence," and the resulting complexities and litigation risks. Drawing on recent case law and market trends, the discussion will highlight the strategic considerations for debtors, lenders, and sponsors navigating these complex exercises, both within and outside formal bankruptcy proceedings.

Gemma Freeman
Dentons Ireland

Kim de Bruijn
Loyens & Loeff N.V.

Judith Elkin
Pachulski Stang Ziehl & Jones

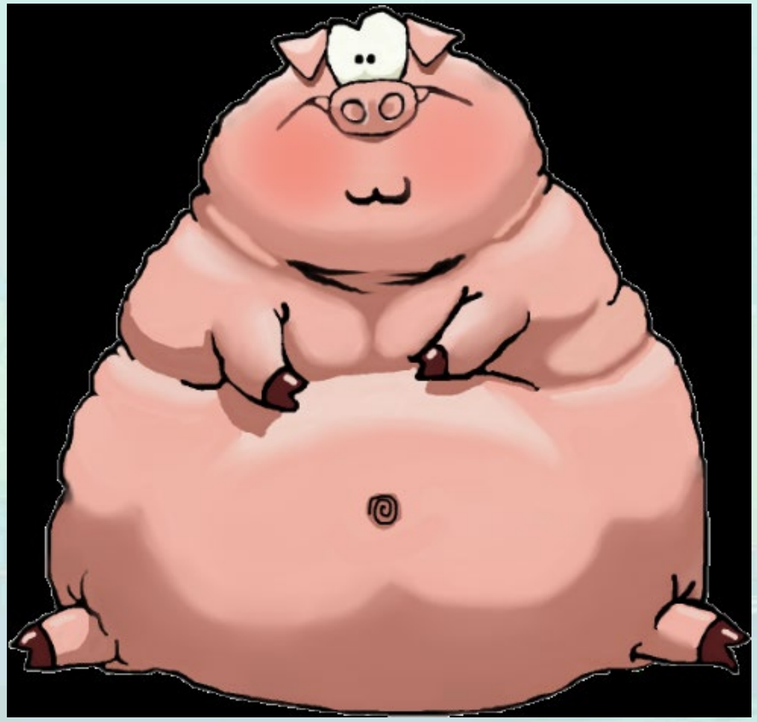
Erin Rosenberg
White & Case LLP

Celine Buttanshaw-Chan
PVTL Point

What is an LME?

Liability Management Exercises (LMEs) are a form of debt restructuring used by companies ahead of upcoming maturities to reduce or manage their overall debt burden through tender offers (or debt buybacks) and exchange offers, allowing certain creditors to exchange their existing instruments for instruments with longer dated maturities and/or other amended terms.

Do LMEs work?



- How do we measure success?
  - Balance Sheet vs. Operational Issues
  - Pigs get fat – LME as a bridge to recovery
  - Hogs get slaughtered
    - Litigation
    - Insolvency Proceedings
- Who manages the LME process?
- Who benefits from the LME? Sponsor? Management? Creditors?

What are the main LME tools?

- Uptiers
- Dropdowns
- Rollups
- Double DIPs
- Make Wholes

LOYENS & LOEFF
Law & Tax

Further. Better. Together.

LME Transactions in the Netherlands

Kim de Bruijn

- 23 April 2026
- Restructuring & Insolvency
- Vincent Vroom and Kim de Bruijn

Key LME transactions - the Netherlands

LME transactions

- **Key goals:** attract new liquidity, reduce debt burden, extend maturities, improve financial stability
- **Essentialia:** company enters into a transaction with one (group of) financier(s), which transaction is in principle permitted under the existing financing documents and can be implemented without an in-court restructuring process.
- **Forms:** tender offers, exchange offers, drop-down, uptier and double dip transactions
- **Late start in Europe compared to the US:**
  - Different legal (e.g. fiduciarty duties) and cultural environment
  - Higher thresholds in LMA ICAs
  - European light-touch and inexpensive restructuring processes (incl the WHOA)

Dutch LME transactions

- **Hunkemöller**
  - Uptier transaction
- **Selecta?**
  - Dutch in-court share pledge enforcement combined with a threat of an LME transaction.
  - In principle, no appeal is possible against a share pledge enforcement

Dutch law aspects of an LME - fraudulent conveyance (*actio Pauliana*)

» Legal voluntary acts can be nullified by creditors outside a bankruptcy scenario (or in a bankruptcy by a bankruptcy trustee)

» Three criteria

- The legal act was voluntary (no pre-existing legal obligation (contractual or statutory)
  - Financial necessity, such as the need for additional liquidity, does not make a legal act involuntary

- The non-participating creditors have been prejudiced
  - Recourse has to be compared with the hypothetical situation in which the legal act would not have been performed
  - Requirement is not met if creditors merely 'missed an upside'

- The company and the participating creditors had knowledge of such prejudice
  - It was (or should have been) reasonably foreseeable for the debtor and its counterparties that a certain legal act would prejudice creditors (*i.e.* by a decrease in their recourse)
  - There are certain statutory presumptions of such knowledge, in the event the legal act is concluded within one year before the creditor invoked the fraudulent conveyance claim, in case of (amongst others):
    - The obligations of the company materially exceed those of the counterparty
    - Payment of, or granting of, security for debts which are not yet due
    - Transactions by the company with a subsidiary or affiliated legal entity

–

Dutch law aspects of an LME - Directors' liability

- Directors' fiduciary duties could, under certain circumstances, mean that the board is obliged not to cooperate with the LME transaction. If the board does so anyway, a non-participating financier may be able to hold the directors liable on the grounds of tort

» Directors' duties

- In the performance of their duties, the managing directors must be guided by the interests of the company and its affiliated enterprise. Additionally, under Dutch law, managing directors must take into account the interests of all stakeholders of the company (which includes its creditors and its employees)
- If a company enters into a state of financial distress, its management should attach more importance to the interests of the creditors with a view to ensure the availability of recourse of their claims. As the company's financial position deteriorates, the company's interests are increasingly influenced by that of its creditors
  - But in the Netherlands, there is strictly speaking no obligation to file for bankruptcy
- Since management of the company is a collective responsibility, each managing director is jointly and severally liable for mismanagement
- A director may exculpate himself by demonstrating that (i) no serious blame can be attributed to him, also in view of the duties assigned to the other managing director(s), and (ii) he has not been negligent in taking measures to avert the consequences of improper management
- Special committees may be installed to which the board delegates specific tasks in relation to the LME transaction. Such committees serve in an advisory capacity, and directors remain liable for the decision-making
  - The concept of 'de facto directorship' does apply in the Netherlands

Private International Law aspects of an LME

» No action clause

- Finance documents may include a ‘no-action’ clause
- Finance documents are often governed by UK or US law
  - Oi case: Dutch court rendered the noteholders inadmissible because of the no-action clause in the UK governed trust deed
  - Hema case: Dutch court did not render a judgment on the applicability of the no action clause as it was not governed by Dutch law
  - Hunkemöller case: Hunkemöller & Redwood’s motion to dismiss based on the no action clause, is partly denied by NY court

» Jurisdiction for the Dutch courts?

- Jurisdiction clause in finance documents as a starting point.
- Place of residence/statutory seat of defendant(s)

» Dutch law applicable?

- Fraudulent conveyance claims will likely be governed by the laws of the state governing the relevant legal act (the LME transaction), which could either be governed by the relationship between debtor and non-participating financiers (the ICA) or between debtor and participating financier (the framework agreement for the LME transaction)
  - We see in Hunkemöller that NY law points to Dutch law
- Directors’ duties claim will likely be governed by the laws of the state where the damages occur (*Erfolgsort*)

» In complex international disputes, the international legal framework allows parties to argue for the application of legal systems that are favourable to them

Contact us

Vincent Vroom

Attorney at Law

Partner

Vincent Vroom, attorney at law, specialises in restructuring and insolvency matters. He handles a range of issues in restructuring cases whether they arise within the courtroom or outside.

Vincent often works on complex matters in international settings and has worked on groundbreaking cases where Dutch entities were involved in US chapter 11 proceedings, schemes of arrangement and other foreign restructuring and insolvency proceedings (including Brazilian RJ proceedings). Vincent also gained broad experience in financing transactions. He headed the London office of Loyens & Loeff from 2014 until 2018. His clients include investors, debtors and financial institutions. Vincent regularly contributes to both Dutch and international publications.

T: +31 20 578 59 84

M: +31 6 51 26 63 19

E: vincent.vroom@loyensloeff.com

Joris Dunki Jacobs

Attorney at Law

Counsel

Joris, attorney at law, is a member of the Litigation & Risk Management practice group. He specialises in insolvency law and corporate law.

Joris advises clients on (cross border) restructurings and insolvency related litigation matters. He specialises in insolvency and corporate law.

T: +31 20 578 50 54

M: +31 6 10 89 46 42

E: joris.dunki.jacobs@loyensloeff.com

Contact us

Kim de Bruijn

Attorney at Law

Senior Associate

Kim de Bruijn, attorney at law, specialises in restructuring and insolvency matters. She works in our Amsterdam office. She focuses on insolvency law, including financial and corporate restructurings and litigation matters.

Kim advises and represents Dutch and international clients in high profile restructurings. Her areas of expertise include insolvency law, restructuring litigation and financial and corporate restructurings. As an insolvency law expert, she regurlarly publishes articles and annotations to case law. She is also a board member of the Netherlands Association for Comparative and International Insolvency Law and a member of the international committee of the Dutch Restructuring Association.

T: +31 20 578 56 88

M: +31 651 01 85 34

E: kim.de.bruijn@loyensloeff.com

Sharita Willigenburg

Attorney at Law

Senior Associate

Sharita Willigenburg, attorney at law, is a member of the Banking & Finance expert group in our Amsterdam office. Sharita represents sponsors, corporates and financial institutions, with a focus on (financial) restructuring and special situations transactions. She is also a member of the Restructuring & Insolvency Topical Team.

Sharita specialises in (financial) restructuring and special situations transactions next to secured lending transactions. Prior to joining the Banking & Finance expertise group, Sharita was a member of the Dispute Resolutions expert group where she focused on restructurings and insolvency proceedings. Sharita also worked in the New York office (2019-2020).

T: +31 20 578 57 26

M: +31 6 21 52 75 03

E: sharita.willigenburg@loyensloeff.com

Disclaimer

- In preparing our analysis we have relied upon the accuracy and completeness of the facts, assumptions, information, documents and representations referenced herein or received from the client. Any incorrectness or incompleteness thereof may affect our analysis. Our analysis is limited to the issues and matters explicitly set out herein and does, in any event, not relate to any non-legal or non-tax issues.
- This document is based on the law, in force as at the date hereof, under which the professional involved is qualified to practice. Any changes in legislation, case law, regulations, interpretations and practices may (retroactively) affect the validity of the views expressed herein. We have no obligation to update, confirm or amend our analysis, unless we are requested to do so and have accepted such update assignment.
- This document may contain certain language (such as “will” or “should”), which may suggest that we have come to a particular level of comfort or conclusion as to a particular issue. We hereby advise you that such language is not intended to state a level of comfort, but that this stipulates our reasoned view based on the law as it stands. Consequently, tax or other governmental or regulatory authorities and/or courts can take a position contrary to the views expressed in this document.
- Our analysis is for the client only and is subject to the terms of engagement as agreed with the client (including our general terms and conditions which are available via our website). Only the client can rely on this document. This document is confidential. Disclosure to any other party is not permitted without our prior written consent

LOYENS & LOEFF
Law & Tax

One Firm: Law & Tax, we are proud of the unique service we offer multinational enterprises, financial institutions, investors and High Net-Worth Individuals from our home markets of the Netherlands, Belgium, Luxembourg and Switzerland. With offices in key financial centres and a global partner network, we reach out and support you wherever you need.

As a leading law & tax firm in continental Europe, we have a particular focus on Private Equity & Funds, Real Estate, Life Sciences & Healthcare and Energy & Infrastructure. We integrate tax, civil law and notarial expertise to support you with smart and efficient solutions through advice, transactions and litigation.

As a trusted partner, the best advice is not just about expertise, but also about cultivating an in-depth understanding of your business and finding the best solution for you. This commitment is fundamental to our success.

Join us in going **Further. Better. Together.**

Amsterdam, Brussels, London, Luxembourg, New York, Paris, Rotterdam, Zurich

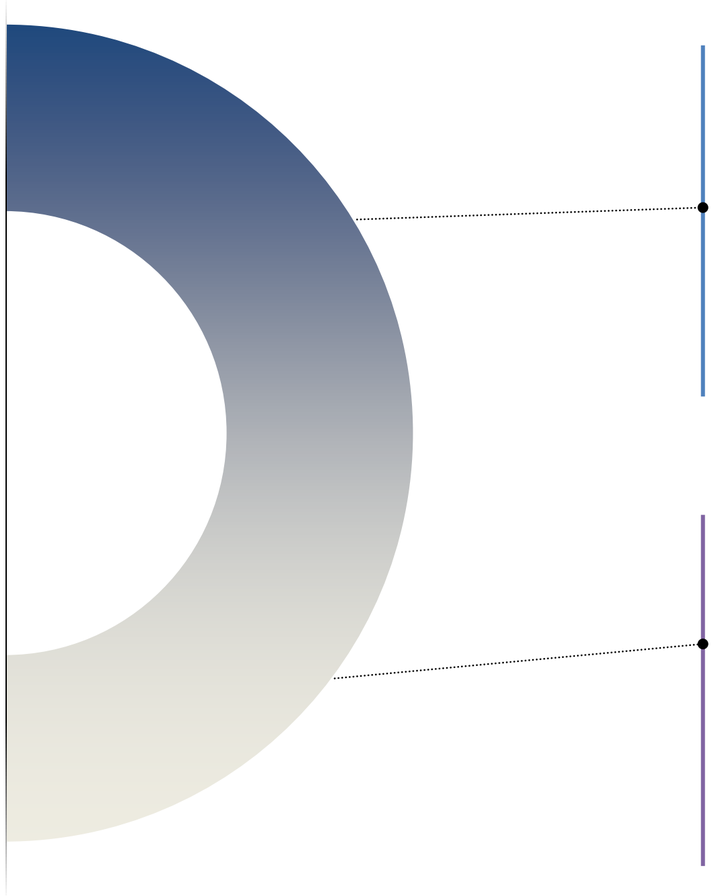
loyensloeff.com

WHITE & CASE

LME Blockers

Erin Rosenberg

What is a Liability Management Exercise (LME)?



What are Liability Management Exercises (LMEs)?

- The term “liability management exercise” (LME) refers to a broad range of transactions by which companies manage their liabilities, such as refinancing, amend-and-extend transactions, or debt-for-debt exchanges. In the U.S. market, it is understood to be a step which would take place prior to (and generally with the intent of avoiding) a Chapter 11 bankruptcy.
- The current market focus is on non-pro rata LMEs, which have become more prevalent in recent years as a means for companies to create runway, de-leverage, or inject additional liquidity. These transactions often involve a subset of lenders working with the company to structure deals that benefit them, sometimes to the detriment of other lenders.
- LMEs usually require company cooperation and can be implemented with or without the consent of majority/super-majority of holders. Where holder consent is obtained, this is generally referred to as “creditor-on-creditor violence”.

Why Do Companies Use LMEs?

Companies pursue LMEs in order to:

- Extend maturities and avoid defaults (“create runway”).
- De-leverage their balance sheets.
- Inject new liquidity.
- Address specific financial problems (e.g., maturity walls, liquidity crunches) – trying to avoid full balance sheet restructurings.
- In some cases, to benefit a subset of creditors at the expense of others, particularly by exploiting documentary loopholes.

LME Blockers
Some jargon

1. **Drop down**

   Moving assets outside of the Restricted Group, in order to be able to conduct transactions otherwise restricted by the covenants.

2. **Priming/Uptiering**

   The Restricted Group incurs new debt secured by (or re-tranches existing debt to have the benefit of) super priority liens having first claim to the Restricted Group's existing collateral; a subset of existing pari lenders consent to required amendments to documents to implement such transactions.

3. **Double Dip**

   New-money creditors seek to maximise their recovery by establishing multiple independent claims into the Restricted Group arising from the same underlying financing (e.g. (a) a guarantee claim against a restricted group guarantor of the primary obligations and (b) the benefit of a primary obligor's intercompany claims against that same guarantor).

4. **Pari Plus**

   A variation of a double dip, where third party creditors get the benefit of an intercompany loan to the Restricted Group guarantor (i.e., 3(b) above), but then also receive a supplemental (priority) claim against an Unrestricted Subsidiary or other non-Guarantor Restricted Subsidiary who has been the recipient of a drop-down of assets.

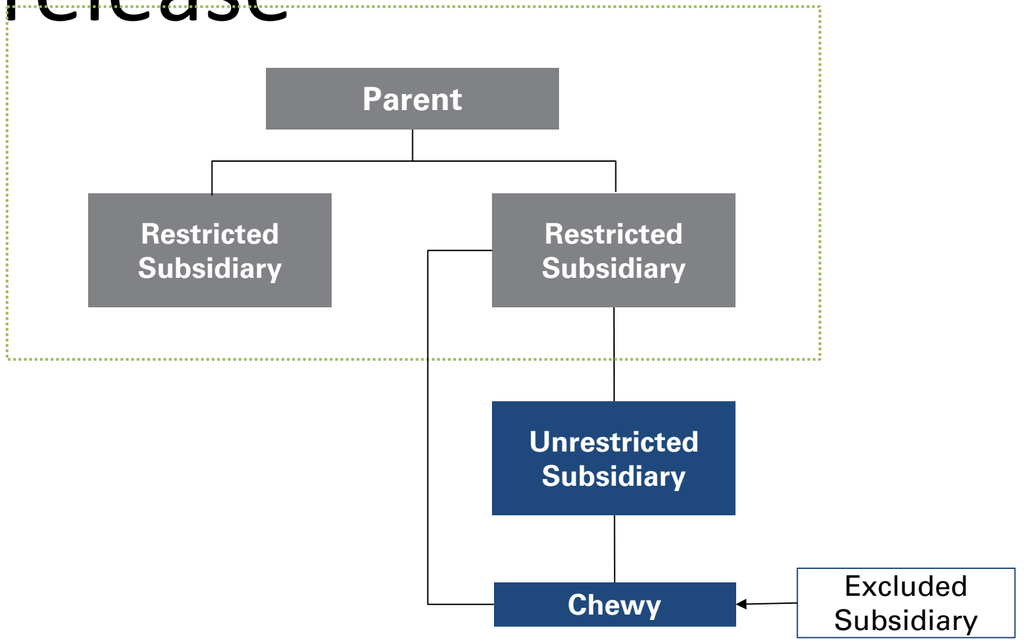
5. **Vote rigging**

   Incurring (or creating voting but undrawn commitments) under an existing debt instrument in order to swing voting in favour of a coercive LME.

Chewy
Engineered release

What happened?

A fraction of ownership interests in a U.S. pet store chain's online business, Chewy, was distributed to unrestricted subsidiaries and affiliates in order to make Chewy an "Excluded Subsidiary" for purposes of the relevant credit agreement, thereby resulting in the automatic release of guarantees and security.



What are the concerns?

"Chewy" blocker provisions are designed to protect lenders from such automatic release by restricting the circumstances that result in a release of a subsidiary due to it becoming non-wholly owned.

Chewy
Engineered release

Why could this be done in U.S. documents?

U.S. credit agreements often contain the concept of an “Excluded Subsidiary”, which typically describes classes of subsidiaries that are exempt from providing a guarantee. This may contain the concept of a “Non-Wholly Owned Subsidiary” and then the Agency or Collateral Matters of the credit agreement may provide that Subsidiary Guarantors will be released (both from their guarantees and the security interests they have granted) if they become Excluded Subsidiaries.

How does this translate into European documents?

The undertaking in European credit agreements which requires the accession of Guarantors often only bites on wholly-owned subsidiaries and Agreed Security Principles further only require the accession of and security to be provided by / in respect of wholly-owned subsidiaries. The “Resignation of a Guarantor” provisions in the credit agreement often allow for a resignation if a guarantee is not required to be granted under the Agreed Security Principles, and modern day intercreditor agreements require the Security Agent to automatically release Transaction Security without further instructions from the creditors if such release is permitted.

Chewy
Engineered release

How can it be addressed?

An example:

no Guarantor shall be entitled to resign in accordance with this paragraph solely because it has ceased to be wholly-owned Group Company following the date upon which it became a Guarantor.

Another example:

no Guarantor shall be entitled to resign in accordance with this paragraph solely because it has ceased to be a wholly-owned Group Company following the date upon which it became a Guarantor as a result of a sale or transfer of the Capital Stock of the Guarantor (x) to an Affiliate of the Parent, (y) that is not made for a bona fide business purpose, or (z) the primary purpose of which is to release such Guarantor or otherwise adversely affect the Secured Parties' interests in the Transaction Security (in each case, as determined by the Company acting reasonably and in good faith).

Check the Agreed Security Principles and the intercreditor agreement too

Chewy
Engineered release

Should a lack of a Chewy blocker be a deal-breaker?

Only needed if non-wholly owned requirement – perhaps push for this not to be the case in the lower/mid-market

Could sometimes be considered less important in Europe compared to the US

BUT – this blocker is regularly conceded by sponsors (so often you may as well ask for it, even if it is not your top priority)

Serta
Priming transaction

What happened?

Serta executed a non-pro rata “uptier” exchange, where a majority group of lenders exchanged their loans on a non-pro rata basis into new debt at the same level in the capital structure. The agent under the pre-existing facility was instructed by the participating majority lender group through a so-called “exit consent” to sign a new intercreditor agreement in connection with the exchange, which left non-participating lenders, contractually subordinated to the new debt.

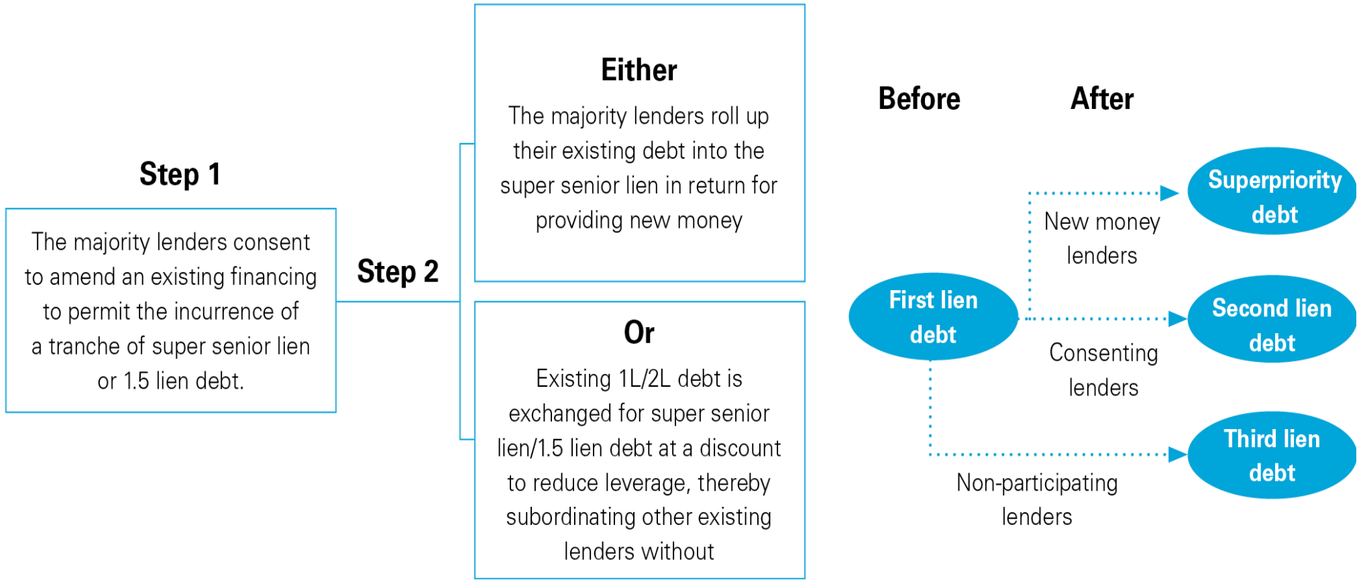
What are the concerns?

Exploitation of the lack of restrictions on subordination of existing debt vis-à-vis newly incurred debt with majority lender consent in order to result in adjustments to the capital structure favouring one group of lenders over another.

What is ‘Uptiering’?

Uptier transaction

- The Restricted Group incurs new indebtedness secured by super priority liens having first claim to the Restricted Group’s existing collateral.
- A subset of the senior lenders are typically tapped to provide the additional capital needed to fund uptier transactions and to consent to required amendments to documents to implement such transactions.



Serta
Priming transaction

Why could this be done in U.S. documents?

- The company used the debt buyback provisions in the credit agreement, which included loose permissions for “open market purchases” to allow the company to buyback, or exchange, debt on one set of terms for debt on another set of terms, only for a subset of the creditors. The use of such “open market purchase” permissions has been somewhat curtailed as a result of the Fifth Circuit Decision of December 31, 2024 in the Serta case.
- The 100% lender voting or ‘sacred rights’ provisions protected against amendments to the priority waterfall and pro rata sharing provisions in the credit agreement, but the new debt was housed in a new, separate credit agreement entered into with priority over the existing facilities by virtue of an intercreditor agreement.

How does this translate into European documents?

- Debt buyback provisions in European loans vary in whether they require debt buybacks to only be conducted via regimes which involve all lenders have the ability to participate on a pro rata basis (at least in the first instance) to such regime being optional.
- The unanimous lender consent provisions do typically protect against amendments to the order of priority set out in both intercreditor agreements and any within a loan agreement; however the increasing number of exceptions to these provisions, whether via structural adjustments regimes or otherwise, means that there are various ways in which priority debt can be included within a structure in a manner which the senior secured creditors may not envisage.

Serta
Priming transaction

How can it be addressed?

Solution 1: fine-tuning the all-Lender consent provisions

- Intercreditor Agreement waterfall and lien and payment subordination, plus intra-facility agreement
- Super Senior debt inclusion/1.5 lien – inclusion, increase and retranching
- Be wary of carve outs (Facility Change/Structural Adjustments are OK if they are properly crafted)
- Amendments “which relate to or have the effect of changing”
- Debt buybacks

Serta
Priming transaction

How can it be addressed?

Solution 2: Serta override – an example

Notwithstanding any other provision of this Agreement or any other Finance Document, an amendment, waiver or (in the case of a Transaction Security Document) a consent in respect of any term of any Finance Document that has the effect of:

i. contractually subordinating any Senior Term Facilities or Senior Additional Indebtedness ("Applicable Indebtedness") in right of payment to any other Indebtedness (including without limitation upon an insolvency or on an enforcement); or

ii. contractually subordinating the Transaction Security securing any Senior Term Facilities ("Applicable Security Interests") to Liens securing other Indebtedness or other obligations (any Indebtedness to which such Applicable Indebtedness or such Applicable Security Interests are subordinated pursuant to this sub-paragraph (ii) and sub-paragraph (i) above, "Priority Indebtedness"),

in each case, including without limitation by converting any portion of the Senior Term Facilities or Senior Additional Indebtedness into Priority Indebtedness, whether by re-designation, refinancing, exchange, re-investment or otherwise) shall not be made without the prior consent of all of the Lenders and the Company unless:

i. each directly and adversely affected Lender has been offered a bona fide opportunity to fund or otherwise provide its pro rata share of the Priority Indebtedness on the same terms (other than backstop fees and other similar fees and/or any fees, costs or expenses in connection with the negotiation of the terms of such transaction) as offered to all other providers (or their Affiliates and/or Related Funds) of the Priority Indebtedness based on the amount of Commitments under the relevant Facility that are directly and adversely affected thereby held by each Lender as compared to the total Commitments that are secured on a pari passu basis with the relevant Facility); and

ii. provided that this clause shall not override the permission for Liens or Indebtedness that is expressly permitted to be senior in payment or lien priority by this agreement as in effect on the date of this Agreement.

Serta
Priming transaction

Should a lack of a Serta blocker be a deal breaker?

Current hold in deal

Other priming

The impact of European intercreditors

Sponsors are often prepared to accept some Serta protection, but a ‘perfect’ solution can be difficult to achieve. Consider the importance on a deal where likely to always be the majority lender.

J Crew
Drop down transaction

What happened?

A U.S. fashion retailer transferred the majority of its IP to an unrestricted subsidiary. That IP was then pledged to secure new debt, and fell outside the existing lenders' security package. The unrestricted subsidiary then licensed it back to J. Crew companies.

What are the concerns?

- Concept of an Unrestricted Subsidiary
- Loss of IP/'crown jewel' assets

What is a ‘Drop Down’?

Drop-down

- Moving assets outside of the existing restricted group, in order to be able to conduct transactions otherwise restricted by the covenants, including new financing.
- The two main type of assets used to support a drop down financing are (i) unencumbered assets or collateral that are transferred out of the restricted group; and (ii) assets of guarantors that release their guarantees.

Step 1

The Restricted Group transfers assets to an Unrestricted Subsidiary, or designate a Restricted Subsidiary as an Unrestricted Subsidiary.

Step 2

The Unrestricted Subsidiary can now incur debt, not subject to any restrictions under the existing covenants. Such debt may be secured by the transferred assets.

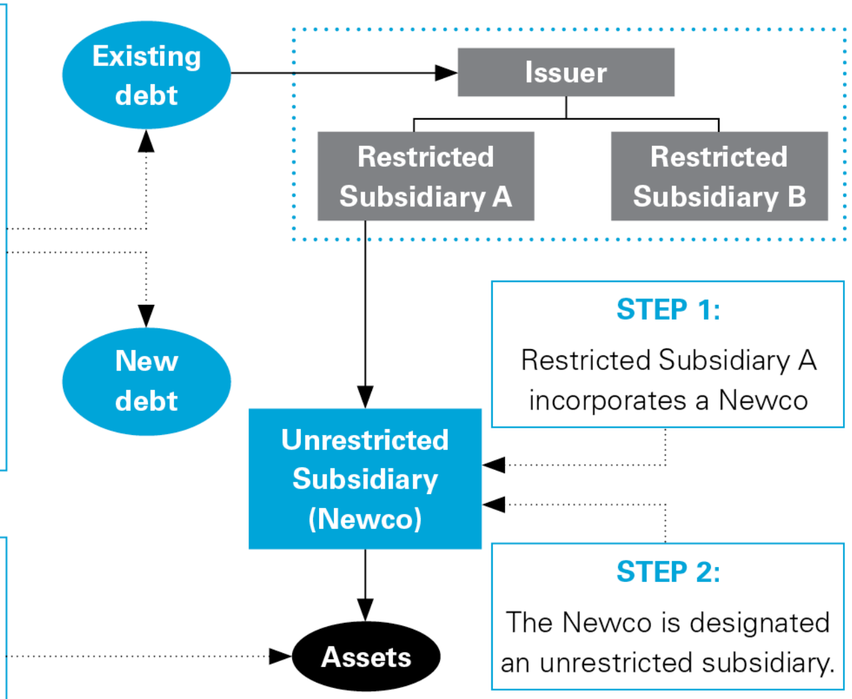
STEP 4A:

Exchange offer is launched by the issuer-the new debt is offered in exchange for the existing debt.

-or –

STEP 4B:

Newco incurs new debt that is secured against the assets, with proceeds used to fund buyback of existing debt.



STEP 1:

Restricted Subsidiary A incorporates a Newco

STEP 2:

The Newco is designated an unrestricted subsidiary.

STEP 3:

Restricted Subsidiary A contributes assets into the unrestricted subsidiary using permitted basket capacity under the covenants.

J Crew
Drop down transaction

Why could this be done in U.S. documents?

U.S. credit agreements often contain the concept of an “Unrestricted Subsidiary”, which isn’t bound by the covenants. JCrew established a newly formed unrestricted subsidiary and used capacity under its investment covenant to transfer a material portion of its material IP to that subsidiary. This included capacity under the so called “J Crew Trapdoor”, an unusual provision which allowed unlimited investments (including in unrestricted subsidiaries) by non-Guarantors with proceeds received pursuant to permitted investments in such non-Guarantors.

How does this translate into European documents?

Many European documents today track US/ High Yield style incurrence covenants, containing the same Unrestricted Subsidiary feature and leakage thereto via Permitted Investments and other carveouts from limitations on Restricted Payments.

What is a ‘Drop Down’?

Drop-down

- Moving assets outside of the existing restricted group, in order to be able to conduct transactions otherwise restricted by the covenants, including new financing.
- The two main type of assets used to support a drop down financing are (i) unencumbered assets or collateral that are transferred out of the restricted group; and (ii) assets of guarantors that release their guarantees.

Step 1

The Restricted Group transfers assets to an Unrestricted Subsidiary, or designate a Restricted Subsidiary as an Unrestricted Subsidiary.

Step 2

The Unrestricted Subsidiary can now incur debt, not subject to any restrictions under the existing covenants. Such debt may be secured by the transferred assets.

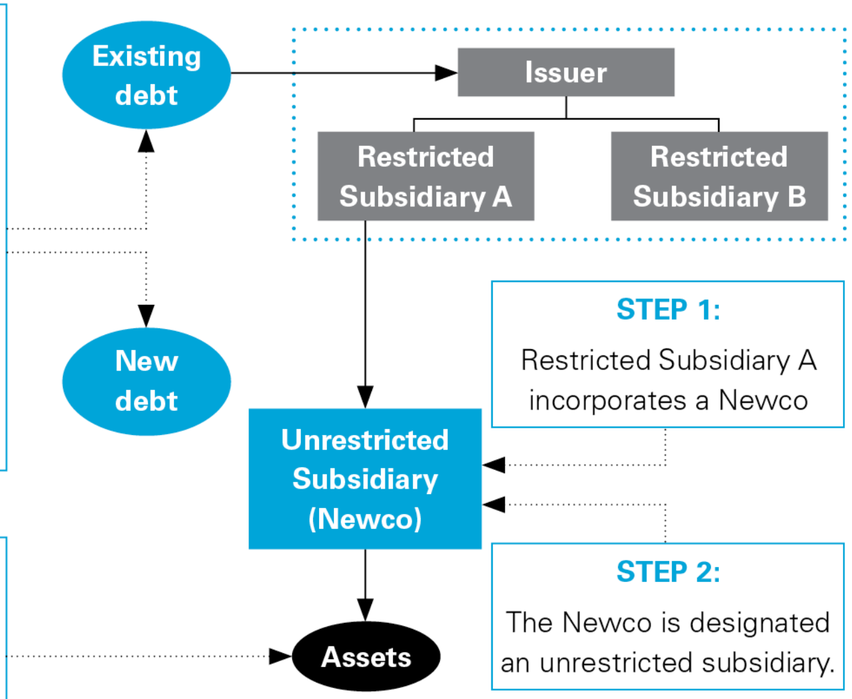
STEP 4A:

Exchange offer is launched by the issuer-the new debt is offered in exchange for the existing debt.

-or –

STEP 4B:

Newco incurs new debt that is secured against the assets, with proceeds used to fund buyback of existing debt.



STEP 1:

Restricted Subsidiary A incorporates a Newco

STEP 2:

The Newco is designated an unrestricted subsidiary.

STEP 3:

Restricted Subsidiary A contributes assets into the unrestricted subsidiary using permitted basket capacity under the covenants.

J Crew
Drop down transaction

Why could this be done in U.S. documents?

U.S. credit agreements often contain the concept of an “Unrestricted Subsidiary”, which isn’t bound by the covenants. JCrew established a newly formed unrestricted subsidiary and used capacity under its investment covenant to transfer a material portion of its material IP to that subsidiary. This included capacity under the so called “J Crew Trapdoor”, an unusual provision which allowed unlimited investments (including in unrestricted subsidiaries) by non-Guarantors with proceeds received pursuant to permitted investments in such non-Guarantors.

How does this translate into European documents?

Many European documents today track US/ High Yield style incurrence covenants, containing the same Unrestricted Subsidiary feature and leakage thereto via Permitted Investments and other carveouts from limitations on Restricted Payments.

J Crew
Drop down transaction

How can it be addressed?

Solution 1:

- Exclude an “Unrestricted Subsidiary” concept – mid-market vs. top-tier
- For full belts-and braces, consider regulating specifically as an all lender consent item

Solution 2:

- Include a “J Crew” blocker – regularly agreed to by sponsors - BUT, quality varies (see next slide)
- Don’t forget about the “J Crew trapdoor”
- Added protection: “IP owning entity” concept

J Crew
Drop down transaction

An example – to be discussed:

Notwithstanding the foregoing or anything to the contrary in this Agreement, in no event shall the Company or any Restricted Subsidiary be permitted to dispose of, or grant an exclusive license in respect of, any Material Intellectual Property, whether as an Asset Disposition, Investment, dividend or otherwise, to any Person that is not a Restricted Subsidiary (including the designation of any Restricted Subsidiary holding Material Intellectual Property as an Unrestricted Subsidiary).

"Material Intellectual Property" means [●], [●], [●] and [●] and any trademarks, patents, copyright or material proprietary software, together with any other Intellectual Property that is owned by a member of the Group and which in each case, in the good faith determination of the Board of Directors of the Company, is material to (a) the current or future business activities of the Group (taken as a whole) or (b) the current or future revenues of the Group (taken as a whole).

J Crew
Drop down transaction

Should a lack of a J Crew blocker be a deal breaker?

Are there ‘crown jewel’ assets for this business? Is IP the right focus?

Essential: negotiate hard on reducing basket sizes

And remember: a typical J Crew blocker might not have stopped the transaction in J Crew!

Envision
Drop down transaction

What happened?

Dropdown of ambulatory surgery (“Amsurg”) business into an unrestricted subsidiary to raise new debt where the proceeds were used to exchange certain existing debt. Prior to the drop down, the Company “stacked” various permitted investments / restricted payments baskets in order to allow transfer of value to Unrestricted Subsidiaries. It also arranged for the proceeds of certain first priority debt incurred at the unrestricted subsidiary to be dividended back to Envision in order to refresh such basket capacity and achieve the full drop down.

What are the concerns?

“Envision” provisions are intended to impose a strict limit on the aggregate amount of all Investments and Restricted Payments in and dispositions to Unrestricted Subsidiaries typically by overriding the general ability to “stack” baskets (i.e., limiting such leakage to Unrestricted Subsidiaries to the dedicated investments basket for investments in Unrestricted Subsidiaries).

Why could this be done in U.S. documents and how does it translate into European documents?

For the same reasons as described for *J Crew* – the existence of an Unrestricted Subsidiary concept and the ability to leak Permitted Investments thereto.

Envision
Drop down transaction

An example – to be discussed:

Notwithstanding the foregoing, the only basket available for Dispositions (including, without limitation, Investments, other Dispositions and Restricted Payments) to Unrestricted Subsidiaries and designations of Unrestricted Subsidiaries shall be the Unrestricted Subsidiaries Investment Basket, and there shall be no rebuilding of such basket, with proceeds received on account of any such transfer or returns on such Investments or otherwise, nor any reclassification of amounts permitted in reliance on such basket.

Envision
Drop down transaction

Should a lack of an Envision blocker be a deal breaker?

This is just an exercise in basket sizing

(and ensuring each of your covenants are caught by the blocker)

Pluralsight
Drop down transaction

What happened?

Similar issue to J Crew re value leakage, but this time to Non-Guarantors.

What are the concerns?

- Concept of a Non-Guarantor (vs. an Unrestricted Subsidiary)
- Similarly to J. Crew, the language can be applied to any material assets, however the protection has become highly associated with restrictions on transferring IP specifically.

Pluralsight
Drop down transaction

An example – to be discussed:

Notwithstanding the foregoing or any other provision of this Agreement, none of the Company or any of its Restricted Subsidiaries shall transfer (whether by investment or disposition or otherwise) any ownership right, or exclusive license or exclusive right to, Material Intellectual Property to any Restricted Subsidiary that is not a Guarantor, and no non-Obligor shall own any Material Intellectual Property, provided that such transfer or ownership shall be permitted to the extent made or existing for a bona fide business purpose and provided further that such bona fide business purpose shall not include a transfer to or ownership by, in order to, directly or indirectly, enable a Restricted Subsidiary to incur Indebtedness or to facilitate or enable a Lien to be granted over the Material Intellectual Property or over the Capital Stock of such Restricted Subsidiary as security to any third-party creditor of Indebtedness.

Pluralsight
Drop down transaction

Should a lack of a Pluralsight blocker be a deal breaker?

Distinction: US vs. mainstream European market

Role of the non-guarantor debt cap and any non-guarantor debt baskets

At Home
Double dip

What happened?

The Company received $200m of new notes funded into a non-guarantor subsidiary and the notes were guaranteed by the Restricted Group. The subsidiary loaned the proceeds of the new debt to the Restricted Group. Consequently, the debt was supported by (i) guarantees of new notes from the restricted group (the first dip) and (ii) an intercompany obligation from the restricted group (the second dip).

- ☐ Sabre – similar principle but new money funded into an Unrestricted Subsidiary.

What are the concerns?

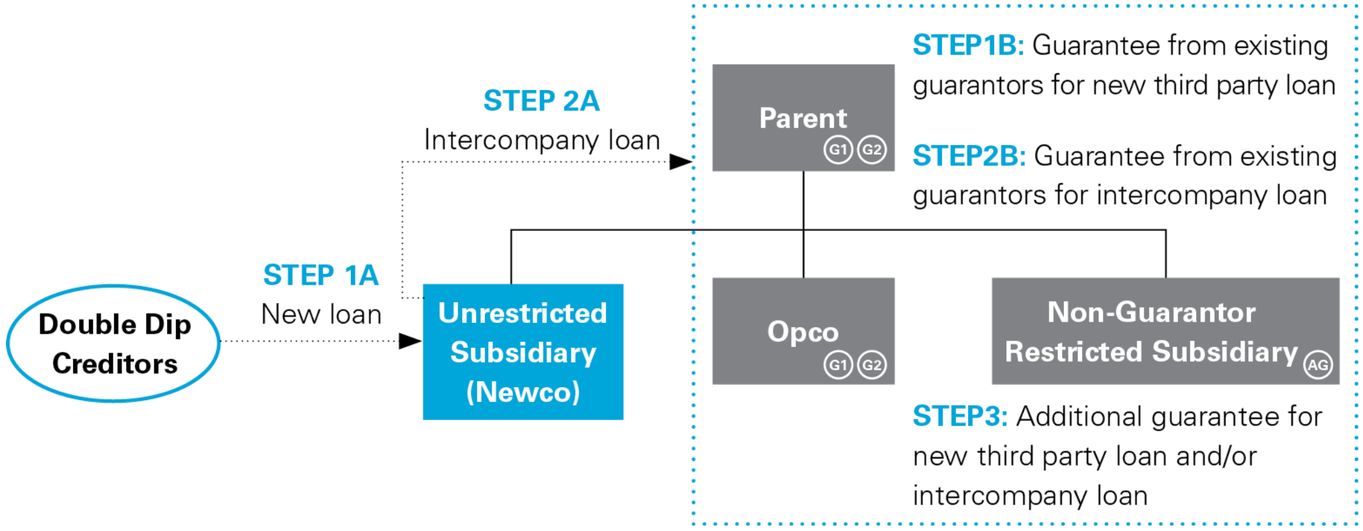
Multiple claims from a new money lender into the Restricted Group.

What is a Double Dip?

Double-dip (and *pari* plus financing)

A double-dip structure is a mechanism which allows new money providers ("**Double Dip Creditors**") to establish multiple independent claims against the Restricted Group arising from the same underlying financing.

Step 1	Step 2	Step 3
The Parent incorporates a Newco outside of the restricted group. The Double Dip Creditors make a loan to this Newco. This loan is guaranteed on a secured basis by the existing guarantors in the restricted group. (Dip 1)	The Newco on-lends the proceeds to entities within the restricted group via an intercompany loan. The intercompany loan receivable is pledged to the Double Dip Creditors. The intercompany loan is also guaranteed on a secured basis by the existing guarantors. (Dip 2)	A non-guarantor subsidiary in the restricted group may provide a guarantee to the Double Dip Creditors for the new third party loan and/or the intercompany loan. (Pari plus)



At Home
Double dip

Why could this be done in U.S. documents and how does it translate into European documents?
For the same reasons in both sets of documents: (1) the ability to have Unrestricted Subsidiaries, (2) Permitted Investment capacity for 'Dip 1' and (3) Permitted Debt capacity for 'Dip 2'.
How is this tackled in documents?

US

- ☐ Prohibition on Unrestricted Subsidiaries holding debt / liens over Restricted Subsidiaries (*Sabre*)
- ☐ Debt/guarantees/liens owed by a Guarantor to a non-Guarantor are subordinated to the senior debt (*At Home*)

Europe

- ☐ Regulated indirectly by (1) limiting investments into Unrestricted Subsidiaries and therefore the ability for such entities to incur debt which may seek credit support from the Restricted Group (Sabre), (2) if the structure involves support for debt at non-Guarantors being provided by Guarantors, reducing non-Guarantor debt capacity by having a small non-Guarantor debt cap which applies to all key debt baskets (At Home) and (3) ensuring robust intra group loan subordination.

At Home
Double dip

Should a lack of a At Home blocker be a deal breaker?

- US Chapter 11 lens vs European single point of enforcement
- Other baskets and caps
- Impact of European intercreditors – ensure robust intercreditor accession

New technology

Key: distinct gap between US and European practices

Protect your blockers! – cautionary tale from *STG Logistics*

Omni-blockers – chilling effect

Notwithstanding anything in the Loan Documents to the contrary, no Loan Party will, and the Loan Parties will not permit any of their Subsidiaries to, (i) directly or indirectly, create, incur, assume or otherwise become or remain liable with respect to any Indebtedness or issue any capital stock; (ii) create, incur, assume or permit or suffer to exist any Lien on or with respect to any property of any kind owned by it, whether now owned or hereafter acquired, or any income or profits therefrom; (iii) make or own any Investment in any other Person; (iv) enter into any transaction of merger, consolidation or amalgamation, or liquidate, wind up or dissolve themselves (or suffer any liquidation or dissolution), or (v) make any Disposition of assets or to otherwise engage in any other activity, in each case, that is undertaken in connection with a liability management financing transaction (this clause (c), the "Anti-Liability Management Provision"), provided that the Anti Liability Management Provision shall not restrict (i) the incurrence of Permitted General Junior Debt or Indebtedness pursuant to Section [ ] and (ii) transactions taken in connection with a Permitted Securitisation, in each case, so long as such Indebtedness is not incurred for the purpose of materially reducing the value of the Collateral or disadvantaging the Lenders in respect of their rights as creditors relative to other creditors;

New technology

Revlon / Incora – vote rigging

- US vs. European approach

Diebold /Robertshaw – grace periods and ability to PIK

- US vs. European approach

Selecta blockers – *uptiering*

- Distressed disposals provisions in the ICA
- European loan approach mitigates this risk

Cooperation Agreements

- A cooperation agreement is an inter-creditor lock-up agreement, where the parties agree not to support a proposed transaction which is not supported by the majority.
- Certain considerations:
  - Time-consuming to put in place and require organisation and expenditure on advisors' fees.
  - Does the group hold sufficient percentage to block.
  - Restrictions on trading and potential effects on liquidity of paper.
  - Debate over "tiered compensation" and other pre-programmed remuneration favouring the initial parties to the cooperation agreement.
- Certain borrowers and sponsors in the market have attempted to include bans on coops in new debt documents.
  - Such proposed language would provide that any creditor that signs up to a coop is treated as a Defaulting Creditor for all purposes, and would define 'cooperation agreement' very broadly, including to cover any understanding as to voting intention, whether written or oral.
- Warner Bros Discovery – "Anti-Boycotting" –The "anti-boycott" wording accepted in the WBD situation marks the first time a variant of anti-cooperation agreement language has cleared any market
- However – it is limited by the scope of the language and the specific circumstances of the WBD case, in particular:
  - It only prevents holders from entering boycott agreements that prevent them from supplying the company with new-money financing – it does not bar cooperation agreements in general
  - The clause may have been least partly intended as a means of preventing holdouts from derailing the syndication of the $17.5bn bridge facility that funded the WBD offer, and the permanent financing that replaces it
- Nonetheless, it was celebrated by borrowers and sponsors who had been working to undermine the cooperation agreement path.
- Since then:
  - Further attempts from sponsors to include anti-coop language in credit agreements
  - So far, Majesco and Vitech are reported to have included "disclosure requirements with teeth"
  - Only known anti-coop clause in the market is that included in the unrestricted subsidiary credit agreement for Altice USA – but was deliberately placed as part of an LME –
  - Selecta and Altice USA antitrust cases launched, seeking to challenge the legality / validity of cooperation agreements.

Conclusion

US vs Europe backdrop

- Larger and more fragmented capital structures increase the potential rewards
- Relationship and reputational constraints are less pronounced than in Europe
- By contrast, English law imposes stricter standards: smaller deal sizes and smaller market, higher reputational sensitivity, more restrictive consent thresholds (often requiring all-lender approval), and legal doctrines such as the “abuse principle” and directors’ duties (with potential criminal liability) act as checks on aggressive tactic
- Availability of UK schemes of arrangement
- Difficulties in moving assets between jurisdictions (tax, transfer pricing) i.e., the splintering of laws makes LMEs harder
- Ability to pay dividends (having distributable reserves)

Cautionary note

- A Blocker is only as good as its drafting
- Generally, less of a concern if the sole lender day 1
- Some of this can be solved for in different ways: smaller baskets, non-guarantor debt caps, knock out the unrestricted subsidiary concept, better framework for amendments in European loans than US loans or HY bonds in the first place

AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Mediation Matters

By Leslie A. Berkoff, Candice L. Kline and Simran Merchant[1]

A Contest of Wills, or Deference Due? Arbitration and Bankruptcy

Coordinating Editor Leslie A. Berkoff
Moritt Hock & Hamroff LLP; New York

Candice L. Kline
Saul Ewing LLP
Chicago

Simran Merchant
Saul Ewing LLP
Chicago

Arbitration and bankruptcy, despite being creatures of federal statutes, could not be more different from one another, and reconciling their application has proven challenging for both arbitrators and bankruptcy judges in their dispute-resolution forums. Arbitration is governed by the Federal Arbitration Act (FAA)[2] and applicable rules issued by the American Arbitration Association (AAA).

Arbitration is a private process with strong confidentiality protections, and is often binding with limited routes for appeal. Arbitration occurs outside of the public scrutiny between the involved parties typically without regard for third-party concerns. Bankruptcy, on the other hand, is a multi-party public process with few confidentiality protections governed by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure (FRBP), which provide robust appellate rights. Despite the foregoing, arbitration clauses — often the exclusive agreed-upon method for resolving disputes — frequently come up in the bankruptcy forums.

The bankruptcy courts then face challenges in enforcing arbitration clauses, balancing concerns of policy and practicality while attempting to harmonize the FAA with the Bankruptcy Code. Recent decisions in *In re Celsius Network LLC* and *In re Yellow Corp*. demonstrate such a struggle. This article will discuss how the courts have reconciled competing policy considerations to enforce arbitration clauses.[3]

A Longstanding Policy Favors Arbitration Under the FAA

The adoption of the FAA was aimed to counter judicial hostility to arbitration, particularly in commercial agreements between equal parties, and to provide guidance for courts enforcing consumer arbitration agreements.[4] Therein, Congress declared that liberal federal policy favors arbitration clauses.[5] Despite the foregoing, a party opposing arbitration might prevail if evidence shows that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue."[6]

To determine congressional intent, the U.S. Supreme Court assesses "(1) the text of the statute; (2) its legislative history; and (3) whether 'an inherent conflict between arbitration and the [statute's] underlying purposes [exists].'"[7] The Court has already opined on when arbitration clauses should be honored under federal statutes and whether certain statutory exceptions apply.

For example, in *Epic Systems v. Lewis*, the Supreme Court upheld the binding nature of arbitration agreements in a labor dispute and rejected an attempt to draw a conflict between the FAA and other federal labor statutes.[8] In that decision, the Court concluded that the FAA's mandate to enforce arbitration agreements for individualized proceedings trumped the National Labor Relations Act (NLRA).[9] Although not a bankruptcy case, *Epic Systems* demonstrates the challenges that

1 Ms. Merchant is also a law student at the University of Illinois-Chicago School of Law.
2 9 U.S.C. § 1, *et seq.*
3 *See In re Celsius Network LLC*, No. 22-10964, 2024 WL 1719633 (S.D.N.Y. April 22, 2024); *In re Yellow Corp.*, Case No. 23-11069, 2024 WL 1313308 (Bankr. D. Del. March 27, 2024).
4 *See Mintze v. Am. Fin. Servs. Inc. (In re Mintze)*, 434 F.3d 222, 228 (3d Cir. 2006).
5 *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985).
6 *In re Mintze*, 434 F.3d at 229 (quoting *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("*McMahon*")).
7 *McMahon*, 482 U.S. at 226-27 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985)).
8 *Epic Systems v. Lewis*, 584 U.S. 497, 502 (2018).
9 *Id.* at 510.

courts face when two federal statutes are at odds with each other.

In *New Prime Inc. v. Oliveira*, the Supreme Court relied on an exception in the FAA, providing that FAA does not apply to contracts for employment, when it ruled against enforcing arbitration clause embedded in an independent contractor agreement.[10] The Court addressed whether a court or an arbitrator must determine the applicability of § 1 of the FAA, which applies only to "contracts of employment," and whether that clause applies to independent contractors. Although the Court concluded that any contract for work fell under the FAA's "contracts of employment" definition — including independent contractor contracts — the dispute was nonarbitrable because all "contracts of employment" were exempt from enforcement under the FAA, although state laws may still apply.[11]

In *Lamps Plus Inc. v. Varela*, the Supreme Court confronted whether the arbitration agreement's ambiguity provided sufficient basis for compelling classwide arbitration.[12] In this case, an employee who had signed an ambiguous contract agreeing to arbitrate his disputes brought a class action on behalf of all employees.[13] Lamps Plus moved to compel arbitration on an individual rather than classwide basis, and to dismiss the lawsuit. Applying California state law, the lower courts found the agreement ambiguous on class claims and construed the provision against Lamps Plus, compelling class arbitration.[14] Lamps Plus appealed, and the Supreme Court reversed,[15] holding that arbitration must arise from consent and not coercion.[16] Applying California's law on ambiguity, the Court found that consent to class arbitration was absent and reversed.[17]

These cases suggest a fact-intensive, case-by-case approach to enforcement of arbitration agreement considerations with a particular emphasis on the existence of consent or a lack thereof. This is especially true in the bankruptcy context.

Bankruptcy Courts Follow *McMahon* but Also Consider the Bankruptcy Code

Bankruptcy courts may hesitate to enforce arbitration clauses because arbitration removes the case from their immediate purview and decision-making power. However, the FRBP support the use of arbitration.

Bankruptcy Rule 9019(c) states that "[o]n stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration." This provision dates to the Bankruptcy Act of 1898 and the 1983 modifications, which allowed a trustee (subject to the court's direction) to submit to arbitration any controversy arising in the settlement of the estate. The legislative history for these statutes is equally supportive of the construct of arbitration.[18]

Consistent with these principles, the Third Circuit in *Mintze* stated that "a bankruptcy court lacks the authority and discretion to deny [an arbitration clause's] enforcement *unless* the party opposing arbitration can establish congressional intent, under the *McMahon* standard, to preclude waiver of judicial remedies for the statutory rights at issue."[19] This determination historically has hinged on whether the matter is core or non-core.

Bankruptcy courts might find "substantially" core matters arbitrable.[20] As previously stated, the *Mintze* decision turned on the "underlying nature of the proceedings, *i.e.*, whether the proceeding derives exclusively from the provisions of the Bankruptcy Code and, if so, whether the arbitration proceeding would conflict with the purposes of the Code."[21] The 2024 decisions in *Celsius* and *Yellow* offer fresh perspectives on reconciling arbitration clauses and bankruptcy, and both suggest a new arbitration-friendly approach.

Celsius Court Enforces an Agreement to Arbitrate — Broadly

In *Celsius*, the district court reversed the bankruptcy court's order and held that it should have compelled arbitration to determine whether the claims at issue were arbitrable.[22] The bankruptcy court had assessed whether the parties agreed to arbitrate, the scope of the agreement, whether any federal statutory claims were nonarbitrable and whether the court could balance the proceedings pending arbitration.[23] The district court concluded that such an approach was too narrow.[24]

By way of background, the debtor brought non-core claims against Mawson Infrastructure Group and its affiliates under three agreements, but only one had an arbitration clause.[25] In the adversary pro-

Leslie Berkoff is a partner with Moritt Hock & Hamroff LLP in New York and chairs the firm's Dispute Resolution Practice Group. Candice Kline is a partner, and Simran Merchant is a summer associate, with Saul Ewing LLP in Chicago.

10 *New Prime Inc. v. Oliveira*, 586 U.S. 105 (2019).
11 *Id.* at 110.
12 *Lamps Plus Inc. v. Varela*, 587 U.S. 176 (2019).
13 *Id.* at 179.
14 *Id.* at 180.
15 *Id.* at 188.
16 *Id.* at 184 (citing *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)).
17 *Id.* at 189.
18 *See* Donald L. Swanson, "Bankruptcy's ADR Rules Have Changed a Little over the Past Century," *Mediatbankry: On Bankruptcy and Mediation* (Oct. 6, 2016), *available at* mediatbankry.com/2016/10/06/bankruptcys-adr-rules-have-changed-little-over-the-past-century (unless otherwise specified, all links in this article were last visited on June 28, 2024).
19 *In re Mintze*, 434 F.3d at 229 (emphasis in original); *see also MBNA Am. Bank NA v. Hill*, 436 F.2d 104, 110 (2d Cir. 2006) (whether arbitrating dispute jeopardizes objectives of Bankruptcy Code); *Phillips v. Congelton LLC (In re White Mountain Mining Co.)*, 403 F.3d 164 (4th Cir. 2005) (whether dispute could not be arbitrated because it involved core issue that would substantially interfere with debtor's ability to reorganize).
20 *In re Hostess Brands Inc.*, Case No. 12-22052, 2013 WL 82914, at *4 (Bankr. S.D.N.Y. Jan. 7, 2013).
21 *In re Mintze*, 434 F.3d at 231 (quoting *In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997)).
22 *In re Celsius Network LLC*, No. 22-10964, 2024 WL 1719633 (S.D.N.Y. April 22, 2024).
23 *Id.* at *2.
24 *See In re Celsius Network LLC*, 658 B.R. 643, 659 (Bankr. S.D.N.Y. 2024).
25 *Id.* at 652.

ceeding, Mawson moved to compel arbitration.[26] The bankruptcy court found that although the parties agreed to arbitrate, only claims arising under the main co-location agreement were arbitrable.[27] Since the related promissory note and security agreement lacked arbitration, the court reasoned that the clauses and claims arising from those documents were not arbitrable.[28] Finding "no special bankruptcy concerns," the bankruptcy court ordered arbitration of all claims that clearly arose from the co-location agreement only.[29]

On appeal, Hon. Colleen McMahon of the U.S. District Court for the Southern District of New York viewed the arbitration clause as "exceptionally broad."[30] The clause, in block capital letters, provided that the parties would irrevocably and unconditionally submit any dispute to arbitration.[31] Given the foregoing, she concluded that the bankruptcy court erred by limiting arbitration only to claims "arising under" one agreement and not under all three agreements.[32]

Because "arising under" appeared "nowhere" in the arbitration clause and was not a test for arbitrability, Judge McMahon disagreed with the bankruptcy court.[33] She also found the boldface language significant, particularly the phrase "of any nature" to suggest that the parties intended to arbitrate any dispute between themselves.[34] She vacated the order denying arbitration on the six other claims based on the other agreements.[35]

A presumption for arbitrability exists when more than mere reference to AAA rules shows a "clear and convincing" intent to arbitrate.[36] Judge McMahon found that the parties "clearly and unmistakably" agreed to arbitrate anything related "in any way" to the main agreement because there was "much" more than a mere reference to AAA rules.[37] In responding to a question of who should decide arbitrability, Judge McMahon relied on *Henry Schein Inc. v. Archer & White Sale Inc*.[38] and ruled that arbitrators have the exclusive right to determine whether a dispute is within the scope of an arbitration agreement when the agreement so states "clearly and unmistakably."[39] Judge McMahon concluded that the bankruptcy court "should have sent the entire matter — all [10] claims — to the AAA for arbitration" with the "first order of business ... [being] for the arbitrator to decide which, if any, of the claims are arbitrable."[40]

Yellow Court Applies a Presumption for Arbitration that Bankruptcy May Overcome

In *In re Yellow Corp*., the bankruptcy court applied a presumption for arbitration when deciding whether a debtor must arbitrate claims for withdrawal liability under multiemployer pension plans.[41] When Yellow filed for chapter 11 protection in August 2023, it was part of several multiemployer pension plans regulated by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA),[42] which holds employers liable for withdrawing from pension plans.[43] After Yellow withdrew from about 20 plans, Central States Pension Fund (the largest of the plans) filed 24 claims for withdrawal liability of $7.8 billion and 21 claims for other liabilities.[44]

The debtors objected to the multiemployer pension plan claims.[45] In response, the multiemployer pension plans filed motions to compel arbitration of their claims despite the bankruptcy stay under § 1401 of the MPPAA.[46] The debtors opposed the motions, arguing that the bankruptcy claims-allowance process should resolve liability.

Allowance or disallowance of these claims would have an enormous impact on the residual equity value of the debtors and all stakeholders. The size and significance of the claims may have been outcome-determinative.

Construing the motions to compel as motions for stay relief, Hon. **Craig Goldblatt** of the U.S. Bankruptcy Court for the District of Delaware questioned whether the MPPAA mandated arbitration of withdrawal liabilities.[47] He did not lift the stay and concluded that no such mandate to arbitrate existed.[48]

In resolving the statutory conflict, the court recognized that § 502(b) of the Bankruptcy Code states that the "[bankruptcy] court ... shall determine the amount of such claim" when an objection is filed to a proof of claim.[49] However, the MPPAA provided that each party may file a claim to calculate contractual liability, although if there is a dispute, it "shall be resolved through arbitration."[50] An MPPAA arbitration differs from one under the FAA and allows review by a district court under a standard of review like an ordinary appeal.[51]

Harmonizing Both Statutes Is How to Resolve Statutory Conflicts

Confronted with "conflicting federal statutes," the challenge began.[52] Judge Goldblatt said that "courts are 'not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both.'"[53] This approach suggests abandoning notions around the supremacy of bankruptcy.

Harmonizing conflicting statutes that both use "shall" to direct disputes "cannot both be given full effect."[54] To resolve the conflict, Judge Goldblatt had to reconcile the Bankruptcy Code's mandate for bankruptcy courts to resolve claim objections and the MPPAA's mandate to subject the labor dispute to arbitration. Addressing a line of FAA and bankruptcy cases, Judge Goldblatt mused about the utility of

26 *Id.*
27 *Id.* at 664.
28 *Id.*
29 *Id.* at 666.
30 *In re Celsius Network LLC*, No. 22-10964, 2024 WL 1719633, at *3 (S.D.N.Y. April 22, 2024).
31 *Id.* at *6.
32 *Id.*
33 *Id.* at *5.
34 *Id.* at *6.
35 *Id.*
36 *Id.*
37 *Id.*
38 *Henry Schein Inc. v. Archer & White Sale Inc.*, 586 U.S. 63 (2019).
39 *Celsius* at *7.
40 *Id.* at *8.
41 *In re Yellow Corp.*, Case No. 23-11069, 2024 WL 1313308 (Bankr. D. Del. March 27, 2024).
42 29 U.S.C. §§ 1381-1461.
43 *In re Yellow Corp.*, 2024 WL 1313308, at *1.
44 *Id.* at *2.
45 *Id.* at *4.
46 *Id.*
47 *Id.* at *6.
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.* at *1, 15.
52 *Id.* at *6.
53 *Id.* at *7 (quoting *Epic Sys.*, 584 U.S. at 510).
54 *Id.* at *2.

multi-factor balancing tests and decided that the conflicting statutes could be "best reconciled by treating the arbitration provisions as creating a *presumption* in favor of stay relief to permit the claim to be liquidated in arbitration."[55] He provided that the presumption "can be overcome in appropriate circumstances where the imperatives of the bankruptcy case so require."[56] The bankruptcy court found that "the unusual circumstances of this case counsel strongly in favor of resolving the withdrawal-liability disputes through the claims-allowance process, notwithstanding the presumption in favor of arbitration."[57]

First, Judge Goldblatt was not convinced that arbitrators would allow other parties, such as other funds, to participate in the arbitration.[58] Second, the bankruptcy court noted that it had scheduled a trial in four months to address this material and important dispute and "conclude[d] that the risk of delay [in arbitration] counsels strongly in favor of denying stay relief."[59] Third, unlike an FAA arbitration, an arbitration under the MPPAA labor law is subject to judicial review, thus an "arbitrator's determination would be reviewed by a district court in essentially the same manner in which this Court's claims allowance decision would be reviewed."[60] Lastly, the bankruptcy court observed that an arbitrator would be disqualified by federal law from entertaining the debtor's planned attacks on Pension Benefit Guaranty Corp. regulations.[61] Although "the presumption in favor of arbitration is one that should lightly be overcome," the court opted to keep the withdrawal-liability dispute in the bankruptcy claims-allowance process.[62]

Conclusion

While the Supreme Court has not squarely addressed the intersection of bankruptcy law and the FAA, given the Court's ongoing interest in cases involving the FAA generally, future arbitration decisions will offer clarity until an on-point decision occurs. However, as shown herein, resolving the tension between arbitration and bankruptcy requires a balanced approach to harmonizing the two legal frameworks.

Because courts must grapple with reconciling both federal statutes, those dealing with arbitration agreements should continue to evaluate their agreements for enforceability and conflicts with bankruptcy rules and policies. By understanding how courts reconcile these conflicts, parties may better navigate the intersection of arbitration and bankruptcy. abi

Reprinted with permission from the ABI Journal, Vol. XLIII, No. 8, August 2024.

55 *Id.* at *11 (emphasis in original).
56 *Id.* at *13.
57 *Id.*
58 *Id.* at *14.
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.* at *15.

Arbitration and Insolvency under Korean Law: Recent Developments and Practical Issues

Judge Jung Hwa YOU
Judge for Cross-Border Cooperation and Coordination
Seoul Bankruptcy Court

Under Korean law, the relationship between arbitration and insolvency reflects a structural tension between party autonomy and collective insolvency administration.

The Korean Arbitration Act strongly protects the validity and enforceability of arbitration agreements. At the same time, the Debtor Rehabilitation and Bankruptcy Act (DRBA) establishes a mandatory collective process designed to centralise claims, preserve the debtor's estate, and ensure equal treatment of creditors.

Recent Korean court practice confirms that the commencement of rehabilitation or bankruptcy proceedings does not automatically invalidate arbitration agreements. Korean courts have in some cases dismissed claim determination proceedings where a valid arbitration agreement existed, recognising that participation in insolvency proceedings and the forum for dispute resolution may remain separate issues.

At the same time, Korean practice remains flexible rather than fully settled. In certain cases, rehabilitation courts have allowed arbitration to proceed first while effectively suspending their own claim determination process, taking into account procedural efficiency, complexity, and timing.

Important practical issues remain unresolved. These include the treatment of pending foreign arbitrations at the time insolvency proceedings commence, and the procedural integration of arbitral awards into rehabilitation claim determination structures.

In practice, the Korean approach may be characterised as pragmatic and case-sensitive. It seeks to preserve both the efficiency of collective insolvency proceedings and the parties' contractual autonomy in arbitration, while leaving significant issues for future judicial and legislative development.

INSOL INTERNATIONAL

VALUATION FOR **INSOL**VENCY PRACTITIONERS

By Prof. Jan Adriaanse, Dr. Marc Broekema RV and Dr. Sebastiaan van den Berg

1. Introduction

Insolvency and restructuring proceedings play a crucial role in preserving economic stability by allowing financially distressed entities to reorganise and recover, while also addressing the interests of creditors. Central to these proceedings is the concept of valuation, a critical determinant of the distribution of assets, the feasibility of reorganisation plans, and the success of the process of restructuring or liquidating the business.

The information which follows presents the outcomes of a survey study among members from INSOL International conducted to assess the significance of valuation, as well as practitioners' experiences within insolvency and restructuring contexts. As economic uncertainties have been heightened by recent global events, understanding the perspectives of professionals, practitioners, and academics on the role of valuation is essential for informed decision-making in specific cases and, more in general, policy formulation.

Valuation in insolvency and restructuring scenarios is a multifaceted undertaking, involving intricate assessments of both tangible and intangible assets, legal considerations, and financial projections. The survey's findings delve into the situations where valuations are most important, as well as the factors that influence valuation determinations. It presents most common methodologies employed, as well as practical experiences from practitioners in the field, and the challenges encountered.

The survey's methodology is presented, including the questions posed, an examination of the perspectives of the practitioners and a review the complexities surrounding valuation. Finally, a conclusion is reached by offering a comprehensive understanding of the role of valuation in achieving equitable outcomes in insolvency and restructuring proceedings.

2. Survey results

2.1 Basic information

The respondents of the survey were INSOL International members globally. The partial or full responses of 161 respondents were included in the analysis while 96 respondents completed the survey in full. The first five questions pertain to basic information: name, gender, nationality, occupation, and years of experience. The majority of the respondents were male (n = 114), a smaller number were female (n = 43), and three respondents preferred not to answer. The respondents were based in 48 different countries. The pool of respondents consisted mainly of accountants (n = 54), lawyers (n = 66) and insolvency practitioners (n = 18). The amount of experience possessed by respondents was generally high. There was a group with less than 5 years of experience (n = 9), a group with 5-10 years of experience (n = 28), a group with 10-20 years of experience (n = 51), and finally, a group with more than 20 years of experience (n = 71).

Table 1

What is your gender?

Answer Choices	Responses	
Male	71.25%	114
Female	26.88%	43
Prefer not to say	1.88%	3

Table 2

What is your occupation?

Answer Choices	Responses	
Accountant	33.54%	54
Lawyer	40.99%	66
Insolvency Practitioner (not a qualified accountant or lawyer)	11.18%	18

Financier	2,48%	4
Academic	3.73%	6
Current (or retired) member of the judiciary	1.86%	3
Regulator	0.00%	0
Student	0.00%	0
Other (please specify)	6.21%	10

Table 3

Years of experience in the Restructuring & Insolvency industry

Answer Choices	Responses	
<5 years	5.66%	9
5-10 years	17.61%	28
10-20 years	32.08%	51
>20 years	44.65%	71

2.2 Introductory questions

Following the generic questions regarding participants' backgrounds, some introductory questions on the topic were posed. Respondents were asked about the general percentage of Restructuring and Insolvency (R&I) cases they deal with where valuation is a point of discussion. This question did not yield a consistent answer, yet slightly more than half of the respondents (n = 57) indicated that valuation is a point of discussion in 50% or more of cases.

Next, an enquiry was made to identify the R&I situations in which the need for a valuation report is most common. Respondents could choose multiple answers and had the option of '*Foreclosure of security rights (e.g. share or asset pledge enforcements)*', '*Fraudulent conveyance actions (clawback actions) or analysis, restructuring plan proceedings (e.g. claim allowance or cram down situations)*', '*Asset disposal / distribution*' or '*Other*'. The answers revealed that the need for valuation reports primarily exists in situations of foreclosure of security rights, restructuring plan proceedings, and asset disposal / distribution. These were chosen by 52.5%, 69.3%, and 74.3% of the respondents, respectively. Fraudulent conveyance actions or analysis were chosen by 24.8% of the respondents. Additionally, 8.9% of the respondents selected other situations, with the most significant ones being: business and asset sales, distressed M&A transactions, financial (out of court) restructuring, sale of the business as a going concern, and solvency assessment.

The survey responses also indicated which valuation methodologies generally are used for valuation reports. Respondents could choose multiple methodologies. Ultimately, 65.4% of the respondents opted for Discounted Cash Flow (DCF) model. The cost approach (asset valuation) was the next most chosen methodology, selected by 54.5% of the respondents. 34.6% of the respondents chose multiples, 24.8% opted for the adjusted present value model, and 5% selected other. Under 'other', the comparison approach, net asset value, fair market value vs. forced liquidation value, and fire sale were mentioned.

Table 4

What is the percentage of R&I cases - that you personally deal with - in which valuation is a topic of discussion?

Answer Choices	Responses	
<10%	8.91%	9
10-25%	15.84%	16
25-50%	18.81%	19
50-75%	22.77%	23
75-95%	19.80%	20
100%	13.86%	14

Table 5

In what kind of R&I situations do you experience the need for valuation reports most frequently? [Select as many as apply]

Answer Choices	Responses	
Foreclosure of security rights (e.g. share or asset pledge enforcements)	52.48%	53
Fraudulent conveyance actions (clawback actions) or analysis	24.75%	25
Restructuring plan proceedings (e.g. claim allowance or cram down situations)	69.31%	70
Asset disposal / distribution	74.26%	75
Other (please specify)	8.91%	9

Table 6

What are the main valuation methodologies that are generally applied in R&I cases? [Select a maximum of 2]

Answer Choices	Responses	
Discounted Cash Flow model	65.35%	66
Relative approach (multiples)	34.65%	35
Adjusted Present Value model	24.75%	25
Cost Approach (Asset Valuation)	54.46%	55
Other (please specify)	4.95%	5

2.3 Discussion points and personal experience

Following the introductory questions, more substantive questions were presented, focused on personal experiences. The first question posed was in connection with the most common points of discussion regarding valuation in an R&I setting. Respondents were directed to choose a maximum of three from the following eight options: '*Forecasting of future cash flows (DCF)*', '*Discount rate (e.g. WACC)*', '*Terminal / continuing value approach, business / turnaround plan as input for the valuation*', '*Distribution of value (i.e. the proposal towards creditors, in or out of the money)*', '*Biases among valuators*', '*Interest rate on debt*', and *'Other'*.

Here, four points stood out prominently. According to the respondents, the most common points of discussion revolved around (1) forecasting of future cash flows (59.4%), (2) discount rate (43.6%), (3) the business / turnaround plan as input for the valuation (55.5%), and (4) distribution of value (48.5%).

Respondents were also queried about the utilisation of the discount rate by valuators in scenarios where the DCF-model is applied. They were given three choices: '*The valuator often adjusts the discount rate (WACC or Cost of Equity) (either upwards or downwards) to account for industry specific risks'*, *'The valuator generally does not adjust the discount rate (WACC or Cost of Equity) (either upwards or downwards) to account for industry specific risks'* and *'I don't know whether the valuator adjusts the discount rate (WACC or Cost of Equity) to account for industry specific risks)'*.

46.5% of the respondents chose the first option. 12.1% of the respondents chose the second.

Respondents were then asked about their experiences with business valuators in court, with four options to select from: '*Valuators hired by a specific party are generally completely independent, and this is verified by court'*, *'Many valuators design their testimony strategically to provide maximum support for the client. Courts catch these attempts and take them into account in the process'*, *'Many valuators design their testimony strategically to provide maximum support for the client. Courts do not catch these attempts*' and *'Other'*.

36.7% of the respondents chose the first option. This seems to confirm that in many instances there seem to be real independent valuators, and the independence is verified by the court. However, 51% of the answers confirm there seem to be non-independent valuators who design their testimony strategically to support their client. This appears problematic. Shouldn't valuators be completely independent to be as fair as possible?

There were also some notable comments made regarding the independence of the valuators. One respondent commented: '*Often times competing valuations, each strategically designed to provide maximum support for their client / outcome, come before Court. Courts are often not as experienced in assessing these valuations and will leave them in a predicament whereby they do not know which valuation to attribute merit to*.' Another respondent comments about how their country handles these difficulties: '*Valuators are hired by the administrator and they have to be completely independent. This is up to the Administrator to confirm, not the court*.'

Table 7

What are the typical discussion points that arise with respect to valuation in a R&I setting? [Select up to 3 most common]

Answer Choices	Responses	
Forecasting of future cash flows (DCF)	59.41%	60
Discount rate (e.g. WACC)	43.56%	44
Terminal / continuing value approach	23.76%	24
Business / turnaround plan as input for the valuation	55.45%	56
Distribution of value (i.e. the proposal towards creditors (in or out of the money))	48.51%	49
Biases among valuators	17.82%	18
Interest rate on debt	7.92%	8
Other (please specify)	7.92%	8

Table 8

In situations where the DCF-model is applied

Answer Choices	Responses	
The valuator often adjusts the discount rate (WACC or Cost of Equity) (either upwards or downwards) to account for industry specific risks	46.46%	46
The valuator generally does not adjust the discount rate (WACC or Cost of Equity) (either upwards or downwards) to account for industry specific risks	12.12%	12
I don't know whether the valuator adjusts the discount rate (WACC or Cost of Equity) to account for industry specific risks	41.41%	41

Table 9

In my experience

Answer Choices	Responses	
Valuators hired by a specific party are generally completely independent, and this is verified by the court	36.73%	36
Many valuators design their testimony strategically to provide maximum support for the client. Courts catch these attempts and take them into account in the process	15.31%	15
Many valuators design their testimony strategically to provide maximum support for the client. Courts do not catch these attempts	36.73%	36
Other (please specify)	11.22%	11

2.4 Advice regarding valuations disputes and challenges related to valuation reports

What should judges do in case of non-independent valuators, discussions about the 'right' valuation methodology or any other valuation disputes? For this question, respondents were given the choice between the following options: '*Appoint mediators to resolve conflict among experts*', '*require conflicting experts to meet and draft a joint report setting out points of agreement and disagreement*', '*Let experts testify together at trial, and ask each other questions (so-called hot-tubbing)*' or '*Apply "final-offer arbitration", whereby the court announces that it will select the*

valuation report that is most persuasive and adopt in its entirety (thereby hoping that experts will be less extreme or biased in their reports)'.

18% of the respondents considered that judges should appoint a mediator to resolve the conflict among experts. 33% of the respondents opted for a less extensive option, and also the most popular one, which is that the court should order the experts to sit down together and outline in a report where they agree and disagree. Just over a quarter of the respondents (26%) believed that the judges should subpoena valuation experts as witnesses so that they can subsequently question each other. Finally, 23% of the respondents believed that judges should apply "final-offer arbitration" to obtain a less biased result.

As follow-up, respondents were asked about their opinion on 'market testing' in R&I cases, i.e. to reach out to potential investors and ask what they believe the company is worth. They were able to select as many as apply and were given the following options to choose from: '*Market testing, or making use of market measures (i.e. evidence from transactions conducted in a market setting) of the valuation analysis should be mandatory*', '*Market testing is of limited value because the market parties can be selected randomly and can lack information*' and '*Market testing might be flawed, but can still provide an indication of reorganisation value*'.

80.2% of the respondents perceived that market testing, even though it might be flawed, can still provide an indication of reorganisation value. This shows that market testing can be a helpful tool for valuators, but not the primary methodology to value assets. 30.2% of the respondents viewed market testing, or making use of market measures of the valuation analysis should be mandatory for all valuators. Also, 21.9% thought that market value is of limited value, due to the fact that market parties can be selected randomly and that they can lack information. These results seem to indicate that market testing is mostly seen as a secondary tool to give an indication of the value of assets.

An important issue for insolvency lawyers and judges might be that they often lack an economic and or valuation background, which can make working with valuation reports challenging. Hence, a follow up question concerned the most challenging aspects related to reading, understanding, and using a valuation report. Respondents could choose up to three of the following answers: '*A lack of good narrative to underpin the financial outcome*', '*Use of jargon that is difficult to understand*', '*Randomness of figures and numbers being used*', '*A lack of consistency in valuation reporting*', '*A lack of general readability*', '*Valuators never give a price*', '*Always only a value range*', and '*The costs involved with valuations versus the benefits*'.

The most popular options were: (1) a lack of good narrative to underpin the financial outcome (52.5%), (2) randomness of figures and numbers being used (40.6%) and (3) a lack of consistency in valuation reporting (38.6%).

Table 10

In case of a valuation dispute, bankruptcy judges should: [select your most preferred option]

Answer Choices	Responses	
Appoint mediators to resolve conflict among experts	18.00%	18
Require conflicting experts to meet and draft a joint report setting out points of agreement and disagreement	33.00%	33
Let experts testify together at trial, and ask each other questions (so-called hot-tubbing)	26.00%	26
Apply "final-offer arbitration", whereby the court announces that it will select the valuation report that is most persuasive and adopt in its entirety (thereby hoping that experts will be less extreme or biased in their reports)	23.00%	23

Table 11

In my opinion: [select as many as apply]

Answer Choices	Responses	
Market testing, or making use of market measures (i.e. evidence from transactions conducted in a market setting) of the valuation analysis should be mandatory	30.21%	29
Market testing is of limited value because the market parties can be selected randomly and can lack information	21.88%	21
Market testing might be flawed, but can still provide an indication of reorganisation value	80.21%	77

Table 12

The most challenging aspects associated with reading, understanding, and using a valuation report in an R&I case are: [select a maximum of 3]

Answer Choices	Responses	
A lack of good narrative to underpin the financial outcome	52.48%	53
Use of jargon that is difficult to understand	29.70%	30
Randomness of figures and numbers being used	40.59%	41
A lack of consistency in valuation reporting	38.61%	39
A lack of general readability	18.81%	19
Valuators never give a price, always only a value range	19.80%	20
The costs involved with valuations versus the benefits	25.74%	26

2.5 Quality of evaluation in R&I cases

Respondents were also asked to provide a rating for the (general) quality of valuations in R&I cases and explain their rating. The average rating was 5.63 on a scale of 1 - 10. One respondent gave a rating of just 3 with the following explanation: "*There are significant biases that come into play when considering valuations in R&I. The range of options is so wide, that it results in an equally wide range of values. Similar to Venture Capital deals, much of the valuation can be disconnected from the cold facts in the R&I case*." Another respondent also gave a rating of 3 and explicitly mentioned that the lack of independence is a significant issue. Someone else went further and stated the following: *'The valuators are biased. The specific situation of the debtor is ignored. Valuations are in the majority of the cases "theoretical", when the valuation assets are put for sale, the price realized is mostly 15 to 25% of the valuation assigned by the valuator. Valuators try to value all and every kind of asset as there is dearth of industry segment valuers*.' This respondent rated the quality of valuations in R&I cases a (low point) 1.

There were also respondents who seemed more positive. A respondent marked the general quality an 8 and stated: *'Valuations have generally provided sufficient guidance to aid parties to make an informed decision. Debated valuations also serve that purpose by generating different views*.' Another respondent even marked a (high point) 10 and gave a logical explanation: *'Reports tend to be good as the preparers know they might be tested in court.'* Last but not least, a respondent gave the quality and 8 and says: *'Most valuers used in high value cases are well-experienced professionals with a good understanding of the relevant markets and a reputation to uphold*.'

The final part of the survey concerned an open answer question focusing on enhancing valuation practice in R&I cases. Respondents were asked to give general advice to valuators. Answers that seem indicative for the general feeling among respondents were:

- *'Be completely independent. Undertake the valuations as if it were for them.'*
- *'Be objective, be able to justify your methodology, reasoning and conclusions by reference to objective standards and evidence.'*

- *'Avoid conflicts of interest, act with integrity and be transparent.'*

- *'Provide more background in respect of the key bases and rationale underpinning the valuations.'*

- *'Brief explanation of the methodology with the use of plain language and use of visuals. Thorough explanation of the rational logic that supports the determined value'.*

- *'Adequately support assumptions and criteria with factual information. Avoid letting client bias affect credibility and reasonability of valuation.'*

Another interesting piece of advice was summoned as follows: '*Stimulate their professional bodies to consider to adopt guidelines and best practices on contacting each other if valuators of 'opposing' parties, or those clients themselves, disagree on valuation aspects. I have not considered this point thoroughly, do not know whether such guidelines and best practices already exist and see limitations in relation to confidentiality but believe it may accelerate discussions.'*

3. Conclusion

Valuation serves as an important element in R&I cases influencing the distribution of assets, the viability of reorganisation strategies, and the overall success of the process. The insights gathered from this survey, encompassing responses from a diverse pool of INSOL International members worldwide, shed an interesting light on the valuation landscape within this context.

First and foremost, the survey revealed that valuation in insolvency and restructuring scenarios is indeed a multifaceted endeavour. The results emphasise the role of valuation in navigating complex financial landscapes. Regarding valuation methodologies, the discounted cash flow model emerged as the dominant choice among respondents. However, a variety of approaches were recognised, highlighting the adaptability required in the field. The most common discussion points concerning valuation centred around:

(1) forecasting future cash flows;

(2) determining the discount rate;

(3) incorporating business / turnaround plans into valuations; and

(4) addressing the distribution of value among creditors.

These findings indeed emphasise the considerations and potential contentious issues in valuation processes. One notable concern raised by many respondents in the survey was the lack of independence of valuators. While some respondents expressed confidence in the independence of valuators, others highlighted instances where valuations may be influenced by strategic considerations, potentially impacting the fairness of outcomes. Respondents also offered suggestions on how judges could address disputes related to valuation, with a preference for requiring conflicting experts to collaborate on joint reports outlining points of agreement and disagreement. Market testing, despite its potential limitations, was viewed favourably by a significant portion of respondents as a valuable tool to provide an extra indication of reorganisation value. Finally, challenges in reading, understanding, and using valuation reports were identified, with respondents pointing to narrative deficiencies, complex jargon, and inconsistency in reporting as common hurdles.

In summary, this survey shows the complexities and different perspectives surrounding valuation in R&I cases. It underscores the need for ongoing dialogue, transparency, and professional standards in this domain. By addressing the challenges identified and implementing the valuable advice provided by respondents, stakeholders can work towards achieving more equitable and informed outcomes and with that limit 'valuation fights' that often hinder successful negotiations in R&I cases.

DUBLIN

IWIRC 2026
Leadership Summit &
International Conference

Insolvency Trends in Retail, Hospitality and Construction

Sharon Barrett, Kroll
Anna Delaud, Sullivan & Cromwell LLP
Pooja Mahajan, Chandhiok & Mahajan
Allyson Smith, Willkie Farr & Gallagher LLP

UK context: 23,938 company insolvencies in England & Wales (2025) · Source: UK Insolvency Service, December 2025

Scene Setting:
Common Themes Across the Three Sectors

INTRODUCTION

Different operating models; common pressure points on liquidity, margins and stakeholder behaviour.

1 Cost & margin compression

Inflation, labour, energy, food/materials and financing costs continue to compress margins.

2 Liquidity before revenue

Headline demand can stay resilient while working capital, supplier terms, rent arrears, tax liabilities or project payments deteriorate first.

3 Protectionism & supply chains

Tariffs, trade friction and sourcing volatility affect cost, inventory availability and project delivery.

4 Stakeholder strategy

Lenders, landlords, suppliers, new money providers and other stakeholders determine whether distress becomes consensual restructuring, sale or formal insolvency.

BY THE NUMBERS

UK **23,938**

company insolvencies in E&W (2025) 18,525 CVLs, 3,730 compulsory, 1,495 admins, 186 CVAs.

EU **+8.6%**

Q4 2025 QoQ rise in accommodation & food service bankruptcies — largest sectoral increase (overall +2.5%).

US **+7.1%**

business bankruptcy filings, 12 months to 31 Dec 2025 (23,107 → 24,737); total filings +11%.

Sources: UK Insolvency Service, Company Insolvency Statistics, Dec 2025 and Mar 2026. Eurostat, 'Business registrations and bankruptcies up in Q4 2025', 16 Feb 2026. Administrative Office of the U.S. Courts, 'Bankruptcy Filings Rise 11 Percent', 4 Feb 2026.

Retail: supplier confidence, lease portfolios and cross-border tools

SECTOR 1 · RETAIL

Retail distress remains elevated — increasingly about liquidity, supplier confidence, inventory availability and rent burden, and whether the operator can fund a proper operational reset.

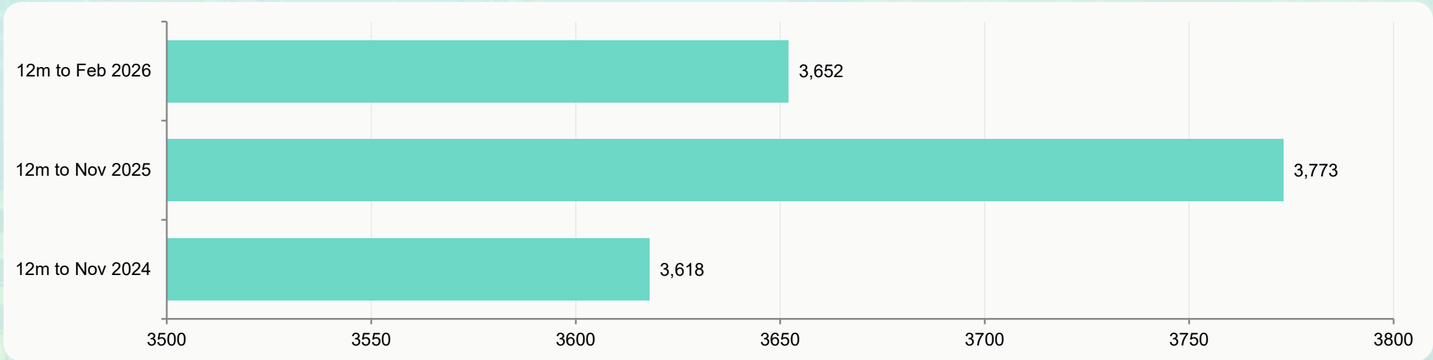
3,652

UK wholesale & retail trade insolvencies rolling 12 months to Feb 2026 (16% of captured-industry cases)

CASE LENS

- Saks (US): liquidity deterioration, vendor inventory withholding; Chapter 11 (Jan 2026) following Aug 2025 LMT.
- Claire's UK&Ireland: insolvency after failed sale; FX, tariffs, labour and transport pressures.
- Fossil: US Chapter 15 recognition of an English restructuring plan.

UK INSOLVENCIES — WHOLESALE & RETAIL TRADE



DISCUSSION POINTS

Q1 Is the main driver weak demand, rent burden, supplier pressure, tariffs— or a failed retail proposition?

Q2 Where does distress crystallise first?

Sources: UK Insolvency Service, Company Insolvency Statistics, Mar 2026, Dec 2025 and Dec 2024. S&P Global Ratings, CreditWeek (2026). Begbies Traynor (28 Jul 2025). Global Restructuring Review (12 Nov 2025).

Hospitality: demand has returned, but margins remain fragile

SECTOR 2 · HOSPITALITY

A margin-compression story: labour, food, energy, rent and business rates can erode liquidity even where customer demand appears to have recovered.

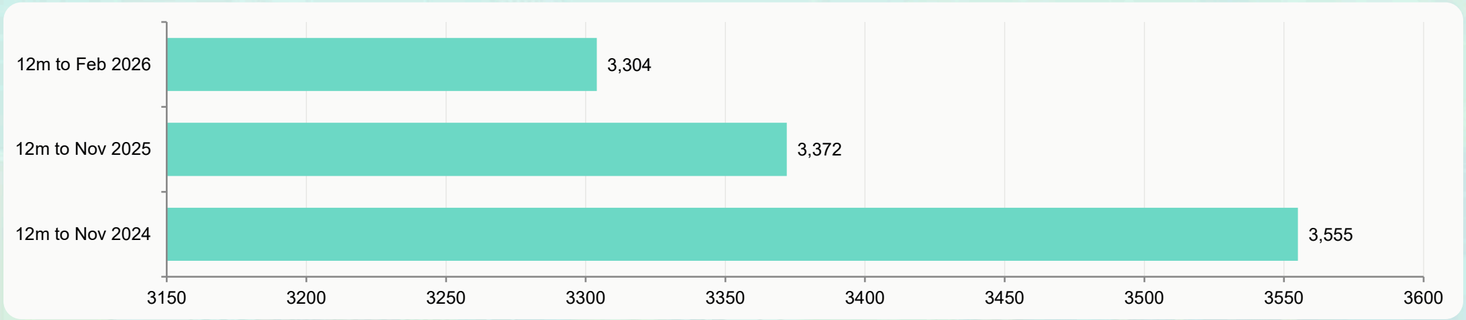
3,304

UK accommodation & food service insolvencies 12 months to Feb 2026 (14% of captured-industry cases)

CASE LENS

- EU: accommodation & food service bankruptcy declarations rose 8.6% in Q4 2025 — largest sectoral increase (Eurostat).
- US: average restaurant food and labour costs each up 35% over five years; pre-tax margin only 3–5% (NRA).
- US/UK: PizzaExpress (Chapter 11 and UK RP).
- 2024 US Chapter 11s: TGI Fridays, Buca di Beppo, Rubio's, Tijuana Flats — labour, traffic, delivery fees, rent roll-offs.

UK INSOLVENCIES — ACCOUNTS & FOOD SERVICE



DISCUSSION POINTS

Q1 Why are we still seeing distress when demand has seeminglystabilised?

Q2 What is the earliest warning sign: arrears, reduced supplier credit, rent default, weak bookings or lender fatigue? What are the key areas for lenders looking at hospitality credits today?

Q3 Which US restaurant Chapter 11 lessons (pricing, closures, delivery commissions, rent) translate best abroad?

Sources: UK Insolvency Service, Mar 2026, Dec 2025 and Dec 2024. Eurostat (16 Feb 2026). National Restaurant Association; Restaurant Dive (5 Dec 2024).

Construction: payment chains, project risk and hidden exposures

SECTOR 3 · CONSTRUCTION

Less a demand-only story; more about risk allocation, fixed-price exposure, payment chains, project disputes, working-capital resilience and counterparty failure.

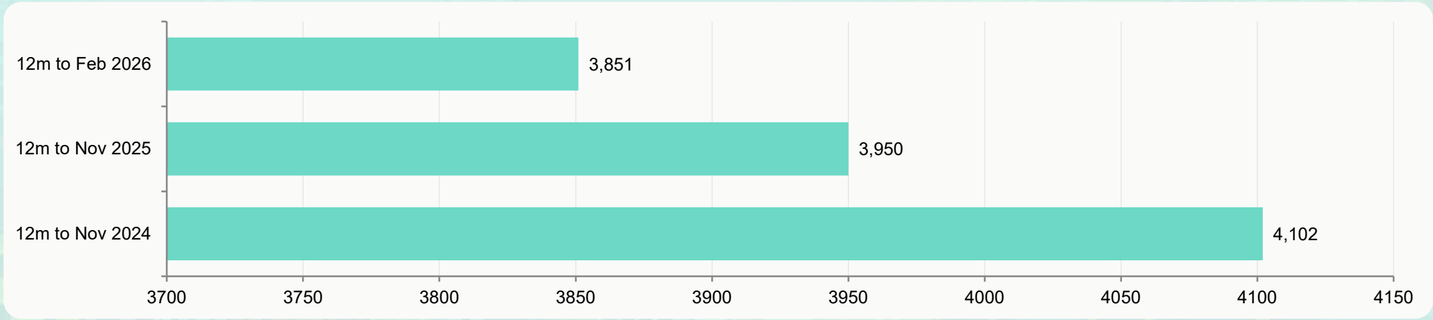
3,851

UK construction insolvencies – 12 months to Feb 2026 (17% — the largest sector by volume)

CASE LENS

- UK 2024: new work £140.7bn (+1.4%); public +6.7%, private –0.7%; OPI +3.4% YoY (ONS).
- US AGC 2025: 62% cite labour costs, 59% labour supply, 54% materials as top concerns.
- Zachry Holdings (US) Chapter 11 (2024): Golden Pass LNG reportedly $2.4bn over budget.

UK INSOLVENCIES — CONSTRUCTION



MODERATED PANEL PROMPTS

Q1 What re the key reasons for failures in the construction industry and why is it the largest sector by insolvency volume?

Q2 When a contractor or sub-contractor fails mid -project, what best preserves value and maintains site continuity?

Q3 Are fixed-price contracts becoming a form of unpriced contingent exposure?

Sources: UK Insolvency Service, Mar 2026, Dec 2025 and Dec 2024. ONS, Construction statistics, Great Britain: 2024. AGC of America / Sage, 2025 Construction Hiring and Business Outlook. Construction Dive (29 Jul 2024).

Questions?

IWIRC Flagship International Conference 2026
Insolvency Trends in Retail, Hospitality, and Construction

1. **Introductions and Scene Setting**
    a. Introduction to insolvency volumes per sector:
        i. In Europe, Q4 2025 EU bankruptcies rose by 2.5% quarter over quarter, with accommodation and food services up 8.6%, while construction was also among the sectors showing an increase.
        ii. In the U.S., business petitions rose 6% in 2025 to 24,039, while commercial chapter 11 filings accelerated sharply at the start of 2026
    b. Filing trends and how legal/restructuring tools are being used in response
    c. Structural shift in insolvency – recent trends vs. historical and cyclical trends

2. **Common Themes Among Sectors**
    a. Different business models operating in the same macro-economic landscape, with inflation, interest rates, input costs, consumer behavior, and protectionist trade environment hitting liquidity before reported revenue:
    b. High fixed costs collide with margin compression and fragile working capital
    c. Insolvency drivers: tariffs, shipping, supply-chain, inventory gaps, covenant headroom, price-escalation or pass-through rights
    d. Lender behavior and use of A&Es/LMEs rather than new money
    e. Restructuring playbook for each industry: footprint rationalization, debt equitization, franchise conversion, and other strategies

3. **Retail Insolvency Trends**
    a. From COVID to today: key influences for this sector include physical store footprints, cost-of-living, trade tariffs, freight disruption, and inventory/supply-chain issues
    b. Use of restructuring tools for survival and/or transformation
    c. Domestic businesses: use of Company Voluntary Arrangements vs. UK Restructuring Plans to rationalize lease portfolios
    d. Cross-border: insolvency considerations across multiple jurisdictions, including key challenges in coordinating processes
    e. Mini case studies:
        i. *In re Claire's Holdings LLC, et al.*, Case No. 25-11454 in the United States Bankruptcy Court for the District of Delaware
        ii. *In re Saks Global Enterprises LLC, et al.*, Case No. 26-90103 in the United States Bankruptcy Court for the Southern District of Texas
        iii. TGJones UK Restructuring Plan and landlord-focused cram down
        iv. Canadian CCAA vs. UK Administration (Mall-Based Context)

4. **Hospitality Insolvency Trends**
    a. Key influences: fixed-costs, labor shortages, consumer confidence, raising energy costs, wage inflation (national living wage), business rates, and seasonal cash flow
    b. Demand has returned post-COVID, but margin structures are fragile.
    c. Why are we still seeing distress when demand has returned?
    d. Mini case studies:
        i. *In re PizzaExpress Financing 2 PLC*, Case No. 20-34868 in the United States Bankruptcy Court for the Southern District of Texas, and related UK Restructuring Plan
        ii. *In re Hooters of America, LLC, et al.*, Case No. 25-80078 in the United States Bankruptcy Court for the Northern District of Texas
        iii. *In re Red Lobster Management LLC, et al.*, Case No. 24-02486 in the United States Bankruptcy Court for the Middle District of Florida
        iv. *In re TGI Friday's Inc., et al.*, Case No. 24-80069 in the United States Bankruptcy Court for the Northern District of Texas

5. **Construction Insolvency Trends**
    a. Key influences: fixed-price contracts, sub-contractor insolvency, tariffs on building materials, input costs, cash flow fragility, volume decline, high leverage, and a tighter construction credit environment
    b. In the EU as a whole, construction of buildings was down 7.2% year over year. The Eurozone construction PMI stood at 44.6 in March 2026, in contraction for four consecutive years.
    c. Upcoming maturity walls 2027-2029

6. **International Overview**
    a. Cross-border tools: are we seeing more forum shopping? Formal process a last resort?
    b. Tariff/trade friction: how does this tie into liquidity pressure and insolvency risk in practice?