"RESCUE CULTURE" 40 YEARS ON: WHERE ARE WE NOW?



3 HARE COURT

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Introduction

On 27 January 1977, a committee chaired by Sir Kenneth Cork was tasked with carrying out a 'fundamental and exhaustive reappraisal of all aspects of the insolvency laws of England and Wales'.[1] The resulting 1982 Cork Report revolutionised the field and laid the groundwork for the Insolvency Act 1986 (the 1986 Act). One aim of the report was 'to devise an insolvency code which will facilitate rescues rather than accelerate failures', thus embedding a commitment to 'rescue culture' in English law.[2]

Whether this policy has succeeded in practice is open to question. The past forty years suggest two conclusions. First, 'rescue' is often honoured in the breach as liquidation 'remains the key player in corporate insolvency law'.[3] Second, reforms prioritising rescue have produced uneven results, as the examples discussed in this article show.

Administration Enters The Scene

Before 1986 there was no collective process for appointing an external manager to hold and dispose of assets for the benefit of the company and its general body of creditors.[4] Action by individual creditors could also derail reorganisation. The 1986 Act introduced company administration to address these deficiencies and promote rescue.[5]

Administration's promise was initially stunted, until the near-total abolition of administrative receivership by the Enterprise Act 2002.[6] Previously, lenders with global security could appoint administrative receivers to pre-empt administration, largely eliminating any prospect of rescue.[7]

These reforms were driven in particular by the government's view that banks had failed to support viable businesses during the recession of the early 1990s, and had instead appointed receivers to protect their own interests.[8] The changes curbed

1 Review Committee on Insolvency Law and Practice, Insolvency Law and Practice: Report of the Review Committee (Cmnd 8558, 1982), 1 (Cork Report).

2 Cork Report (n 1), paragraph 1502; Philip R Wood, Principles of International Insolvency (2nd edn, Sweet & Maxwell 2007) 175; Roy Goode and Ewan McKendrick, Goode and McKendrick on Commercial Law (6th edn, Penguin 2021), paragraph 31.11.

3 David Milman, 'Forty Years of Corporate Insolvency Law' (2023) 15 Contemporary Issues in Law 5, 10.

4 Goode and McKendrick (n 2), paragraph 31.56.

5 Ibid, paragraph 31.08.

6 The limited exceptions allowing for the appointment of an administrative receiver are found in Chapter IV of Part III of the 1986 Act.

7 Kristin van Zwieten, 'Mid-Crisis Restructuring Law Reform in the United Kingdom' (2023) 24 European Business Organization Law Review 287, 289–290.

8 Mike Stevenson, 'The Enterprise Bill 2002 – a move towards a rescue culture?' (2002) 18 Tolley's Insolvency Law and Practice 155.

secured creditors' ability to '"scoop the jackpot" with little regard to other stakeholders'.[9] Section 248 of the Enterprise Act 2002 also overhauled administration, by introducing among other things schedule B1 to the 1986 Act, improving efficiency and confirming administration as the main statutory alternative to liquidation.

Commencing in 2011, the 1986 Act was modified to include 'special' administration regimes for insolvent businesses that provide a statutory or critical public service, such as financial services institutions, payment systems providers, utility suppliers and critical infrastructure companies. Depending on the applicable regime, special administrations include specific statutory objectives. For example, in respect of insolvent financial services institutions the regime provides for the protection of client money and the maintenance of market stability, while for relevant infrastructure entities the regimes provide for the preservation of the ongoing supply of critical services.

The special administration regime for financial institutions was first used in October 2011 following the insolvency of MF Global UK Limited. The special administration process led to protracted litigation culminating in the court approving the distribution of over US$1 billion in pooled client money and assets to creditors and claimants.



The 2020 Reforms: Some (Very) Brief Background

The Corporate Insolvency and Governance Act 2020 (CIGA) delivered the most significant reforms to English insolvency law since the Enterprise Act 2002.[10] Covid-19 caused an immediate collapse in demand across many sectors and created uncertainty about future demand.[11] That emergency accelerated reform. The Corporate Insolvency and Governance Bill was introduced on 20 May 2020 and received royal assent on 25 June 2020.[12] CIGA's three permanent reforms, discussed below, concern moratoria, supply contracts and restructuring plans.

Part A1 Moratoria: A Missed Opportunity?

CIGA inserted Part A1 into the 1986 Act, creating a new 'freestanding' moratorium, so called because it is not tied to any particular insolvency process and may not lead to one.[13] Its purpose is to give a company breathing space to explore rescue and restructuring options free from creditor action, as explained by in Minor Hotel Group MEA DMCC v Dymant.[14]

In this respect the Part A1 moratorium resembles Chapter 11 of the US Bankruptcy Code.[15] Chapter 11's efficacy stems in part from its 'debtor-in-possession' model, in which management is not displaced by an external insolvency practitioner. A monitoring officer may be appointed, but with far narrower powers than under a management-displacement regime, and such appointments are rare.[16] This keeps control with those who know the business, and reduces the friction involved in handing the reins to an outsider. Finally, and perhaps most significantly, section 362(a) of title 11 of the United States Code provides a broadly drawn automatic stay on litigation upon filing, subject to limited exemptions at section 362(b).

The payment holiday under a Part A1 moratorium is far narrower. It offers a reprieve mainly from what can be conveniently described as 'trade debts'.[17] Various pre-moratorium debts remain payable during the moratorium, including potentially substantial liabilities 'arising under a contract or other instrument involving financial services'.[18] To be effective, the company must persuade creditors to support the moratorium.[19] If a creditor insists on payment and the company cannot pay from cash reserves, realise assets immediately or secure immediate third-party funding, that will likely be fatal.[20]

In such circumstances, the intended breathing space is largely illusory and the use case for Part A1 moratoria as a rescue tool is limited. Low uptake is therefore unsurprising.[21] It has also been observed that Part A1 departs significantly from the pre-pandemic plan, which was premised on lenders being prevented from enforcing

9 Milman (n 3), 10.

10 Gerard McCormack, 'Permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid-19' (2020) INSOL International 2.

11 World Bank Group, INSOL International and International Association of Insolvency Regulators, 'From Hibernation to Revitalisation: Analysis of Insolvency COVID-19 Response Measures and their Wind-Down' (Report, May 2022), 15.

12 van Zwieten (n 7), 303.

13 McCormack (n 10), 4.

14 Minor Hotel Group MEA DMCC v Dymant [2022] EWHC 340 (Ch), [6], per Sir Alastair Norris.

15 Canadian Pacific Forest Products Ltd v JD Irving Ltd (1995) 66 F 3d 1436 (6th Cir) 1442.

16 McCormack (n 10), 10–12.

17 Ibid, 6.

18 Section A18 and schedule ZA2 to the 1986 Act.

19 Jennifer Payne, 'An Assessment of the UK Restructuring Moratorium' (2021) Lloyd's Maritime and Commercial Law Quarterly 454, 464–465.

20 Minor Hotel Group MEA DMCC v Dymant [2022] EWHC 340 (Ch), [33], per Sir Alastair Norris.

21 Peter Walton and Lézelle Jacobs, Corporate Insolvency and Governance Act 2020 – Final Evaluation Report November 2022 (Insolvency Service 2022).

pre-commencement arrears.[22] This suggests that, in a Part A1 moratorium 'it is financial creditors, rather than the debtor, that are "in the driving seat"'. [23]



The New Regulation of Supply Contracts: A Bridge Too Far?

An ipso facto clause is triggered by an insolvency event (or likely insolvency) and terminates or modifies a contract regardless of breach, automatically or on election, typically in executory contracts. The US Bankruptcy Code enables debtors to 'cherry-pick' beneficial contracts, while section 365(e) of title 11 of the United States Code invalidates ipso facto clauses.[24]

Party autonomy is central to English commercial law but historically created difficulties in insolvency. Before 1986, a supplier of essential goods could force payment of pre-liquidation debts by threatening to cut off supply unless arrears were paid or guaranteed personally by the liquidator.[25] This allowed suppliers to jump the queue by demanding priority payment in exchange for continued supply. Section 233 of the 1986 Act prohibited such 'ransom' payments and the Insolvency (Protection of Essential Supplies) Order 2015 broadened this regime, introducing section 233A.

Sections 233 and 233A made only a limited statutory inroad in favour of rescue, confined to 'essential' supplies. Where a company depended on an essential supply outside the statutory list, section 233A offered no help. Further, suppliers could demand a personal guarantee from the office-holder for post-insolvency charges, failing which termination rights revived, often fatal for companies with limited liquidity.

Section 233B of the 1986 Act marks a major shift towards debtor protection. It applies where a company enters a relevant insolvency procedure and covers all contracts for the supply of goods and services, not just 'essential' supplies. This narrows the gap with the US position, though US law remains broader (covering all executory contracts). Section 233B disables clauses that purport to terminate or cause 'any other thing' to take place after entry into an insolvency procedure, whether automatic or at the supplier's election.[26]

Suppliers are also prevented from exercising termination rights triggered by pre-insolvency events where the entitlement arose before the start of the insolvency period.[27] This went beyond what was trailed before enactment. In 2018, the government's plan targeted termination rights arising by reason of entry into an insolvency process, not rights unconnected to insolvency or the company's finances.[28]

The explanatory notes to CIGA state that the policy intention was, among other things, to maintain the supply of goods and services to distressed companies.[29] But if the policy aim is 'rescue', why is the prohibition engaged in liquidation (where rescue is not possible) or in an administration where rescue is not being pursued? The policy does not clearly justify encouraging differential treatment between creditors in those contexts.[30]

Practically, to disapply the prohibition the supplier must obtain consent from the office-holder or the company, or apply to court at its own cost and satisfy the court that continued supply would 'cause the supplier hardship'. The government suggested this would be a 'safeguard of last resort' with a high bar.[31] Section 233B also raises interpretive issues likely to be litigated, including the scope of 'supply of goods or services', extra-territorial effect and whether the regime is prospective or retrospective.

In short, increased debtor protection has been achieved, at least in part, by making continued supply the default for distressed companies. However, this may do so in a way that leaves some suppliers themselves in an 'unnecessarily precarious' position.[32]

22 van Zwieten (n 7), 303.

23 Ibid, 303.

24 McCormack (n 10), 28.

25 Wellworth Cash & Carry (North Shields) Ltd v North Eastern Electricity Board (1986) 2 BCC 99265; David Milman and Peter Bailey (eds), Sealy & Milman: Annotated Guide to the Insolvency Legislation (28th edn, Sweet & Maxwell 2025), commentary on section 233.

26 Section 233B(3)(a)–(b) of the 1986 Act.

27 Section 233B(4) and (8) of the 1986 Act.

28 van Zwieten (n 7), 305.

29 Explanatory Notes to the Corporate Insolvency and Governance Act 2020, paragraph 39.

30 Schedule 4ZZA to the 1986 Act.

31 Lorraine Conway, Commons Library analysis of the Corporate Insolvency and Governance Bill [HC 2019–21] (House of Commons Library Briefing Paper 8922, 2020) 30.

32 van Zwieten (n 7), 306.



Part 26A Restructuring Plans: New Vistas, New Battlegrounds

CIGA introduced Part 26A of the Companies Act 2006, creating restructuring plans. It applies where section 901A(1)–(3) are satisfied. Condition A requires actual or likely financial difficulties affecting (or potentially affecting) the company's ability to carry on business as a going concern. Condition B requires (a) a proposed compromise or arrangement with creditors, members or any class of either and (b) that the purpose is to 'eliminate, reduce or prevent, or mitigate the effect of' the financial difficulties in section 901A(2).

Under section 901C, the court may order meetings of creditors or classes of creditors. It may also exclude creditors with no 'genuine economic interest in the company' under section 901C(4).

The court's power to sanction a Part 26A plan is in section 901F(1). In outline, if at least 75 per cent in value of a class of creditors or members present and voting at the section 901C meeting agree the compromise or arrangement, the court may sanction it following an application.

A key distinction between Part 26A and the traditional scheme of arrangement under Part 26 is the 'cross-class cram-down'. Under section 901G, the court has a discretion to sanction a plan even where one or more classes fail to approve it by the requisite majority, provided two conditions are met.

Condition A requires the court to be satisfied that, if the plan were sanctioned under section 901F, members of any dissenting class 'would be no worse off than they would be in the event of the relevant alternative'. Section 901G(4) defines the 'relevant alternative' as whatever the court considers would be most likely to occur absent sanction. The 'no worse off' test was considered extensively in Re Petrofac Ltd.[33]

Condition B requires approval by at least 75 per cent in value of a class of creditors or members present and voting at the section 901C meeting who would receive a payment, or have a genuine economic interest, in the relevant alternative.

The recent decision in Re Poundstretcher Ltd reaffirms the court's willingness to sanction restructuring plans in which the interests of some classes of creditors may be materially impaired, in circumstances in which it is established that the insolvency alternative would result in a worse outcome for impacted creditors.[34]

The statutory scheme contains multiple potential points for the wily litigator acting for the plan proponent or a dissenting creditor, some of which are discussed below.

Subject to eligibility, a distressed company can seek a Part A1 moratorium while preparing a restructuring proposal. Otherwise, where appropriate, companies may be well advised to apply to stay individual creditor claims under CPR 3.1(2) or stay enforcement of a judgment under CPR 83.7(4)(a) pending consideration of a plan.[35]



A commonly used way to engage the court's Part 26A (and Part 26) jurisdiction is to insert a newly incorporated English company as substitute or co-obligor for a debt, without assets to meet the assumed liabilities (and therefore in 'financial difficulty'). This approach has been sanctioned at first instance. In Re AGPS Bondco plc, Snowden LJ considered but did not decide whether the artificiality of this technique could justify refusing sanction.[36] Its use may attract tactical challenge from dissenting creditors.

Under section 901C(4), creditors or shareholders with no 'genuine economic interest' can be excluded from voting, giving plan proponents a route to neutralise those who are 'out of the money'. The use of this power has generated intense disputes at convening and sanction hearings. When and how to deploy section 901C(4) to maximum effect, and how to respond, will be critical.[37]

As 'cross-class cram-down' can bind dissenting creditors, it creates greater scope (and sometimes greater incentive) for contested litigation than a traditional scheme of arrangement. That can increase costs and delay implementation of the reorganisation needed to rescue the business. But where creditors will not agree, companies may have little choice but to incur the expense and litigation risk.

Conclusion

The commitment to 'rescue culture' is embedded in English insolvency law, but its development to date is uneven. The Enterprise Act 2002 entrenched administration as the main formal alternative to liquidation. CIGA's three reforms show ambition, but also the limits of progress without a wholesale commitment to 'rescue' of the kind seen elsewhere. The use case for Part A1 moratoria is narrow because financial services liabilities remain payable during the moratorium. Section 233B, by contrast, arguably goes too far in negating ipso facto clauses while providing for differential creditor treatment that is sometimes hard to explain. Part 26A restructuring plans, though potentially costly, add a powerful tool in the event of creditor dissent: 'cross-class cram-down'.

To keep pace with changing conditions, further reform will doubtless be considered in future, and the pendulum may swing further towards 'rescue' if international trends continue along their current trajectories. In any event, difficult questions of policy and principle will remain.

33 Re Petrofac Ltd [2025] EWCA Civ 821.
34 Re Poundstretcher Ltd [2026] EWHC 1438 (Ch).
35 Riverside CREM 3 Ltd v Virgin Active Health Clubs Ltd [2021] EWHC 746 (Ch).
36 Re AGPS Bondco plc [2024] EWCA Civ 24 [33]–[34], per Snowden LJ.
37 Re Smile Telecoms Holdings Ltd [2022] EWHC 387 (Ch).