# Corporate Rescue in the United Kingdom: Past, Present and Future Reforms

by

Paul J. Omar
of Gray's Inn, Barrister

and

Jennifer Gant
Lecturer, Nottingham Law School

## I - Introduction[1][2]

Recent discussion in Australia in respect of insolvency has focussed on the role of the law in encouraging innovation. Concern has been expressed for some time about the effectiveness of the voluntary administration regime in terms of providing an effective and efficient means of saving companies in financial distress. Although most often comparisons have been made with the bankruptcy regime in the United States, it is worthwhile considering also the position in the United Kingdom. That jurisdiction's regime not only has provided the heritage for current Australian law but it also provides a point of comparison given the institutional and regulatory similarities.

In the United Kingdom, the modern law relating to both personal and corporate insolvency is currently contained in the Insolvency Act 1986.[3] Although of some vintage now, the IA 1986 was the governmental response to the report and recommendations of a multi-disciplinary committee tasked with reviewing insolvency law and practice in the late 1970s.[4] The Cork Report influenced the implementation of the IA 1986, which brought together in one statute both personal bankruptcy and corporate insolvency and at the same time effected a radical reconstruction of the law relating to all forms of insolvency, including the introduction of the concept of corporate rescue through the use of two new procedures: the corporate voluntary arrangement[5] and administration. During the early years following the passage of the IA

[1] This paper is based on a presentation titled "Corporate Rescue in the UK: Ten Years after the Enterprise Act 2002 Reforms", given by Paul Omar to the Colloquium on "Benchmarking Voluntary Administration on its 20-Year Anniversary" organised by the Bankruptcy and Insolvency Law Scholarship Unit at the Adelaide Law School, Adelaide, Australia on 26 July 2013. Paul wishes to thank Professors David Brown and Christopher Symes for the kind invitation to address the colloquium and the members of the audience for the number of useful criticisms and feedback they have provided. Paul also wishes to note the assistance of Jennifer Gant in helping to finalise this paper, for which a co-author credit is well deserved. Any errors or omissions remain, however, Paul's own.
[2] A portion of this introduction was taken from Chapter 4 of Jennifer Gant's PhD Thesis, titled *"Rescue Before a Fall: an Anglo-French Analysis of the Balance between Business Rescue and Employment Protection in the UK and France",* submitted at the Nottingham Law School in January 2016.
[3] Insolvency Act 1986 (1986 c. 45) ("IA 1986").
[4] K. Cork, Sir (Chairman), *Insolvency Law and Practice: Report of the Review Committee* (Cmnd. 8558) (HMSO, 1982) ("Cork Report").
[5] Commonly referred to by its acronym: "CVA".

1986, a number of issues were observed relating to the underutilisation of the new procedures in comparison to receivership, which was often preferred by principal creditors. This led to reforms at the turn of the millennium with the aim of making the rescue procedures more efficient and beneficial to all manner of debtors and providing greater benefits to unsecured creditors.

The reforms, though enacted through the Insolvency Act 2000 and Enterprise Act 2002,[6] were brought into force at the same time over 2003-2004, constituting a radical change to almost every part of the insolvency framework. The two texts have not been the end of reforms, however, nor should they be. As the effects of globalisation and recession have affected business practices and regulation over the period since the promulgation of the reforms, so too must insolvency systems evolve to meet the changing paradigm of economic recovery. In so doing, modern insolvency systems with effective forms of corporate rescue can play their part in recovering from the financial crisis by helping to create an environment where business failure and associated unemployment can be mitigated. This article seeks to chart the direction of reforms in the post-2003 era and to offer, in light of the analysis of the success (or otherwise) of these reforms, a prediction of the future direction of the law.

## II – The Cork Era

### *A Time before Cork*

27 January 1977 is the key date in the history of insolvency law in the United Kingdom. It was on this day that an interdisciplinary committee[7] was formed, presided over by Kenneth Cork (who later became Sir Kenneth Cork).[8] The committee's task was to report on the state of insolvency law in the United Kingdom and to propose recommendations for its improvement by way of legislative reform. Before delving into the outcomes of the Cork Committee, there are some preliminary observations worthy of note. Sir Kenneth Cork's father was engaged in the accountancy profession, a career also undertaken by his son, who founded an accountancy firm Cork Gully (still existing in practice) in the 1960s. The firm's primary activity was, apart from the incidental provision of accountancy services to clients, the restructuring of enterprises and negotiation of deeds of arrangement between a debtor company and its creditors. These deeds of arrangement had the aim of contractually binding parties to a debt settlement agreement.[9]

During the 1960s and 1970s, the insolvency of a company would normally lead to the appointment by the main secured creditor of a firm of accountants with the task of recovering debts through receivership, a procedure created sometime in the 18th century and which was based on an old equitable

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[6] Insolvency Act 2000 (2000 c. 39) ("IA 2000"); Enterprise Act 2002 (2002 c. 40) ("EA 2002").
[7] Commonly referred to as the "Cork Committee".
[8] The title was conferred on Sir Kenneth during his tenure as Lord Mayor of London in 1978-79 at the same time as his presidency of the committee.
[9] The history of the firm and its most prominent clients is discussed in Sir Kenneth Cork's excellent autobiography, titled *Cork on Cork* (Macmillan, 1988).

remedy in real property law. The receivership procedure was seen as a means whereby a creditor benefitting from a debt secured under a floating charge could appoint a receiver to take control of the assets subject to the security, effectively taking control of the company. The receiver's primary objective was to realise his client's security by applying funds released in the liquidation of an equivalent value of assets of the debtor company.[10] A receiver's fundamental role was to do his utmost to assure the settlement of the company's debts in this way. Once the receiver had completed his task, the directors then resumed control of the enterprise in whatever state it was in. Companies rarely survived this procedure, as its aim was to maximise returns to creditors, in particular the principal creditor holding the floating charge, rather than having any concern for the survival of the company. At that time, insolvency work was normally provided by accountants, although there were some solicitors who provided advice to clients about how to avoid worst case scenarios and their legal consequences. There was however, no regulated profession of insolvency practitioners in the United Kingdom as there had been in France since 1967.

While the United Kingdom insolvency system was not completely obsolete at the time that the Cork Committee was formed, the system as it existed was not adapted to the needs of modern business. With the exception of some small alterations, the law had not been the object of any serious revision for a number of years. The law on personal bankruptcy was still governed by the Bankruptcy Act 1914,[11] applying only to England and Wales. Scotland and Northern Ireland had their own personal bankruptcy regimes, though there were significant similarities between the three systems. Corporate insolvency was governed by a unified regime under the Companies Act 1948,[12] applying to the entirety of the United Kingdom. This Act provided procedures for voluntary liquidation initiated by the company and/or its shareholders as well as an involuntary liquidation initiated by creditors.[13] There was also a procedure available whereby a compromise or arrangement could be made between the company and its creditors, in similar form to the informal deed of arrangement and a precursor to the modern Scheme of Arrangement.[14] There was, however, nothing akin to procedures aimed at corporate recovery or rehabilitation that had been adopted elsewhere. Some early models are known, such as judicial management in the South African Companies Act 1926,[15] *redressement judiciaire* in the French Decree of 20 May 1955,[16] later replaced by the Law of 13 July 1967[17] or the Australian procedure of judicial management, introduced in 1961. Growing consciousness of the need for a rescue-oriented procedure meant, however, that the advent in 1978 of the

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[10] V. Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge University Press, 2009), at 20.
[11] Bankruptcy Act 1914 (4 & 5 Geo. V c. 59). For an insight into the development of insolvency, especially in the formative period of the 19th century, see V. Lester, *Victorian Insolvency* (Oxford University Press, 1995).
[12] Companies Act 1948 (1948 c. 38).
[13] Ibid., Part V.
[14] Found today in the Companies Act 2006 (2006 c. 46), sections 895-901.
[15] Companies Act (Act no. 46 of 1926).
[16] Decree no. 55-583 of 20 May 1955.
[17] Law no. 67-563 of 13 July 1967.

best known recovery model in the form of Chapter 11 of the Bankruptcy Code of the United States ("Chapter 11") greatly interested the Cork Committee, as the debate in anticipation of its creation and subsequent enactment coincided with the beginning of the committee's deliberations.[18]

*Demand for Reform: the* Raison d'être *of the Cork Committee*

Apart from the relative void of a modern bankruptcy and insolvency system, the reason for the formation of the Cork Committee was above all due to the serious economic situation in the 1970s. In retrospect, the crisis of the 1970s, in the wake of rising petrol prices, political uncertainty and serious industrial conflicts, was one of the most significant for the survival of the country, more so than was the crisis of the 1990s or indeed the recent global financial crisis beginning in 2008, whose consequences are still being felt today. This financial crisis, like many others, was precipitated by a housing bubble. Just before the crisis of the 1970s, companies in certain sectors had continued to experience growth, particularly in the construction industry, a factor that suggested that perhaps the country's economy was indeed strong enough to survive the frequent regime changes (and consequent shifts in economic policy) between the Labour and Conservative Parties that had occurred throughout the 1960s and early 1970s.

In 1972, however, during the hearing of the bankruptcy of John Poulson, a well-known architect, the Government was implicated in a scandal in which Poulson was accused of bribing and corrupting local councillors, officials and civil servants in order to win construction contracts in cities throughout the country. The scandal went to the heart of the government as it emerged that the then Home Secretary Reginald Maudling was involved in Poulson's business. Maudling was forced to resign from government when it emerged that he had joined the boards of three of Poulson's companies between 1967 and 1969, for which his compensation was a large annual covenant in favour of his wife's charitable project, the *Adeline Genée Theatre*. Maudling was accused of receiving Poulson's "gifts" at his hearing, these being viewed by the court as corrupt payments.[19]

This scandalous episode illuminated the then common corrupt business practices and overall absence of an ethical code in the business world, along with the resulting inadequacy of consumer protection.[20] The "phoenix syndrome" thrived off the fraudulent sales of companies by directors complicit with liquidators in a cyclical process of company creation in anticipation of their failure, the purpose of which was personal enrichment to the disadvantage of company creditors.[21] Even the most reputed accountants managing the accounts of large respected companies in receivership were

[18] For a comparative contextual history behind the adoption of Chapter 11 and the IA 1986, see B. Carruthers and T. Halliday, *Rescuing Business* (Oxford University Press, 1998).
[19] J. Tribe, "The Poulson Affair: Corruption and the Role of Bankruptcy Law Public Examinations in the Early 1970s" (2010) 21 *Kings Law Journal* 495, at 499, 501 and 503.
[20] Even as recently as 2009, the Farepak scandal saw small investors who put small sums throughout the year aside in order to save for their Christmas festivities, lose all of their savings.
[21] Finch, above note 10, at 174.

viewed unfavourably. The perception was that they did not care about the position of employees, entrepreneurs, who were subject to extremely high (even punitive) taxation rates in the 1970s, or indeed other stakeholders who could potentially be adversely affected by a receivership (inevitably followed by a liquidation) in favour of a principal creditor. Given that the profession was not well organised and that only the members of regulated accountancy firms generally had a professional status subject to ethical guidelines, "cowboy"[22] liquidators existed who would take hold of small businesses and enrich themselves by selling the assets of the company under their care in return for commission. Some of these cowboys even stalked companies that they knew were struggling financially, offering them a form of contrived liquidation with the aim of enriching themselves with the funds released from asset sales at the expense of the company and its creditors.

After numerous revelations into the disgraceful state of business ethics (or lack thereof) in the press, there were demands for reforms. Many accountants and liquidators believed that a reform to the law was necessary in order to sanitise their tarnished professional reputation. They were driven to call for the formation of an organisation that could represent the entire profession. Thus, the Insolvency Practitioners Association ("IPA"), originally founded in 1961, was revived in order to create a forum within which practitioners could debate the problems confronting them in practice. It was not, however, the only (or indeed official) body representing practitioners to the Government. It was against the background of scandal and concern for the effects on consumers that the Labour Government of the day initiated the formation of the Cork Committee in 1977. Other concerns included the lack of regulation and associated destruction of the reputation of the professionals involved. Such was the need for change that the Government was motivated to act at the insistence of both professionals and their clients, as well as the trade unions. The change in government two years later did not undermine the objective set for the Cork Committee, as the Conservatives shared the ambition of reviving the economy and strengthening the business sector. They too recognised that reforms in the area of insolvency law would assist in attaining this objective.

*The Work of the Cork Committee*

Like many committees charged with a specific mandate, the Cork Committee included non-governmental representatives, including lawyers (notably Muir Hunter QC, who had played a role in the Poulson affair as Crown Prosecutor), a former trade unionist, a banker, the director of a large corporation, the secretary of a cooperative association (representing consumers) as well as two judges. Curiously, the Cork Committee included only one accountant: Sir Kenneth Cork himself. However, it was also assisted by two working groups constituted by professionals, notably of accountants and academics. The work of the Cork Committee was thus not only emblazoned with the hallmark of neutrality, but was also rich in the solid practical experience necessary for creating a practical framework for reform. Its work resulted in the publication of an intermediate report and a principal report on the reform needs for

[22] Also known as "ambulance chasers", a practice first highlighted in the United States.

national law, the latter appearing in 1982. Sir Kenneth Cork had, of course, some experience in the development of proposals for reform as he had also contributed to the 1976 Report on the Draft EEC Convention on Insolvency Proceedings with regard to the implications for its adoption by the United Kingdom.[23]

The report of 1982 was long and exhaustive, even to the point of containing, according to hearsay, a chapter on “extra-terrestrial insolvency”, fortunately absent from the final report. There were literally hundreds of recommendations included in its text. The Cork Committee had reviewed national law in the light of comparative law, referring to many examples of developments elsewhere, including those that provided for a new “rescue culture” that had been highlighted by the implementation of Chapter 11 in the United States. Because of the level of detail in the report, which commented on the law and also gave a historical perspective on its evolution, it quickly acquired a near-mythic status. It became the source of inspiration for numerous reform committees throughout the world, such as the Harmer Committee that reviewed the law in Australia in 1988. Even today, it is quite normal to refer to the contents of the Cork Report in discussions on insolvency law reform.

A positive response from government to the recommendations of the Cork Report came during the 1984-85 parliamentary session when the opportunity came for the rapid adoption of a text that would accompany the concomitant overhaul of company law. In fact, both pieces of legislation: the Companies Act 1985[24] and the Insolvency Act 1985[25] were adopted within the same Parliamentary session. The latter text, however, was not on the statute book for long, being quickly replaced by a new version, the IA 1986, which constituted a quasi-reordering of the insolvency provisions of both texts. The 1986 text thus gathered together the collective insolvency procedures recently introduced into law as well as the liquidation procedures set out in the Companies Act 1985. The IA 1986 also constituted the codification of corporate insolvency law and personal bankruptcy together (including the English and Scottish procedures pertaining to individuals). However, it was only following the adoption of the Scotland Act 1998 and the devolution of power to the new parliament in Edinburgh that Scotland began to overhaul its own personal insolvency regime.[26] Today, corporate insolvency procedures remain reserved to the Parliament in London, until such time that Scotland is able to gain independence, of course.

*The Results of the Cork Report and the Rescue Dynamic*

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[23] *Report of the Advisory Committee on the EEC Draft Bankruptcy Convention* (Cmnd. 6602) (HMSO, 1976). The convention was adopted in 1995 but never entered into force. Its terms were substantially replicated in the European Insolvency Regulation (EU Regulation No. 1346 of 2002) (“EIR”), itself recently reformed in 2015 (EU Regulation No. 2015/848) (“Recast EIR”).

[24] Companies Act 1985 (1985 c. 6).

[25] Insolvency Act 1985 (1985 c. 65).

[26] D. McKenzie Skene, “Plus Ça Change, Plus C’est La Même Chose? The Reform of Bankruptcy Law in Scotland” (2015) 3 *Nottingham Insolvency and Business Law e-Journal* 285.

It was the conclusion of the Cork Report that the United Kingdom insolvency system lacked any real method for rescuing companies in financial difficulties. While true that there were some procedures in existence that might meet some of the objectives of rescue, they were admittedly not fit for modern purposes and the fundamental aims of corporate rescue. Receivership, which could be used to reorganise companies, did not guarantee rescue, rather the majority of procedures resulted in the consignment of companies to oblivion. The Cork Committee also considered that the receivership procedure was of limited use as it required the prior existence of a floating charge in order to appoint a receiver. Some companies could be saved under the scheme of arrangement process available in the Companies Act 1948 (and its later successors of 1985 and 2006),[27] but this procedure was time-consuming, requiring the involvement of specialists, the preparation of meticulous (and costly) documentation as well as a minimum of two court dates. Furthermore, at the time, it was felt that the scheme procedure was not designed for businesses at the threshold of insolvency.[28]

As such, the methodology of the Cork Committee was to embark on a comparative analysis to draw inspiration from the experience in a number of different jurisdictions which had, by then, implemented procedures with the aim of providing mechanisms by which companies could be rescued. As examples of this process, the Cork Committee pointed to Chapter 11 in the United States, which procedure was the perceived forerunner of corporate rescue. It was seen as providing a broad and flexible mechanism with nearly limitless possibilities for the reorganisation and ultimate rescue of the debtor company. The debtor remained in possession of the company and a stay was established to disallow the issue of any claims on the company assets. The final objective of a Chapter 11 procedure was stated as being the creation and approval of a plan agreed with the debtor's creditors to modify and restructure the debtor's obligations and, if appropriate, to grant the debtor a discharge.[29] However, though the Chapter 11 model was quite seductive to those tasked with reforming British insolvency law, it incorporated a practice that the United Kingdom did not wish to copy: it left the debtor in charge of its business rather than replacing him with an official of some description. The "debtor in possession" model was generally unacceptable to the British perspective on insolvency because of the distrust it was thought likely to engender.[30]

Other jurisdictions were also considered. In fact, despite the place of honour often granted to the United States for its innovative rescue regime, importantly for European considerations, France was actually the first to embrace rescue. The reforms in the Law of 1967 introduced a procedure of judicial settlement

[27] Companies Act 1985, sections 425-427 (now Companies Act 2006, sections 994-996).
[28] Recent practice, certainly since *Re Drax Holdings Ltd; Re Inpower Ltd* [2004] 1 BCLC 10, appears to sanction the use of schemes close to, if not over, the insolvency threshold.
[29] O. Lobo (ed), *World Insolvency Systems: A Comparative Study* (Thompson Reuters, 2009), at 693-800.
[30] Chapter 11 as a model has never entirely gone away from the reformists' psyche, for which see J. Tribe, "The Extension of Small Company Voluntary Arrangements: A Response to the Conservative Party's Corporate Restructuring Proposals", Chapter 8 in P. Omar (ed), *International Insolvency Law: Reforms and Challenges* (Ashgate, 2013) (193-228).

that provided for a composition with creditors that allowed the company to continue to function. It was, however, a court led procedure, a feature which distinguished it from the American regime.[31] South Africa had also had reorganisation procedures in place since the Companies Act 1973 (the legislative successor to the 1926 forerunner), which provided a mechanism for corporate reorganisation by which company debt could be compromised with creditors and/or a moratorium on enforcement put in place. The text gave a number of options through which a reorganisation might be achieved.[32] The observed experience of these procedures among a variety of jurisdictions, reflected in the Cork Report, showed that rescue could be a viable proposition for quite a few companies.

## III - The Insolvency Act 1986 and its Rescue Paradigm[33]

*Introduction*

The IA 1986 embraced the objective of promoting recovery by the introduction of two new rescue procedures: the CVA, covering companies prior to formal insolvency, and administration for companies closer to insolvency. In its deliberations over how to approach corporate rescue from a United Kingdom perspective, although the Cork Committee considered a number of pre-existing procedures as examples of regimes that they might wish to emulate in some way, the inspiration for the two new recovery procedures were found in models that already existed within the law. Thus, the structural foundations for the CVA and administration were found respectively in a simplified and stripped down version of the scheme of arrangement and receivership. Nonetheless, there was also a conceptual difference between the two procedures: the CVA attempted to provide a framework for the type of debtor-creditor negotiation that was similar to an informal workout, while administration was more formal a process directed by an administrator under the overall supervision of the court. Both procedures lay on a path of increasing formality, with the CVA upstream and administration further downstream. In addition, unlike receivership, administration was in nature a collective procedure, thus serving the interests of all creditors, both secured and unsecured, rather than just the principal secured creditor. Rejecting the debtor-in-possession model, what the two procedures had in common was the fact that, though the right of initiation could rest with the debtor, they were both managed exclusively by an insolvency practitioner.

*The CVA*[34]

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[31] A. Sorenson and P. Omar, *Corporate Rescue Procedures in France* (Kluwer Law, 1996), at 24-26.

[32] See South African Companies Act (Act 61 of 1973), section 311 for the scheme of compromise and sections 427-440 for judicial management, both of which can function as reorganisation procedures. These were also said to be the inspiration for the procedure known as Official Management appearing in the Australian Uniform Companies Acts 1961.

[33] Please note that reference in this section to the IA 1986 is to the version prior to the enactment of the IA 2000 and EA 2002.

[34] IA 1986, Part I (sections 1-6).

The Cork Report stated that its intention with regard to the CVA procedure was that it should be an inexpensive, quick and efficient method of dealing with financial difficulties without engaging in formal procedures.[35] It centred on companies dealing with creditors and negotiating terms with them under the guidance of an insolvency practitioner, arriving at an agreement in compromise through which debts could be settled and the company could survive. The CVA often involved a partial waiver of the debts due with a rescheduling of repayments. The CVA was available to the directors of a company that was in financial difficulty, but was not necessarily insolvent. Directors could apply to the court for the approval of CVA proposals.[36] The objective of the proposals submitted to the court had to be a compromise or settlement of claims by creditors. A qualified insolvency practitioner had to be nominated to oversee the arrangement[37] and to provide a report within 28 days to the court containing the proposals of the CVA and whether or not he believed it should be put to shareholders and creditors.[38] The court could then give permission to summon meetings with shareholders and creditors in order to consider the terms of the arrangement.[39] However, proposals that affected preferential or secured creditors could not be considered without the express consent of those affected.[40] In the event that the plan was accepted by the requisite majority, it could then be imposed upon all creditors, whether signatories to the plan or not.[41] However, challenges could also be brought by shareholders or creditors on the grounds that the CVA unfairly prejudiced their interests or that there had been some material irregularity in the meetings.[42] The practitioner also had the duty to oversee the debtor during the execution of the recovery plan, though the duration of the practitioner's oversight was often quite short in practice.

*Administration*[43]

The Cork Report had emphasised the need for a new rescue procedure that would allow the business to continue, thus preserving employment, trading and the generation of profits, as well as the eventual satisfaction of most of the company's creditors.[44] This ethos resulted in the second rescue procedure, administration, which was more formal and introduced a suspension of debt enforcement proceedings under the protection of a moratorium. The administration procedure required that it would lead to one of four possible outcomes, specified in the administration order, though there was no hierarchy or priority applied to these objectives. The outcomes included the survival of the company or a part of it as a going concern;[45] the

[35] Cork Report, at paragraph 204.
[36] IA 1986, section 1(1).
[37] Ibid, section 1(2).
[38] Ibid, section 2(2); Insolvency Rules 1986, rule 1.7.
[39] Ibid, section 3.
[40] Ibid, section 4(3)-(4).
[41] Otherwise known as a "cram-down" (ibid. section 5).
[42] Ibid., section 6.
[43] Ibid., sections 8-27 (Part II).
[44] Cork Report, in Chapter 9.
[45] IA 1986, section 8(3)(a).

approval of a CVA;[46] the sanctioning of a scheme of arrangement;[47] or for some more advantageous realisation of the company's property than might be attained in a straight liquidation.[48] Administration was viewed as leading somewhere, not just to the company being rescued but also, because the administrator undertook the management of the company, to some other potentially rehabilitative procedure being successfully implemented.

The production of a report by the administrator was usual to help the court decide whether an administration order should be granted.[49] The application for an order was then made by company, directors or creditors.[50] The effect of the order was to introduce a moratorium with any administrative receivers being required to vacate office.[51] Upon the granting of the order, a qualified insolvency practitioner would be appointed as administrator,[52] endowed with wide powers[53] to investigate and ascertain the company's affairs.[54] The administrator took managerial control of the company and dealt with its assets as he saw necessary to the performance of his duty. The administrator was required to publish a statement of his proposals[55] to be considered at a creditors' meeting.[56] Creditors were also entitled to information from the administrator through a creditors' committee until they were eventually presented with the recovery plan.[57] Although the adoption of the recovery plan was normally approved during a meeting called by the administrator, dissenting shareholders or creditors could seek remedies in court in the event that they perceived that they had suffered unfair prejudice in the plan.[58] The implementation of the recovery plan generally led to the administrator selling the whole of the business or as individual business units as a going concern with the shell (plus any remainder) being wound up, following which the administrator was discharged.[59]

*Changes in Practice, Profession and Ethics*

The global modernisation of insolvency systems, represented by the introduction of the CVA and administration procedures, was not the only modern feature of insolvency law introduced by legislation at this time. It was also accompanied by a new ethical awareness in the business world. Thus, accompanying the IA 1986 was a new regime targeting directors who had contributed to the failure of the companies for which they were responsible.

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[46] Ibid, section 8(3)(b).
[47] Ibid, section 8(3)(c), the scheme being one under Companies Act 1985, section 425 (now Companies Act 2006, section 895).
[48] Ibid, section 8(3)(d).
[49] Insolvency Rules 1986, rule 2.2.
[50] IA 1986, section 9.
[51] Ibid, section 11.
[52] Ibid, section 13.
[53] Ibid, sections 14-17.
[54] Ibid, sections 21-22.
[55] Ibid, section 23.
[56] Ibid, section 24.
[57] Ibid, section 26.
[58] Ibid, section 27, similar in function to the procedure available under Companies Act 1985, section 459 (now Companies Act 2006, section 994).
[59] Ibid., section 18.

The Company Directors' Disqualification Act 1986[60] provided for sanctions applicable to directors who had failed in their duties with the possibility of disqualifying them from company directorship for a period of time, depending on the severity of their negligence or wrong doing. The moralisation of the day also led to an overhaul of the profession of insolvency practitioners and the creation of an interface between the government and the industry in order to address issues relating to the structure of the profession and its ethical guidelines. Given the diverse professions practicing in the field of insolvency and the idiosyncratic constitution of the field, it was governed by seven different professional associations,[61] which are described as Recognised Professional Bodies ("RPBs") and are tasked by the Secretary of State to issue licenses to practitioners falling within their remit. An eighth organisation, the Association of Business Recovery Professionals[62] is an umbrella organisation that groups together the other seven RPBs and acts as an intermediary with the government and other public powers. The mechanism of interface between the government and the profession is normally provided by the Joint Insolvency Committee ("JIC") (composed of representatives of the seven other organisations) under the authority of the Department of Business, Innovation and Skills ("DBIS"), specifically through the agency of the Insolvency Service. It is the JIC that is consulted prior to the adoption of insolvency regulations and which adopts the common standards for insolvency law practitioners,[63] although individual practitioners are still governed by the rules of their own professional associations. The operation of the JIC and the process through which the profession is regulated are intended to occur by consensus; the government does not intervene to legislate unless there are exceptional reasons for so doing.[64]

## IV - Cork's Rescue Paradigm: Obstacles to their Use

*Introduction*

There were a number of issues that conspired to avoid large scale resort to the new rescue procedures following their introduction in the IA 1986. It would not be until additional reforms were undertaken at the turn of the millennium that either of the rescue procedures would experience a significant increase in their popularity. There are several reasons that can be advanced to justify the

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[60] Company Directors' Disqualification Act 1986 (1986 c. 46).

[61] The 7 RPBs are: (1) The Association of Chartered Certified Accountants; (2) The Insolvency Practitioner Association; (3)-(5) The Institute of Chartered Accountants of three different countries: England and Wales, Scotland and Ireland; and (6)-(7) The Law Society of both England and Wales and Scotland. There are also the "official receivers", who work for the Insolvency Service and whose business is to oversee insolvency proceedings where there is (as yet) no appointed insolvency practitioner. They are expected to comply with the same rules and professional practices as any other insolvency practitioner.

[62] Commonly referred to as "R3".

[63] These are contained in various Statements of Insolvency Practice and "Dear IP" letters that notify practitioners of changes to the law. The standards and notifications are prepared by R3 and adopted by the JIC. They do not carry the force of law, but any infractions can be taken into account in the event of professional sanctions.

[64] Unless, of course, such intervention relates to the abolition of receivership. The exception does not prove the rule. Interestingly, the same question has arisen more recently in the context of the regulation of pre-packs.

optimism that occurred upon the entry into force of the IA 1986 and the reality of the use in practice of the procedures it contained. Both rescue procedures had certain advantages and disadvantages affecting their perceived usefulness to practitioners.

*The CVA*

The simplicity of the CVA framework was viewed in avoiding a formal insolvency that would otherwise consume the assets of the company. It had the potential to benefit all creditors, regardless of whether or not their debts had been reduced in the compromise, instead of just a single secured creditor profiting from receivership and causing detriment to the collective of creditors. The procedure was also more favourable to debtors, albeit later leading to creditor contempt for it. As a debtor-friendly procedure, it encouraged companies to seek help at an earlier stage and, as a recovery procedure, it could provide a catalyst for management changes that would further assist in the recovery of the company.

There were, however, also a number of disadvantages attached to the procedure, highlighted in a report published by the Insolvency Service in 1993,[65] which noted several barriers to its use. The lack of a moratorium made ensuring successful negotiations difficult. There were also problems associated with financial support for the restructuring of the debtor company. Creditors often preferred to appoint a receiver, which kept them in control of the situation. It was also underutilised as there was uncertainty with regard to what might happen if the company defaulted following the CVA with a worry that creditors might find themselves in a less favourable position. Creditors might also be required to give significant waivers or concessions, though it could also be argued that this was better than the alternative, given distributions tended to be significantly reduced in liquidation. It was also crucial that secured creditors lent their support for the CVA, as, in the event that their benefits were affected, they could impede the entire process. Finally, it was a time-consuming procedure, during which a creditor could still petition for liquidation, although this has now changed following the reforms in the IA 2000 and the availability of a moratorium on creditor claims. These disadvantages offer an explanation as to why the CVA was underutilised initially, leading instead to the new administration procedure becoming more popular in comparison.

*Administration*

Administration presented a number of advantageous characteristics. It was collective in nature, orientated toward rescue and facilitated attempts to restructure a company. Administration was a secure court-supervised framework that would benefit all creditors and avoid the ravages cause by a secured creditor's single minded recovery of assets. It was debtor-friendly, encouraging companies to seek assistance at an early stage of financial distress. It also had the potential of avoiding the bad publicity associated with

[65] *Company Voluntary Arrangements and Administration Orders: A Consultative Document,* (Insolvency Service, October 1993).

receiverships by promoting rescue as a joint effort between the debtor and its creditors, rather than forming a part of the reputational problem associated with banks and the lending culture that had become the subject of great criticism. However, there was a notable lack of hierarchy among the objectives set out in section 8(3) of the IA 1986, where recovery is only set out as a potential objective equally relevant among several others, leading one to believe that the procedure was not truly oriented toward the rescue of businesses. It was also expensive due to the costs of the court supervision, the required reports and the involvement of an insolvency practitioner. As such, it was not necessarily that beneficial for small companies. Finally, the floating charge holder could block the appointment of an administrator in this early form of administration, though today, as administrative receivership has been largely abolished, a qualifying floating charge holder can only act to appoint an administrator within collective proceedings.

*Administration vs Receivership*

In addition to the growing pains associated with the introduction of a totally new concept of corporate rescue and the implementation of the new rescue regime, it was in the relationship between administration and receivership that the ambiguities of the new procedures became evident. Administrative receivership had been imported into the IA 1986 based on the private law procedure of receivership and did not disappear until much later in the turn of the millennium reforms introduced by the EA 2002. However, at the time when the new rescue-oriented procedures were put in place, creditors naturally preferred a procedure that gave them privileged access to the assets of the debtor. Confidence in the possibility of using rescue as a natural choice from among the tools available to the insolvency practitioner was slow in coming. In fact, even though the appointment of an administrator blocked the continuation of a receivership procedure, the opposite was equally true. From the time that a principal creditor gained knowledge that its debtor or some other creditor of the debtor was about to apply for an administration order, it could launch a receivership procedure under a loan agreement containing a floating charge, which was quite usual for business lending of any major amounts. Although a moratorium was available from the moment of the presentation of the order, it did not prevent the appointment of a receiver unless the principal creditor had already consented to the opening of an administration procedure. In the majority of cases, receivership took precedence, although in practice, when a choice between the two procedures was possible, unsecured creditors far preferred the opening of an administration procedure as its moratorium provided an advantage over the situation of competing creditors.

The aims of the new “rescue culture” were further defeated as a practice borrowed from receivership began to become popularly used in administration procedures. The practice consisted of selling the business and the debtor company’s saleable assets to a subsidiary of the company with the object of selling the useful and obligation-free subsidiary to a third company, also known as a “hive-down”. This technique defeated the aim of rescuing of the company and protecting its unsecured creditors, employees and other vulnerable stakeholders in favour of the rescue only of its business or profitable assets with the sole benefit enjoyed by the company, its administrator and the third party purchaser. This solution rapidly became the norm in administrations, which led to the question as to what advantage in terms of corporate rescue the procedure presented if practitioners merely sold the business to realise a sum distributable to creditors instead of saving the company.

*Disappointing Results and Interim Adjustments*

The disadvantages and obstacle listed above in relation to the mechanisms of the procedures and habits within practice can explain why, during the early years of the rescue culture, results in the United Kingdom were disappointing. The CVA suffered from the absence of a moratorium and was not useful unless debtors acted quickly, while administration presented a clear disadvantage in relation to receivership from the point of view of secured creditors. It was only during the 1990s that these two procedures experienced a boom: the CVA from about 1994-95 and administration just before the turn of the millennium. In the table below,[66] the statistics provide an overview of the competition between the procedures up to and beyond the time the 2000-2002 reforms were implemented. These confirm that, prior to the reforms, receiverships remained in the ascendance, while rescue as a whole did not appear to enjoy any similar popularity.

| **RECEIVERSHIPS, ADMINISTRATIONS AND COMPANY VOLUNTARY ARRANGEMENTS IN ENGLAND AND WALES REGISTERED AT COMPANIES HOUSE (not seasonally adjusted)** | | | | |
|---|---|---|---|---|
| Year | Receivership Appointments | Administrator Appointments | In Administration (EA 2002) | Company Voluntary Arrangements |
| **1987** | | 131 | | 21 |
| **1988** | | 198 | | 47 |
| **1989** | | 135 | | 43 |
| **1990** | | 211 | | 58 |
| **1991** | 7,815 | 206 | | 137 |
| **1992** | 8,523 | 179 | | 76 |
| **1993** | 5,362 | 112 | | 134 |
| **1994** | 3,877 | 159 | | 264 |
| **1995** | 3,226 | 163 | | 372 |
| **1996** | 2,701 | 210 | | 459 |
| **1997** | 1,837 | 196 | | 629 |
| **1998** | 1,713 | 338 | | 470 |
| **1999** | 1,618 | 440 | | 475 |
| **2000** | 1,595 | 438 | | 557 |
| **2001** | 1,914 | 698 | | 597 |
| **2002** | 1,541 | 643 | | 651 |
| **2003** | 1,261 | 497 | 247 | 726 |
| **2004** | 864 | 1 | 1,601 | 597 |
| **2005** | 590 | 4 | 2,257 | 604 |
| **2006** | 588 | 0 | 3,560 | 534 |
| **2007** | 337 | 3 | 2,509 | 418 |
| **2008** | 867 | 2 | 4,820 | 587 |
| **2009** | 1,468 | 0 | 4,161 | 726 |
| **2010** | 1,309 | | 2,835 | 765 |
| **2011** | 1,397 | | 2,808 | 767 |
| **2012** | 1,222 | | 2,532 | 839 |
| **2013** | 917 | | 2,365 | 577 |
| **2014** | 724 | | 1,790 | 435 |
| **2015 (Jan-Jun)** | 301 | | 851 | 184 |

[66] The data to 2011 was tabulated from statistics collected by the Insolvency Service for England and Wales by Dr. J Tribe (University of Kingston) and published as Table 8.1 in Tribe, above note 30, at 204.

* Shaded areas denote statistics unavailable.

## V- The Impetus for Change

The pressure for reform grew well before the turn of the millennium. Perhaps in the same way as domestic company law had been placed under regular review since 1844 by the Department of Trade and Industry (precursor to DBIS),[67] the Insolvency Service, also under the same Government department, began to look at insolvency law in the early 1990s. The 1993 report, already mentioned,[68] was, for the Insolvency Service, ample evidence to support claims that the procedure was under-utilised specifically because of the lack of a moratorium. This was underpinned by the statistics they collected. There was also the general disapproval by creditors, reflected in the report, of a procedure that, despite being under the control of a practitioner, seemed to be led by the debtor. This embryonic rescue model did not seem at all attractive, even though its company law (and more formalistic) counterpart, the scheme of arrangement, began to acquire an insolvency vocation, which has even been extended in recent practice to the restructuring of European businesses in financial difficulties.[69]

Administration on the other hand, though not dealt with specifically in the report, was known to suffer from the lack of focus in section 8 of the IA 1986 as to the objectives of the procedure, while also being subject to the secured creditors' avowed preference for receivership. With such difficulties, one might be forgiven for thinking that the beginnings of the rescue culture had not occurred under the best auspices. The 1993 report, however, set the agenda for the debate on whether the rescue procedures available in the IA 1986 needed to be better reoriented towards clearer rescue objectives. Two working groups were set up by the Insolvency Service to separately look at CVAs and administration, respectively coming up with a report in 1995[70] and 2000.[71] The punctuated appearance of these reports during the 1990s helped keep the pressure on considerations of reform up to the post-Millennium period, when reforms were actually undertaken. This did not mean that no reforms to insolvency law occurred: two statutes were passed in 1994[72] effecting minor, but necessary changes, although it was clear that these were not intended to be by way of far-reaching reforms.

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[67] The legislative cycle of company law is formed by an extensive set of laws (practically codes given the size of the texts) adopted in 1844, 1862, 1883, 1908, 1929, 1948, 1985 and, most recently, in 2006. The lacuna of nearly 40 years between 1948 and 1985 can be explained by a project that failed due to conflict between the government and the unions.
[68] Above note 65.
[69] Recent examples include Rodenstock GmbH (2011) and Magyar Telecom BV (2013).
[70] *Revised Proposals for a New Company Voluntary Arrangement Procedure: A Consultative Document* (Insolvency Service, April 1995).
[71] *Review of Company Rescue and Business Reconstruction Mechanisms: A Consultation Paper* (Insolvency Service, May 2000). This was followed in short order by the White Paper, titled Insolvency – a Second Chance (Insolvency Service, 2001) (Cm 5234), which set out what was to become the EA 2002.
[72] Insolvency (Amendment) Act 1994 (1994 c. 7); Insolvency (Amendment) (No. 2) Act 1994 (1994 c. 12).

Adding to the debate, there was increasing awareness within the United Kingdom of a global shift toward the primacy of corporate rescue as a vital element of a mature legal and economic system. Between 1986 and 2000, a number of countries had been trying aspects of the rescue culture, some even experimenting with a number of variants of the models available. Within Europe, the political context contributed to the need for reform, notably in countries that had recently escaped from the Soviet yoke, such as Czechoslovakia,[73] Estonia,[74] Hungary,[75] Latvia[76] and Lithuania.[77] In fact, a number of these jurisdictions had to reform their laws more than once, as their first attempts were not always able to resolve the problems of their rapidly evolving economies. Within the European Community (later union), reforms saw the light of day, not only in Germany,[78] following reunification in 1990, but also in Finland,[79] Ireland,[80] Malta,[81] Portugal[82] and Sweden.[83] The major reforms that occurred in France in 1994 were also part of this wave.[84] One of the consequences of this rush to reform and wholesale adoption of the rescue culture, especially in projects around the Millennium, was the European Commission's 2003 report, which recommended, inter alia, fresh starts for honest debtors and the abolition of obstacles towards rescue.[85]

Returning to the United Kingdom, the output of the two working groups led to two bills, which were quickly adopted by Parliament as the IA 2000 (dealing essentially with the CVA, but also enabling the introduction of the UNCITRAL Model Law on Cross-Border Insolvency 1997) and the EA 2002 (to cover reforms to administration, which took slightly longer to complete). The latter text was by way of being an omnibus law dealing with a number of discrete topics related by a business theme, hence the word "enterprise" in its title.[86] The implementation of the 2000 text was delayed so that both sets of reforms could enter into force together. In any event, the implementation of nearly all of the reforms to corporate and personal insolvency took place on different dates between 15 September 2003 and 1 April 2004. Both acts modified the IA 1986 by replacing certain of its provisions with new sections and schedules that were aimed at improving the rescue procedures in terms of efficiency, benefit and practical use.

## VI - Millennial Reforms and Subsequent Challenges[87]

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[73] Law no. 328/1991.
[74] Bankruptcy Law 1992; Commercial Code 1995.
[75] Law no. 49 of 1991.
[76] Law of 3 December 1991.
[77] Bankruptcy Law 1992.
[78] Insolvenzordnung 1990.
[79] Company Reorganisation Law 1993:47.
[80] Companies Act 1990.
[81] Companies Law 1995.
[82] Decree-Law no. 132/93 of 23 April 1993; Decree-Law no. 127/96 of 8 August 1996.
[83] Business Reorganisation Law 1996:764.
[84] Law no. 94-475 of 10 June 1994.
[85] *Best Project on Restructuring, Bankruptcy and a Fresh Start* (September 2003).
[86] It received its Royal Assent on 7 November 2002, perhaps a truly "revolutionary" day.
[87] Space here does not permit an exhaustive rendering of the detail of the post-EA 2002 provisions, for which recourse to one of the more established (and better) works in the field is recommended, such as: R. Goode, *Principles of Corporate Insolvency Law* (4th ed) (Sweet &

*Introduction*

The importance of the reforms can be briefly summarised. A variation of the CVA was created for small and medium sized enterprises that allowed for a moratorium at the request of the company or its directors. The administration procedure was simplified with a new hierarchy of objectives and an out-of-court appointments facility was introduced. A presumption as to a maximum duration for administration procedures also featured in the changes. These reforms reflected concerns about the position of unsecured creditors, the need to streamline administration as a rescue tool and the importance of collective insolvency procedures, as opposed to private recovery methods such as the receivership procedure available to floating charge holders. Despite significant opposition from banks and other financial institutions, the primary lenders in the market who benefitted most from the control afforded by receivership, the government viewed it as being desirable to promote administration and the rescue culture it supported and restrict receivership. As a result, receivership was suppressed and only remains available for the insolvencies of large complex companies of specific types detailed in the reforms. Crown privilege was also abolished and a new regime was introduced wherein a portion of the distributions in liquidation were reserved specifically for unsecured creditors.[88]

The view might be taken that, where the post-Cork IA 1986 had failed in its paradigm shift, the IA 2000 and EA 2002 reforms overall, and which will be further detailed below, were intended to effectively change the focus of insolvency from wealth maximisation for the privileged few towards a true collective approach in the form of administration and other rescue-oriented procedures, incidentally supporting the further development of the rescue culture sweeping legal systems globally. The power of this shift saw many of the objections to the contents of the reform process, such as those brought by lobbying bodies and organisations such as the British Bankers' Association, simply fail to prevail against the will of government. As a consequence, the anticipation was that the reforms would be far-reaching and signal a real change, not just to the structure of corporate rescue proceedings, but to the embedding of the rescue culture more generally.[89]

*Receivership Vanishes*

The first and perhaps most surprising thing was the disappearance of receivership. By dint of wishing to be good Europeans and thus required to privilege the cause of collective procedures, the Government announced that receivership would no longer be available except in the case of large-scale projects and/or financial contracts with a threshold set at a sum which would exclude most contracts of lending. As such, administrative receivers can no longer be appointed even if a qualifying floating charge is held, unless the agreement was entered into prior to the commencement date of the EA

Maxwell, 2011); H. Rajak, *Company Rescue and Liquidation* (3rd ed) (Sweet & Maxwell, 2013).

[88] IA 1986, section 176A.

[89] Tribe, above note 30, has a good discussion of the process by which this has occurred.

2002.[90] As exceptions to the general prohibition, an agreement will be exempt if it is in relation to:

- an appointment in pursuance of an agreement forming a capital market arrangement;[91]
- a public-private partnership project;[92]
- a utility project designed for the purpose of a regulated business;[93]
- a project company designed to develop land in a disadvantaged area (urban regeneration);[94]
- a project financed under an agreement in which a debt of at least GBP 50 million is expected to be incurred;[95]
- a company with a "market charge";[96]
- social landlord companies;[97] or
- protected railway companies.[98]

These seemingly new-found European credentials the Government espoused actually hid a darker reality. The real reason was that the Government had viewed the banks with a jaundiced eye ever since the beginning of the 1990s, when their actions in the midst of the then financial crisis (often precipitated by panic and concern for their own financial position), had led to an upsurge in the use of receivership. In the Government's opinion, the moral contagion created by the banks had led to the disappearance of a considerable number of businesses which might have otherwise benefited from rescue with the consequent loss of employment. The fact that the banks had seen, as a result, the health of their balance sheets improve, was for the Government unacceptable, especially given the inevitable cost of social security benefits provided by the State. The fact that receivership was also a procedure that was initiated by a single creditor (even if it was the major creditor) added to the misgivings of the authorities, despite the lobbying by representative bodies keen to impress on the Government the positive benefits for recovery and re-lending in the economy. Despite the official announcement of the curtailment of receivership, creditors did not lose out entirely, as they would obtain, via the reforms to administration, the right to nominate the administrator.[99] Furthermore, the interests of secured creditors are taken into account in the new hierarchy of administration objectives.[100]

*CVAs Reformed: The Moratorium Effect*

The essential framework of the CVA was not really changed by the IA 2000 reforms, except in small (but important) ways responding to two particular

[90] IA 1986, section 72A(1), (4)(a).
[91] Ibid, section 72B.
[92] Ibid, section 72C.
[93] Ibid, section 72D; Schedule 2A, paragraph 10 sets out a list of regulated businesses).
[94] Ibid, section 72DA.
[95] Ibid, section 72E.
[96] Ibid, section 72F.
[97] Ibid, section 72G.
[98] Ibid, section 72GA.
[99] Ibid., Schedule B1, paragraphs 14-18.
[100] Ibid., Schedule B1, paragraph 3.

problems that had arisen under the IA 1986 paradigm. The first was the effect on creditors unknown at the time of the approval of a proposal, who previously had retained their rights of action. Following the IA 2000 reforms, they are normally bound by the proposal that is adopted.[101] Furthermore, the reforms resolved the problem of knowing, in case of any disagreement, which of the decisions of the meetings of creditors or shareholders took priority. In effect, to deal with the lacuna in the old law, the reforms took the position that the creditors' decision would have priority,[102] which was thought to enable agreement to be reached on a proposal with one obstacle fewer to surmount.

The real impact of the IA 2000 reforms was to introduce a variation of the previous CVA model especially targeted to the position of small- and medium-enterprises ("SMEs").[103] These companies can now benefit from the possibility of requesting a moratorium to protect themselves from the actions of their creditors for a period of at least 28 days, but with the possibility of an extension of up to 2 months.[104] Reforms also include a new section that makes it an offence to make false representations with a view to obtaining a CVA.[105] Delinquent directors can be prosecuted where an offence has been committed in relation to the obtaining of a CVA with moratorium, which guards against the possibility of directors using the benefit of a 28-day grace period without there being good cause. Directors who wish to apply for a moratorium are also required to apply with the assent of a practitioner and to guarantee that the necessary funds will be available for the company's needs during the currency of the procedure.[106]

*The New-Look Administration and the Rise of the Pre-Pack*

An enabling provision was provided for in the EA 2002, which creates a new section 8 of the IA 1986 applying Schedule B1 containing the new-look administration procedure and the powers of administrators. The same provision repealed the entirety of Part II of the IA 1986 (the old administration provisions). However, and potentially confusingly, Part II is still preserved for special administration regimes pertaining to water and sewage companies, railway companies, air traffic service companies, public-private partnership companies, and building societies, among others. As a whole, if one disregards the content of the new-look procedure, which is much more complex than previously was the case, administration has not changed in its fundamentals, save in two very important respects: the enhanced importance of rescue and the appointment of the insolvency practitioner. The tightening up of the timetable and introduction of a presumption that procedures should

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[101] Ibid., Schedule A1, paragraph 37.
[102] Ibid., section 4A(3)-(6), subject to a right of challenge by the members.
[103] Ibid., Schedule A1, which sets out the detail of the new variety of the CVA with threshold tests to determine whether companies qualify. It also gives a long and complicated list of companies that are excluded from the benefit of the new rules.
[104] Ibid., Schedule A1, paragraph 37. Generally, the moratorium will last until the point meetings are held in relation to the approval of any proposal.
[105] Ibid, section 6A.
[106] Ibid., Schedule A1, paragraph 6.

last no longer than a year also helps concentrate attention on promoting swift and efficient rescues.[107]

The first great change impacts on the orientation of the procedure and places rescue in a more overt way as the principal objective. Paragraph 3 of Schedule B1 states expressly that rescue is the primary (and most desirable) outcome of the procedure. This can be contrasted with the original administration procedure in the IA 1986, which provided for four alternative solutions that an insolvency practitioner could choose from as the goal of the particular administration procedure. This left each option on a level of equal importance – rescuing the company was an equal alternative to providing for a better result than in a straight liquidation. The new purpose of administration provided for three hierarchical objectives, those being to rescue the company as a going concern, and if that is not possible, to achieve a better result than would be achieved in liquidation. As such, except where a rescue is not useful or the outcome for the creditors is no better than would be the case in liquidation, the practitioner is bound to privilege rescue as the option. The use of the word “company” as opposed to “business” in this provision is designed to deal with concerns over the hive-down process and to make the procedure much more attractive to the directors, who would otherwise fear the dismantling of their business, as well as incentivise them to act quickly.

As an alternative, in second place, there is the option to improve on the result that might be the outcome of liquidation, where a prolonged continuation of business is not usually an option. This “enhanced liquidation” is also desirable because it avoids an immediate “fire-sale” and the potential loss of value of the business or of its assets. Finally, if the first two options were unattainable, the administrator could seek to realise property to make distributions to secured and/or preferential creditors, in similar fashion to the function of a receiver.[108] However, the practitioner would need to justify this by reference to the collective interest and demonstrate that it would not be irreparably damaged by adopting this option. In this light, the emphasis is on the fact that the administrator[109] should perform his function in the interests of all of the company’s creditors,[110] which serves to shift the duty to a principal creditor to a responsibility to the collective. The reforms also seek to inject greater efficiency and rapidity into the process, which is evident from the insertion of the specific instruction for an administrator to perform his duties as quickly and efficiently as reasonably practicable,[111] making this a legal obligation and therefore also enforceable as an obligation in practice. The new hierarchy of objectives also embeds the primacy of the practitioner as the court is bound to consider his professional advice and will not counter this unless exceptional grounds exist.

[107] Ibid., Schedule B1, paragraphs 76-78 (which also deal with extensions of time).
[108] Ibid., Schedule B1, paragraph 3(1)(a)-(c); the hierarchy being specified in paragraphs 3(3)-(4).
[109] Ibid., Schedule B1, paragraph 6.
[110] Ibid., Schedule B1, paragraph 3(2).
[111] Ibid., Schedule B1, paragraph 4.

The second important change is in the appointments process, which previously was under the control of the court and required a petition to be brought by either the debtor or a creditor. The reforms introduced the concept of the out-of-court appointment and extended this option to the company and to some secured creditors. An administrator can be appointed by the holder of a qualifying enforceable floating charge,[112] as long as a provisional liquidator or administrative receiver has not already been appointed.[113] A qualifying charge must state that the provisions of Schedule B1 apply; purport to empower the holder to appoint an administrator over the company; or purport to empower the holder to make an appointment that would otherwise be of an administrative receiver. Certain conditions attach to limit the definition of a qualifying floating charge that, in essence, require the creditor to have security over all or substantial parts of the company's property.[114] Once appointed, a notice of appointment and other prescribed documents must be filed at the court, including a statutory declaration that the person appointing the administrator is the holder of a qualifying enforceable floating charge; that the appointment was legally made; that the administrator consents to his appointment; and that he is of the opinion that the purpose of the administration is reasonably likely to be achieved.[115] Underpinning creditor primacy in the appointments process, in cases where the company itself seeks to appoint, the directors are required to notify the secured creditor, who has the option then to proffer an alternative person to nominate. In cases of disagreement, the court is bound to prefer the creditor's choice.[116] This appears to reflect a view that the creditor has particular knowledge of the debtor's financial position and will be more likely to act in the face of the directors' possible inertia.

The possibility of avoiding judicial scrutiny of appointments has also, without doubt, facilitated the appointment in the year that followed the reforms, especially in the pre-pack context, whose numbers till now have continued to increase. The simple aim of a pre-pack is to protect the debtor company by avoiding the reputational stigma and the loss of confidence of its contracting partners when approaching the threshold of insolvency. In order to achieve a turnaround with these protections in place, the practitioner undertakes to put together a sale of assets or of the business of the company to a pre-selected buyer. The pre-pack in the United Kingdom is based on a process that evolved in the United States, referred to as a "stalking horse offer", which refers to an offer or bid designed to test the market prior to a formal auction, essentially setting a reserve price for an asset sale. If the assets or business are not then sold for more than the offer, the third party making the offer is obliged to complete the purchase. In the United Kingdom, it is the practitioner and the principal creditor who, together, lead the negotiations with a buyer usually identified by the practitioner through his network of contacts. The main

[112] Ibid., Schedule B1, paragraph 16.
[113] Ibid., Schedule B1, paragraph 17.
[114] Ibid., Schedule B1, paragraph 14.
[115] Ibid., Schedule B1, paragraph 18. In fact, where necessary, including where the court is closed, the filing may even occur by fax, the date of the transmission being treated as effective.
[116] Ibid., Schedule B1, paragraph 26.

concern is to protect confidence in the debtor and, for listed companies, the value of their stocks by avoiding the competition of other creditors, particularly unsecured creditors, up to the moment when the contract is signed by the purchasing company and approved by the court in an administration procedure opened at the last moment and then quickly closed.

The great defect of pre-packs lies in the fact that other creditors (chiefly the unsecured ones) are kept out of the way during the process and often know nothing of what is happening until such time as the appointment is made of a practitioner in the context of the ensuing administration. The facility given to the secured creditor to appoint the administrator, usually the same one that has acted in the pre-pack, assists in achieving a quick turnaround of sales with a high level of confidentiality. However, the question arises as to whether or not a sale in this manner risks the potential for a resurgence of the phoenix syndrome that evoked such dread prior to the introduction of the IA 1986. Part of the solution is found in practice in the responsibility, referred to above, that the practitioner owes to the general body of creditors, but, perhaps more relevantly, in the importance of the insurance policy to which all practitioners are required to subscribe. The other part of the protection for the unsecured lies in the JIC's Statement of Insolvency Practice 16 ("SIP 16"), which first appeared in 2008 and has been twice revised, the most recent being in 2015. It deals with the responsibility of practitioners in the framework of a pre-pack sale and sets out key compliance standards. These mandate transparency, the public interest and the collective nature of proceedings as being necessary concerns practitioners must bear in mind when conducting the process.[117]

## VII - Continuing Criticisms[118]

*Introduction*

The revisions made by the IA 2000 in relation to the CVA and the EA 2002 for administration were intended to resolve many of the shortcomings observed in the rescue procedures introduced by the IA 1986. While some of these have been resolved, the experience overall since the reforms still remains a little ambiguous, particularly in the way receiverships continue to survive at the margins of insolvency and pre-pack administration has arisen as the chief restructuring tool.

*Receivership*

While the Government made its intention of making receivership disappear perfectly clear, it remains the case that the procedure has not entirely vanished from the statute book and has apparently become, particularly in the

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[117] A copy may be obtained via the R3 website at: <https://www.r3.org.uk/media/documents/technical_library/SIPS/SIP%2016%20Version%203%20Nov%202015.pdf>.

[118] Paul is particularly indebted, in this section, to Dr Alexandra Kastrinou, Senior Lecturer at the Nottingham Law School, for the many discussions over coffee that have teased out many of the thoughts that are stated here as opinions.

wake of the global financial crisis, the tool of choice for creditors who can still benefit from it. The fact of the exclusion in relation to pre-EA 2002 contracts can be seen in the statistics reflecting the appointments made from 2003 onwards, although the figures for the period of the recent global financial crisis must be taken to contain a high element of cases in which one of the exceptions to the general prohibition applies. Part of the statistics must also include the use of receivership in the property law context, where appointments remain possible. An interesting question, however, about the figures is to speculate whether the companies subjected to receiverships at the instance of their creditors in the period following 2008 would have preferred, it being the case, the option for administration, were it also available. More recently, it can be seen that the statistics for the number of receiverships shows a drop, which might suggest an important reorientation in favour of administration as the principal choice for rescue. To what extent this may be despite the creditors' wishes cannot be known with certainty, although a conclusion might be that the statistics still evidence some competition between both procedures, but not one that is as clear cut as under the pre-EA 2002 paradigm. Should further reforms be undertaken? It seems as if, more recently, numbers continue to reduce and the procedure is in decline. Perhaps the best outcome is to simply leave the procedure where it is and to draw attention once more to those procedures that have a true rescue vocation. The question does arise, however, as to what type of rescue it is likely to be, given that the shape of rescue itself is changing, driven by developments in North America. In fact, there is a movement in practice, reflected in the literature, towards a reconsideration of the aim of rescue, given that, in the United States, there are many procedures that conclude in a sale under section 363 of Chapter 11. The idea of rescue has been recently referred to as including the recycling of assets in order to return those assets to a state of economic productivity, such that others who are better placed might maximise the "use-value" of those assets.[119] That is a description that could also have been used in the context of receivership, where recovery on behalf of the creditor, although usually followed by a liquidation of the corporate shell, was viewed as contributing to the creditor's ability to re-use these assets, especially in being able to recycle them (or their value) with view to further lending.

*CVAs*

According to the statistics, the impact of the IA 2000 reforms appears to be negligible, with only a slight increase evident in 2003, swiftly followed by a reduction in numbers until the period immediately after the global financial crisis. Recently, the figures again show a drop in the use of the procedure. In a manner of speaking, the CVA does not appear to have enjoyed the favour of practitioners. There remain a number of criticisms of the CVA that might explain this stagnation. CVAs are still not well regarded due to the uncertainty surrounding a company's ability to adhere to the arrangements set by the procedure, which may be particularly difficult to eradicate as it goes to the

[119] See J. Girgis, "Corporate Reorganisation and the Economic Theory of the Firm", Chapter 8 in B. Wessels and P. Omar (eds), *Insolvency and Groups of Companies* (INSOL Europe, 2011), pages 108-9, and the references cited in footnotes 1 and 24 of that work.

heart of the British connection between debt and guilt. While the rescue culture may have been implemented through these new procedures, perceptions of insolvency remain tainted with blame and the stigma of irresponsibility, making the engendering of trust between opposing creditors and debtors under a CVA all that much more difficult. Just as in its pre-reform incarnation, the reticence of the creditors faced with a procedure that is seemingly controlled by the debtor continues to play a determining role. This reticence, which in some cases breaks out in hostility, undermines the view that the CVA offers a consensual approach to resolving financial difficulties at an early stage. Moreover, the procedure remains quite time consuming as well, despite time limits being set for the process.

As a result, CVAs are still viewed as being overly debtor-friendly and inimical to creditors, particularly in the event that shareholder challenges under section 4A of the IA 1986 are successful. Thus while the new administration procedure has been taken up with some level of alacrity, the CVA remains underused and perceived with suspicion. This explicit preference by creditors (and perhaps also debtors) for administration, which, prior to 2003, was the only rescue procedure attracting a moratorium, appears to have been translated into the new version of the procedure, including the option with moratorium designed for SMEs. It is also possible that resort to the CVA is considered by debtors at much too late a stage in the process, when administration is the only realistic option. Furthermore, the promise of the creation of a more flexible procedure for SMEs has not quite been kept, since costs of CVAs can, in some instances, rival those of administration. For businesses that are especially concerned by a loss of reputation (and value), pre-packs have, for some time now, offered a more confidential and procedurally flexible alternative. Nonetheless, the statistics continue to show a small, but not unimportant, number of procedures, proof perhaps of some utility. It may be that the procedure plays a role for debtors who do not enjoy the possibility of an upstream restructuring via a scheme of arrangement, but are not quite at the stage where administration (whether of the pre-pack variety or not) is a necessity. In light of this, the CVA might be seen as a procedure that occupies a small, but essential, space in the range of possible tools for rescue and thus not be in dire need of reform.

*Administration*

The big debate in rescue is most certainly in relation to administration and its pre-pack variant, particular as far as the vocation and purpose of the procedure are concerned. The reforms to this procedure might be seen as ambiguous in their purview. On the one hand, the procedure has become much more complex. On the other hand, the role of the court in scrutinising appointments has been reduced by the new out-of-court appointments process and by the increasing role given to practitioners generally, given that courts have traditionally maintained an arm’s length approach to the supervision of professionals. However, the fact that the practitioner may be appointed by a secure creditor, in whose interest he is authorised to act (the third purpose of administration) evokes memories of receivership and of the period when creditors acted really according to their will. One might ask whether that is really rescue in the 21st century. The problem seems to be that the procedure was ambiguous at the outset, since, in 1986, administration played a lesser role as compared to receivership and was not as well appreciated by creditors, thus leading to the slow burn development of a rescue culture. After the IA 2000/EA 2002 reforms, administration has become even more of a hybrid: on the one hand, a collective procedure, but, on the other, a procedure that can guarantee a determining role to the secured creditor and ensure a distribution in its interest.

With pre-packs, the view may be taken that this “schizophrenia” is even more pronounced, as the secured creditor plays a role in the procedure, while only the presence of the practitioner (and eventual administrator) is supposed to guarantee that the collective interest will be taken into account in a procedure that takes place largely unknown to the creditors. It is more difficult, though, to ask what reforms might be useful here. Perhaps a fresh look could be taken at the balance between different creditor interests, though it is difficult to see how a reform might serve to create a new equilibrium without alienating the secured creditors. Nonetheless, the secured creditors have not always had their own way, especially in connection with what happened to receivership. As for pre-packs, the profession is aware of continuing concerns and the revisions to SIP 16 appear targeted to addressing these. More recently in 2014, the Graham Report reviewed the operation of pre-packs and largely conclude that they were well-managed, though recommendation were of course made.[120] It also stated that legislation remained an option for the Government, perhaps a signal to practice that the revisions to SIP 16 should not otherwise be an excuse for relaxing vigilance. In fact, one of its recommendations for the use of an independent panel to review offers is currently being implemented.

## VIII - Insolvency for the Future: Reforms and Modernisation

*Introduction*

Despite the reforms instituted by the Enterprise Act 2002, controversies that arose prior to the new legislation remain and improvements are left to be made. In the decade following the reform, practice has not only developed in relation to pre-packs, but also in the design of reorganisation driven by the developments from the United States and Canada. In light of the challenges that have confronted insolvency systems in the UK in the past, what challenges are to be expected for the future? There are two in particular that appear evident, the parlous state of the law itself and the potential for European influence on domestic insolvency.[121]

*The State of the Law*

[120] *Graham Review into Prepack Administration* (Insolvency Service, June 2014).
[121] A longer list of desirable changes and an incidental plea for a new committee on the model of the Cork Committee are set out in J. Tribe, “Crystal Balls and Insolvency: What does the Future hold?” (2012) 23 *International Company and Commercial Law Review* 405.

There is a need to contemplate, during any consideration of substantive reforms, the shape of the legal text that will embody future reforms. The current shape is particularly mediocre and needs much reordering to make it clearer and more certain. The reason is that, following the reforms, the rescue procedures were contained substantially in the schedules making cross-referencing to the main Act provisions difficult. The fact that parts of the Act are "invisible", including the repealed Part II of IA 1986 that still applied to certain types of undertaking, does not help coherence or clarity. Furthermore, much that is important to the practitioner is in the Insolvency Rules 1986, which have been undergoing a process of updating in the past few years under the aegis of the Insolvency Rules Committee.[122] This is because the law itself, especially in personal insolvency, authorises extensive rule-making to complete the operations of procedures.[123] The balance between primary and secondary legislation may thus be said not to be where one might expect it to be. Overall, the view may be taken that practitioners find it on occasions difficult to navigate the labyrinth that is the UK insolvency system.

This is not to mention the need to review the legislation periodically in light of changes occurring at European level, particularly with respect to the recent replacement of the EIR by a "recast" version in 2015. Future developments in this area, detailed below, might add to the pressure for an early review of domestic law. In any event, whether future changes are extensive or not, the Insolvency Service would do well to institute a regular timetable for the revision of insolvency law, such as there apparently exists for company law. Given the adoption of a distinct law of corporate insolvency in 1986 and the changes occurring at the beginning of the millennium, the law relating to insolvency, it would appear, has been the object of revision about every 15 years. While, such a gap might not be sustainable in current times, particularly in light of the ongoing effects of the global financial crisis, more regularity in the revision process is to be welcomed.

*The European Influence*

Even given the shape of current politics in the United Kingdom, the possibility of external influence, particularly European, on the domestic legal order is never far from the legislator's mind. The authorities are also conscious of the evolution of insolvency frameworks in other European Union member states and potential competitor jurisdictions on the economic plane, particularly the United States. The need to review domestic laws against a background of regulatory arbitrage occurring globally is something of which the Government is acutely aware. While the phenomenon of regulatory arbitrage currently benefits the United Kingdom, there is no guarantee of the duration of this happy state and it is sensible to review laws periodically in order to ensure that operators in the business environment continues to have access to procedures that are favourable. In that light, the Government reviewed domestic law against the recommendations published by the European Commission as part of a 2014 text targeting reforms to deal with four

[122] Some changes to primary legislation have also been made by the Small Business, Enterprise and Employment Act 2015 (2015 c. 26).
[123] IA 1986, section 322.

particular concerns: the availability of a framework to facilitate preventive restructuring, assisting restructuring negotiations through enabling the appointment of a mediator and for stays to be available, ensuring the success of restructuring plans through certain minimum content and clarifying creditor and court involvement in the adoption process as well as providing protection for new financing arrangements.[124]

While the Government appeared to be satisfied that domestic law largely mapped to the benchmarks set out in the recommendations, the initiative has now resulted in the formation by the European Commission of an Experts' Group on Restructuring and Insolvency. The role of the experts in the group, which began its work in January 2016, will be, over the course of a 3-year period, to assist the Directorate-General Justice and Consumers in the formulation of minimum standards for a new and harmonized restructuring and insolvency law for the European Union. The proposed law is intended in part to address the terms set out in the 2014 Recommendation. As such, the remit of the Experts' Group not only covers the development of common principles and rules in the area of preventive restructuring procedures that were the subject of the 2014 Recommendation, but also common principles and rules in relation to formal insolvency procedures,[125] the promotion of second chances for honest debtors (natural persons), the qualification of insolvency practitioners, the duties and liabilities of directors in insolvency as well as measures seeking to reduce costs for SMEs in restructuring and insolvency procedures as well as facilitating their access to such procedures. In addition, the Experts' Group will be tasked with ensuring that any common principles and rules that are proposed are consonant with the EIR. It seems that at the very least these topics will form part of the new programme, although it may be difficult to predict the precise direction of all the initiatives that may be taken as part of this new programme. Nonetheless, the direction of this programme is likely to have an impact on domestic law, which will need to be taken into account once the scope and direction of the European texts are known.

## IX - Conclusions

History has shown that reforms rarely contain all the solutions needed to resolve all the problems of a legal system. The work of the Cork Committee, however, tried to provide essential changes with the aim of updating the insolvency framework and to endorse a system that would be able to respond to the requirements of a fluctuating economy. Insolvency practitioners, who have come from a number of different professions, have brought extensive experience in business as well as pragmatic solutions proven by years of practice. This has contributed to the fact that the introduction of the idea of rescue was accepted from the beginning as an asset to a modern legal

[124] *Recommendation on a New European Approach to Business Failure and Insolvency* (Document COM(2014) 1500 Final) (12 March 2014), at 6-10. See also the INSOL Europe Study (12 May 2014) assessing to what extent the member states were already compliant with the norms being promoted.

[125] Note Recital 22, Recast EIR, which mentions the need for a review of employment-related preferences.

system. Nevertheless, the experience of the IA 1986 paradigm, from its inception and prior to the reforms, has also demonstrated that competition between procedures and the different preferences of participants may lead to a diversion from the spirit of rescue intended to imbue the law, with the potential consequence that the objectives set might not be achieved at the outset. Perhaps all reforms are trial and error, until tempered through the experience of practice.

The shift towards a greater emphasis on rescue can be seen, nonetheless, in the reforms that were incorporated in the IA 1986 by the combined impact of the IA 2000 and EA 2002. Both of these amending acts altered the landscape of corporate rescue in the UK by introducing a moratorium for CVAs, giving a certain leeway to corporate management to initiate procedures, curtailing the use of receivership aimed at privileging the collective nature of rescue and preventing the secured creditor from having too much say in his debtor's fate. However, the secured creditor now has an important role to play in administration by the power of appointment. Other changes to administration have seen the Crown giving up its preference, while unsecured creditors may now benefit from the constitution of a small ring-fenced fund dedicated to their at least partial repayment. The more recent use of the pre-pack in administration has taken the popularity of such methods of rescue to great heights, although the reality of periodic financial crises will always mean that liquidation is more frequently than not the predominant procedural outcome.

The lessons and challenges that became apparent following the Cork-inspired and rescue-oriented insolvency system of the 1980s and which continue to prevail in the minds of practitioners, academics and policy-makers are numerous: how can an equilibrium be found between the needs of the profession for a "light-touch" regulation juxtaposed against the need for the protection of consumers and other stakeholders; how can confidence be instilled in the system while also continuously taking stock of its efficiency and improving it at various appropriate intervals of time; how can procedures best be updated in response to changes in practice without causing undue disruption and uncertainty in the system as a whole? These challenges continue to affect the user-friendliness of insolvency systems and make the need for reform all the more apparent as time passes. To that end, it would perhaps be advisable to view the task of reform as a continuous project that can be constantly progressed in order to pursue an eternal quest to perfect the law. When, though, will such reforms take place? It is difficult to say, but it does not seem that they are at the moment a priority, short of a volte-face by the Government or an external macro-economic event generating a crisis requiring a legislative response. Small and targeted reforms are always possible, but an extensive and wholesale revision of the statute book does not appear likely in the short-term. Nonetheless, this remains a space to watch.

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