En matière de justice civile, les procédures en cours et les procédures ouvertes avant la fin de la période de transition se poursuivront en vertu du droit de l'Union. Sur la base d'un accord mutuel avec le Royaume-Uni, le portail e-Justice conservera les informations relatives au Royaume-Uni jusqu'à la fin de 2024.

Insolvency/bankruptcy

Ecosse

1 Who may insolvency proceedings be brought against?

Section 1 of the Bankruptcy (Scotland) Act 2016 ("**the 2016 Act**") provides that "the estate of a debtor may be sequestrated". This means that insolvency proceedings may be brought against various entities which are defined as a "debtor" in the 2016 Act. These include a living debtor, a deceased debtor or their executor or a person entitled to be appointed as executor to a deceased debtor, a trust, a partnership (including a dissolved partnership), a limited partnership (including a dissolved partnership) within the meaning of the Limited Partnerships Act 1907, a body corporate or an unincorporated body.
Insolvency proceedings may also be brought against companies (incorporated or unincorporated), in accordance with the Insolvency Act 1986 ("**the 1986 Act** ").

2 What are the conditions for opening insolvency proceedings?

Personal insolvency proceedings can be opened either by debtor application (including under the minimal asset process), or by a creditor petition at the sheriff court. A debtor can also enter into a trust deed, which is a voluntary form of insolvency proceeding between an individual and their creditors
Insolvency proceedings may be opened against a living debtor, upon their own application, in circumstances where:
the total amount of their debts (including interest) at the date their application is made is not less than £3,000;
an award of insolvency has not been made against the debtor in the period of 5 years ending on the day before the date the debtor application is made;
the debtor has obtained the advice of a money adviser;
the debtor has given a statement of undertakings (including an undertaking to pay to the trustee after the award an amount determined using the common financial tool);
the debtor is "apparently insolvent" or has, within the prescribed period, been granted a certificate for the insolvency of their estate or has granted a trust deed which is not a protected trust deed by reason of the creditors objecting or not agreeing,
and for the purposes of the application the debtor shall not be "apparently insolvent" by reason only that they have granted a trust deed or that they have given certain notice to their creditors.
Insolvency proceedings may further be opened against a living debtor on their own application, but under the "minimal asset process", where certain criteria apply. The criterion are:
the debtor has been assessed by the common financial tool as not requiring to make a contribution to their insolvency, or has been in receipt of a prescribed payment for a period of at least 6 months ending with the day on which the application is made;
the total amount of the debtor's debts (including interest) at the date the application is not less than £1,500, but no more than £17,000;
the total value of the debtor's assets on the date of the application does not exceed £2,000;
the value of a single asset of the debtor does not exceed £1,000;
the debtor does not own land;
the debtor has been granted a certificate for insolvency of their estate;
in the period of 10 years ending on the day before the day on which the debtor application is made no insolvency award has been made against the debtor in pursuance of an application made by the debtor under the minimal asset process, and;
in the period of 5 years ending on the day before the day on which the debtor application is made no insolvency award has been made against the debtor in pursuance of an application made by the debtor other than under the minimal asset process, or a petition for their insolvency.
Insolvency proceedings can also be opened against a living debtor on the petition of a qualified creditor (or qualified creditors) if the debtor is "apparently insolvent", and the qualified creditor has provided the debtor with a debt advice and information package ("**DAIP**") no more than 12 weeks prior to presentation of the petition. A DAIP means the DAIP referred to in section 10(5) of the Debt Arrangement and Attachment (Scotland) Act 2002 ("**the 2002 Act** ").
A qualified creditor (as referred to above) is a creditor who, at the date of the presentation of the petition (or, as the case may be, the date the debtor application is made), is a creditor of the debtor in respect of liquid or illiquid debts other than contingent or future debts or amounts payable under a confiscation order, whether secured or unsecured, which amount (or of one such debt which amounts) to not less than £3,000. Qualified creditors means creditors who, at the said date, are creditors of the debtor in respect of such debts as aforesaid amounting in aggregate to not less than £3,000.
Given that the term "apparently insolvent" forms part of the criteria which must be satisfied for a debtor to make an application for their own insolvency, or when a creditor is petitioning for a debtor's insolvency, it is important to understand what this means. Apparent insolvency in Scotland is constituted whenever:
a debtor's estate is made insolvent, or they are adjudged bankrupt in England or Wales or Northern Ireland; or
not being a person whose property is for the time being affected by a restraint order, detained under or by virtue of a relevant detention power or subject to a confiscation or charging order, has given written notice to their creditors that they have ceased to pay their debts in the ordinary course of business; or
they have become subject to main proceedings in a Member State other than the United Kingdom;
the debtor grants a trust deed;
following the service on the debtor of a duly executed charge for payment of a debt the days of charge expire without payment (unless at the time of the occurrence the debtor was able and willing to pay their debts as they became due, or that but for the debtor's property being affected by a restraint order or being subject to a confiscation order or charging order, the debtor would at that time have been able to pay those debts as they became due);

a decree of adjudication of any part of the debtor's estate is granted either for payment or in security (unless at the time of the occurrence the debtor was able and willing to pay their debts as they became due, or that, but for the debtor's property being affected by a restraint order or being subject to a confiscation order or charging order, the debtor would at that time have been able to pay those debts as they became due);
a debt constituted by a decree or document of debt (as defined in section 10 of the 2002 Act) is being paid by the debtor under a debt payment programme under Part 1 of that Act and the programme is revoked (unless at the time of the occurrence the debtor was able and willing to pay the debtor's debts as they became due, or that, but for the debtor's property being affected by a restraint order or being subject to a confiscation order or charging order, the debtor would at that time have been able to pay those debts as they became due);
a creditor of the debtor, in respect of a liquid debt which amounts (or liquid debts which in aggregate amount) to not less than £1,500, has served on the debtor, by personal service by an officer of court, a demand in the prescribed form requiring him either to pay the debt (or debts) or to find security for its (or their) payment, and within 3 weeks after the date of service of the demand the debtor has not complied with the demand or intimated to the creditor, by recorded delivery, that he denies that there is a debt or that the sum claimed by the creditor as the debt is immediately payable.
Insolvency proceedings against a living debtor may also be opened by a temporary administrator or a Member State liquidator appointed in main proceedings
The trustee acting under a trust deed may open insolvency proceedings against a living debtor if, and only if, the debtor has failed to comply with any obligation imposed on them under the trust deed with which they could reasonably have complied, or with any instruction or requirement reasonably given to or made of them by the trustee for the purposes of the trust deed, or if the trustee avers in his petition that it would be in the best interests of the creditors that an insolvency award be made.
Insolvency proceedings may further be opened against a deceased debtor on the petition of a qualified creditor (or qualified creditors) of the deceased debtor, a temporary administrator, a Member State liquidator appointed in main proceedings, or a trustee acting under a trust deed. Insolvency proceedings can also be opened against a deceased debtor by debtor application which is made by the executor, or a person entitled to be appointed as executor on the estate.
In order for a debtor to enter a trust deed the minimum repayment period must be 48 months, unless an alternative arrangement is agreed. Trust deeds also require an individual to pay a set amount per month for the period of the deed. However a voluntary trust deed is not binding on any creditor who does not consent to its terms, and in order for it to become protected the minimum debts must be £5,000.
Corporate insolvency in Scotland can be through liquidation (voluntary or by order of the court), reorganisation (company voluntary arrangement ("**CVA**") or administration), or receivership. Administration may be also be used as a winding-up procedure; not strictly a reorganisation process.
Any creditors (private or government) can apply to court seeking to have a company wound up (compulsory liquidation), or put into administration, while the company itself can resolve to be wound up (voluntary liquidation, which can be either solvent or insolvent, with solvency judged on the ability to pay all debts within 12 months). The company may also petition the court that it be wound up. Further, the Secretary of State may apply to court for a company to be wound up, if it is in the public interest to do so. Such companies do not need to be insolvent.
Compulsory liquidation may be on grounds that the company is unable to pay its debts (insolvency), with that inability proven by an unsatisfied statutory demand for payment or an unsatisfied judgment. The court may also ask that a company be put into liquidation on the ground that it is just and equitable to do so. At any point after a petition (from any party) has been presented to the court for compulsory liquidation, the court may appoint a provisional liquidator. Such appointments are generally made to protect the assets of the company ahead of the winding-up hearing. The powers of the provisional liquidator are set out in the court order appointing them.
For a company to enter administration it must be insolvent, or likely to become insolvent. Case law has found that 'likely' in this sense means more likely than not. The company or its directors may appoint an administrator, as may a floating chargeholder (such appointments being made outside of court).
A CVA may be proposed by the company. It need not be insolvent for it to do so. A CVA may also be proposed by the office-holder in a liquidation or administration (if either of those procedures has already commenced).
As soon as the proceedings commence (either the company's resolution to wind up; the court's order for administration or liquidation or the filing of a notice of appointment of an administrator with the court (for those appointment not made by court order), the office-holder may act.

3 Which assets form part of the insolvency estate? How are the assets treated which are acquired by or which devolve on the debtor after the opening of the insolvency proceedings?

The whole of a debtor's property, with some exceptions, vests in the trustee as at the date of insolvency to form part of the insolvent estate. The trustee is vested in the estate and the debtor is divested. The trustee also acquires a right to the estate which vests in the debtor after the date of sequestration, but before the debtor's discharge. The whole estate of the debtor does not include any interest as tenant under a tenancy which is an assured tenancy within the meaning of Part II of the Housing (Scotland) Act 1988, or a protected tenancy within the meaning of the Rent (Scotland) Act 1984, in respect of which, by virtue of any provision of Part VIII of that Act, no premium can lawfully be required as a condition of the assignation, or a Scottish secure tenancy within the meaning of the Housing (Scotland) Act 2001.
Property which does not vest in a trustee includes any property kept outwith a dwellinghouse in respect of which attachment is, by virtue of section 11(1) of the 2002 Act, incompetent, or any property kept in a dwellinghouse which is not a non-essential asset for the purposes of Part 3 of the 2002 Act. Property held on trust by the debtor for any other person is also excluded. Also, if the debtor under the minimal asset process reasonably requires the use of a vehicle, any vehicle owned by the debtor the value of which does not exceed £3000, is not to be regarded as an asset.
The vesting of a debtor's estate in a trustee shall not affect the right of hypothec of a landlord.
It should be remembered that the provisions on vesting are without prejudice to the right of any secured creditor, which is preferable to the rights of the trustee.
In a trust deed the assets of the debtor are transferred to be administered for the benefit of creditors and payment of debts, although only assets which are capable of voluntary transfer can be transferred by the debtor. If a trust deed becomes protected, the 2016 Act contains provisions in relation to reaching an agreement in respect of a debtor's heritable property.
In corporate insolvency, all property owned by the company, anywhere in the world, is subject to the insolvency procedure. The term 'property' is widely defined in law.

4 What powers do the debtor and the insolvency practitioner have, respectively?

The trustee in a personal insolvency or trust deed (or any office holder) must be a qualified insolvency practitioner. The meaning of an insolvency practitioner, in terms of the 1986 Act, is the same in Scotland as it is in England and Wales. It is an offence for a person, other than the Accountant in Bankruptcy, to act as a trustee in Scotland without being a qualified insolvency practitioner.
An insolvency practitioner must be a natural person. Licences for insolvency practitioners can only be issued by a professional body that the Secretary of State authorises to do so. To obtain a license the applicant must pass exams and have a certain number of hours of practical insolvency experience.
In every personal insolvency there is a trustee, whose general functions are:
to recover, manage and realise the debtor's estate, whether situated in Scotland or elsewhere;

to distribute the estate among the debtor's creditors according to their respective entitlements;
to ascertain the reasons for the debtor's insolvency and the circumstances surrounding it;
to ascertain the state of the debtor's liabilities and assets;
to maintain a sederunt book during their term of office for the purpose of providing an accurate record of the sequestration process;
to keep regular accounts of their intromissions with the debtor's estate, such accounts being available for inspection at all reasonable times by the commissioners (if any), the creditors and the debtor, and;
whether or not the trustee is still acting in the insolvency, to supply the Accountant in Bankruptcy with such information as he considers necessary to enable him to discharge his functions under the 2016 Act.
A trustee, in performing their functions, shall also have regard to advice offered to him by the commissioners (if any).
If the trustee has reasonable grounds to suspect that an offence has been committed in relation to an insolvency by the debtor in respect of their assets, their dealings with them, or their conduct in relation to their business or financial affairs, or by a person other than the debtor in that person's dealings with the debtor, the interim trustee or the trustee in respect of the debtor's assets, business or financial affairs, then the trustee shall report the matter to the Accountant in Bankruptcy. Also, if the trustee has reasonable grounds to believe that any behaviour on the part of the debtor is of a kind that would result in a sheriff granting an application for a bankruptcy restrictions order, the trustee shall report the matter to the Accountant in Bankruptcy. The reports shall be absolutely privileged.
Where the Accountant in Bankruptcy is the trustee, he may apply to the sheriff for directions in relation to any particular matter arising in the insolvency.
Where the debtor, a creditor or any other person having an interest is dissatisfied with any act, omission or decision of the trustee, they may apply to the sheriff court and, on such an application being made, the sheriff may confirm, annul or modify any act or decision of the trustee or may give the trustee directions or make such order as they see fit.
The remuneration of an insolvency practitioner acting as an office-holder in a corporate insolvency is set by creditors. The insolvency practitioner can apply to court if they think the remuneration basis set by creditors is insufficient. Creditors may apply to court if they consider remuneration is excessive.

5 Under which conditions may set-offs be invoked?

A debt which arises before insolvency may be set-off against a claim against the creditor which arises before the insolvency. A debt which arises after insolvency may be set-off against a claim which arises after insolvency.

6 What effect do insolvency proceedings have on current contracts the debtor is a party to?

While the trustee in personal insolvency proceedings represents both the creditors and the debtor, the trustee does not represent the debtor in his liabilities. As such the trustee is not, by acceptance of office and taking possession of the estate, bound to the creditors of the debtor in any continuing obligations or contracts which continue after insolvency has commenced. It is however possible for the trustee, with the authority of creditors, to adopt a contract. In doing so, the trustee will either bind the creditors directly (or those who gave authority), or the trustee will be personally bound with relief against the creditors. A trustee who adopts a contract without the authority of creditors is personally liable for the obligations.
The trustee may enter into any contract where it is considered that this would be beneficial for the administration of the debtor's estate, except where the adoption is precluded by the express or implied terms of the contract.
In some contracts the trustee may not have to execute any performance and can simply claim the benefit of the contract; such as collect payment. In other contracts the trustee may honour the obligations and carry out performance because a benefit will be produced for the estate.
If the trustee does not adopt a contract then the other party may have a claim for damages as an ordinary creditor in the insolvency, but not, in the absence of special provision in the contract, if the other party has terminated the contract or consented to the same, following the insolvency.
The contractual powers of the trustee in a personal insolvency are set out at section 110 of the 2016 Act. The trustee must, within 28 days from receipt of a request in writing from any party to a contract entered into by the debtor, adopt or refuse to adopt the contract. The 28 day period may be extended on application to the sheriff court if the Accountant in Bankruptcy is trustee, or by application to the Accountant in Bankruptcy if he is not the trustee. Any such decisions to extend the period are subject to review or appeal. It is also possible for the Accountant in Bankruptcy to refer a case to the sheriff for a direction before making a decision or undertaking any review. If the trustee does not reply in writing to a request by any party to a contract within the 28 day period (or any longer period, as the case may be) then the trustee shall be deemed to have refused to adopt the contract.
The continued provision of certain supplies (utilities, communications and IT services considered 'essential') can be continued in the insolvency without the need to pay any arrears outstanding at the entry to insolvency.
In corporate insolvency an insolvency office-holder is under no obligation to perform contracts entered into by the debtor company. A liquidator may disclaim an unprofitable contract, ending the insolvent's interest/liability in it (the counterparty may claim in the insolvency for losses/damages as a result of the insolvency). Other than essential supplies, suppliers can terminate contracts upon insolvency (if their contract provides for it). Any unpaid goods/services would be a claim in the insolvency.

7 What effect does an insolvency proceeding have on proceedings brought by individual creditors (with the exception of pending lawsuits)?

In personal insolvencies, section 109(5) of the 2016 Act allows the trustee to bring, defend or continue any legal proceedings relating to the estate of the debtor.
Generally, if someone has a claim against a debtor at the date on insolvency, they will claim in the insolvency. Although court action against the debtor may be the most appropriate way to constituted a disputed debt.
The processes of liquidation and administration acts to create a moratorium. Legal action cannot be taken against the company post-commencement without the consent of the office-holder, or permission of the court.
In a CVA, any creditor bound by the agreement could not take legal action to purse the debt (as they are bound by the accepted agreement). A post-approval creditor could take such action if they were not paid.

8 What effect does an insolvency proceeding have on the continuation of lawsuits pending at the moment of the opening of the insolvency proceeding?

A debtor cannot raise or continue a court action which the trustee is willing to pursue. Intimation of the action should be made to the trustee, allowing the opportunity to "sist" themselves into the action or defend it. The court action can however continue, regardless of the trustee's position.
Proceedings affecting status; such as divorce, can be pursued by a debtor notwithstanding their entry into insolvency proceedings. An action of damages for solatium is personal to the party so a trustee has no title to initiate proceedings, although a trustee may sue for patrimonial loss or may enter into an action in which solatium is claimed, or a debtor may have to account to the trustee for the proceeds of any action.
There is provision in Scotland which allows a debtor to intimate their intention to apply for insolvency or a trust deed, by applying for a moratorium. A feature of the moratorium is that it provides the debtor with a 6 week protection from diligence. So a court action may continue during this period before the insolvency proceedings are entered into, however diligence on any judgement granted will not be allowed.
The liquidation and administration processes create a moratorium. Pending actions at the date of the insolvency cannot be continued without the consent of the office-holder, or permission of the court.

A creditor in a pending action at the approval of a CVA could not continue such an action, as they would be bound by the terms of the CVA (whether or not they themselves voted to approve it).

9 What are the main features of the participation of the creditors in the insolvency proceeding?

Creditors can be involved in insolvency proceedings in a number of ways, including creditors meetings. Within 60 days of an award of insolvency the trustee has to decide whether or not to call a statutory meeting of creditors. If a meeting is held, the creditors present can vote to replace the trustee. If the trustee decides not to call a meeting, creditors can request one and the trustee is obliged to call the meeting if not less than a quarter in value of the creditors (based on the total debt owed) request it. Other meetings can be called by creditors at any time. A meeting must be held if called by one tenth in number or one third in value (based on the debt owed) of the creditors. A meeting of creditors can issue directions to a trustee but the trustee and other creditors have the right to appeal to the sheriff court. At any meeting of creditors commissioners can be elected. Commissioners can be elected to generally advise and supervise the administration of the bankruptcy, including auditing the trustee's accounts. Commissioners are creditors or their mandated representatives. If no commissioners are elected, the Accountant in Bankruptcy performs this function.

Trustees are required to produce accounts at the end of the first year and periodically thereafter until the end of the insolvency. Accounts have to be audited by the Accountant in Bankruptcy or elected commissioners. Creditors will be sent copies of a determination of the trustee’s outgoings and remuneration. Creditors can ask to see the accounts and can appeal against the determination.

In relation to an ordinary trust deed, the deed will not be binding on creditors unless they have agreed to its terms, and it becomes protected.

In corporate insolvency proceedings, creditors participate in insolvency proceedings though creditor meetings and other decision processes. They may also form a committee and elect its members. Office-holders must update creditors regularly (every 6 or 12 months, depending on the procedure) on the progress of a case.

10 In which manner may the insolvency practitioner use or dispose of assets of the estate?

The trustee in a personal insolvency administers the insolvency on behalf of the creditors, and has powers to identify and recover the debtor’s estate which vests in the trustee. Indeed section 109 of the 2016 Act states that the trustee shall, as soon as may be after their appointment, and for the purpose of recovering the debtor’s estate (subject to section 113 of the Act regarding the debtor’s family home), take possession of the debtor’s whole estate so far as vesting in the trustee and any document in the debtor’s possession or control relating to his assets or his business or financial affairs. The trustee must also make up and maintain an inventory and valuation of the estate, and thereafter send a copy of any such inventory and valuation to the Accountant in Bankruptcy. The trustee is also entitled to have access to all documents relating to the assets or the business or financial affairs of the debtor sent by or on behalf of the debtor to a third party and in that third party's hands, and to make copies of any such documents. If any person obstructs a trustee who is exercising, or attempting to exercise, a power to access documents, the sheriff, on the application of the trustee, may order that person to cease so to obstruct the trustee. The trustee may further require delivery of any title deed or other document of the debtor, notwithstanding that a right of lien is claimed over the title deed or document, but without prejudice to any preference of the holder of the lien.

Once assets have been recovered, the trustee must then manage and realise the estate. In terms of section 109 of the 2016 Act the trustee shall, as soon as may be after their appointment, consult with the Accountant in Bankruptcy concerning the exercise of their functions and, subject to certain exceptions, comply with any general or specific directions given to him as the case may be by the creditors; on the application of the commissioners; by the sheriff, or; by the Accountant in Bankruptcy, as to the exercise by the trustee of such functions.

The trustee may do any of the following:

carry on or close down any business of the debtor;

bring, defend or continue any legal proceedings relating to the estate of the debtor;

create a security over any part of the estate;

where any right, option or other power forms part of the debtor's estate, make payments or incur liabilities with a view to obtaining, for the benefit of the creditors, any property which is the subject of the right, option or power;

borrow money in so far as it is necessary for the trustee to do so to safeguard the debtor’s estate; and

effect or maintain insurance policies in respect of the business or property of the debtor.

Any sale of the debtor’s estate by the trustee may be by either public sale or private bargain.

The following rules shall apply to the sale of any part of the debtor’s heritable estate over which a heritable security is held by a creditor or creditors if the rights of the secured creditor or creditors are preferable to those of the trustee:

the trustee may sell that part only with the concurrence of every such creditor unless they obtain a sufficiently high price to discharge every such security;

the taking of steps by a creditor to enforce their security over that part after the trustee has intimated to the creditor that they intend to sell it, and the commencement by the trustee of the procedure for the sale of that part after a creditor has intimated to the trustee that they intend to commence the procedure for its sale, shall be precluded;

where the trustee or a creditor has given intimation (as outlined above), but has unduly delayed in proceeding with the sale, then, if authorised by the sheriff in the case of intimation under any creditor to whom intimation has been given, may enforce their security, or vice versa the trustee may sell that part.

The function of the trustee to realise the debtor’s estate shall include the function of selling, with or without recourse against the estate, debts owing to the estate.

The trustee may sell any perishable goods without complying with any directions given, if the trustee considers that compliance with such directions would adversely affect the sale.

It is incompetent for the trustee, or an associate of the trustee, or for any commissioner, to purchase any of the debtor's estate in pursuance of section 109 of the 2016 Act.

The trustee must comply withthe requirements of section 109(7) of the 2016 Act and may do anything permitted by section 109 only in so far as, in their view, it would be of financial benefit to the estate of the debtor and in the interests of the creditors to do so.

11 Which claims are to be lodged against the debtor's insolvency estate and how are claims arising after the opening of insolvency proceedings treated?

Creditor claims in an insolvency proceeding in Scotland are debts which, generally, were due as at the date of insolvency. If an application was presented by a debtor, then the date of insolvency is the date of award. If the insolvency arose by virtue of a creditor petition, then the date of insolvency is the date of the first warrant to cite the debtor.

The trustee’s outlays and remuneration, the expenses incurred by a creditor who petitioned for the debtor’s insolvency or concurred in the petition, and interest on the debts from the date of insolvency until payment of the debt, are also paid from the estate (provided that sufficient funds are ingathered).

Claims which arise after the opening of the insolvency proceedings cannot be claimed. Therefore a creditor whose claim arises after the sequestration has a claim against the debtor, which could result in a further insolvency proceedings being opened. Indeed, it is competent to have more than one insolvency in progress against a single debtor.

In corporate insolvency, all debts and liabilities owed by the company prior to the onset of insolvency can be lodged in the insolvency. Debts payable in the future may also be claimed, but discounted to present values. Liabilities arising from certain criminal actions (such as drug trafficking) are not provable in administration or liquidation. Liabilities incurred after the commencement of proceedings are considered 'expenses'. These are subject to their own hierarchy of payment but all must be paid before money can be distributed to creditors.

12 What are the rules governing the lodging, verification and admission of claims?

Section 122 of the 2016 Act sets out the provisions for submitting claims in a personal insolvency. In order to obtain an adjudication as to the creditor's entitlement (so far as funds are available) to a dividend out of the debtor's estate, a creditor must submit a claim to the trustee not later than the "relevant day". The relevant day is the day which is 120 days after the day on which notice is given to the creditor as to whether the trustee intends to call a statutory meeting, or where no notice is given to the creditor, the day which is 120 days after the day on which the trustee gives notice to the creditor inviting the submission of claims.

If a creditor submits a late claim to the trustee (after the relevant day) then the trustee may, in respect of any accounting period, provide an adjudication as to the creditor's entitlement (so far as funds are available) to a dividend out of the debtor's estate if the claim is submitted not later than 8 weeks before the end of the accounting period, and there were exceptional circumstances which prevented the claim from being submitted before the relevant day.

The trustee, for the purpose of satisfying the validity or amount of a claim submitted by a creditor, may require the creditor to produce further evidence. The trustee may alternatively require any other person who they believe can produce relevant evidence, to produce such evidence. If the creditor or other person refuses or delays to do so, the trustee may apply to the sheriff court for an order requiring the creditor or other person to attend for private examination before the sheriff.

Creditor's claims are to be submitted in a prescribed form, as set out in the Bankruptcy (Scotland) Regulations 2016.

Creditors in a corporate insolvency may submit a claim (proof of debt) at any point in proceedings. A claim must be submitted to be able to vote in any meeting (or other decision procedure) or to receive a distribution. In administration or liquidation, where a distribution is intended, the office-holder will write to all those creditors yet to prove their claims stating that a distribution will be made, inviting them to submit claims, and fixing a last date to do so in order to be included in that distribution. An office-holder may deal with claims submitted after this date, but is not obliged to do so. In winding up by the court there is a standard form that must be submitted to prove debts. No other procedure has a standard form but the legal framework for other procedures states what must be included in a proof for distribution purposes. If a creditor does not claim in time, they cannot disturb the distribution.

13 What are the rules governing the distribution of proceeds? How are claims and the rights of creditors ranked?

The priority of distribution in personal insolvency proceedings are as follows:

The outlays and remuneration of the interim trustee in the administration of the debtor's estate;

The outlays and remuneration of the trustee in the administration of the debtor's estate;

Where the debtor is a deceased debtor, deathbed and funeral expenses reasonably incurred and expenses reasonably incurred in administering the deceased's estate;

The expenses reasonably incurred by a creditor who is a petitioner, or who concurred in a debtor application, for the debtor's insolvency;

Ordinary preferred debts (excluding any interest which has accrued thereon to the date of insolvency);

Secondary preferred debts (excluding any interest which has accrued thereon to the date of insolvency);

Ordinary debts;

Statutory interest on the ordinary preferred debts the secondary preferred debts and the ordinary debts between the date of insolvency and the date of payment of the debt, and;

Any postponed debt.

Any surplus remaining, after all the debts have been paid in full, shall revert to the debtor or to his successors or assignees.

Some claims arising from employment are treated as preferential, and payable after the expenses of the procedure are met but before the claims of floating chargeholders and unsecured creditors.

14 What are the conditions for, and the effects of closure of insolvency proceedings (in particular by composition)?

Insolvency proceedings are generally thought of as being closed once the administration is complete and the trustee has paid any dividends to creditors, has completed all accounts, and has been discharged as trustee. However, it has been established through case law in Scotland that insolvency continues notwithstanding the discharge of the debtor and the trustee. This is because the process may be revived through an application to the court, or now in certain circumstances; the Accountant in Bankruptcy.

The effect of closure of the insolvency proceedings are that, in terms of section 145 of the 2016 Act, the debtor is discharged within the United Kingdom of all debts and obligations for which they were liable at the date of insolvency. Accordingly, the creditors can no longer look to enforce payment of these debts. There are exceptions however, with the debtor not discharged of any liability to pay a fine imposed in a justice of the peace court (or a district court, any liability under a compensation order within the meaning of section 249 of the Criminal Procedure (Scotland) Act 1995 ("**the 1995 Act**"), any liability to forfeiture of a sum of money deposited in court under section 24(6) of the 1995 Act; any liability incurred by reason of fraud or breach of trust, any obligation to pay aliment or any sum of an alimentary nature under any enactment or rule of law or any periodical allowance payable on divorce by virtue of a court order or under an obligation, not being aliment or a periodical allowance which could be included in the amount of a creditor's claim, or child support maintenance within the meaning of the Child Support Act 1991 ("**the 1991 Act**") which was unpaid in respect of any period before the date of sequestration of any person by whom it was due to be paid or any employer by whom it was, or was due to be, deducted under section 31(5) of the 1991 Act.

At the end of a trust deed the debtor is discharged from all their trust deed debts providing that their trustee considers that they have met their obligations under the trust deed.

Provision for composition was repealed in Scotland in respect of insolvency petitions presented after 1 April 2015, by virtue section 18 of the Bankruptcy and Debt Advice (Scotland) Act 2014.

There are detailed procedural rules on the exit/closure of all corporate insolvency proceedings, both liquidation and reorganisation.

Court approval is not needed for reorganisation plans, but an aggrieved party may apply to the court if they feel their interests have been unnecessarily harmed.

Creditors agree proposals made by the debtor (in a CVA – >75% approval, by value) or insolvency office-holder (administration, simple majority, or approval of all secured and a majority preferential creditors in cases where no return to unsecured creditors is thought likely).

In a CVA, once approved all unsecured creditors at the point of the proposals are bound by the arrangement.

15 What are the creditors' rights after the closure of insolvency proceedings?

After closure of insolvency proceedings, creditors may appeal the discharge of the trustee, and also have the right to make an application to reopen and revive the proceedings.

Also, as discussed above, while the closure of the insolvency proceedings and debtor discharge generally means that the debtor is discharged in the United Kingdom of all debts and obligations for which they were liable for at the date of insolvency, there are exclusions. Therefore, creditors may still have rights to pursue these certain excluded debts, notwithstanding the closure of the insolvency proceedings.

Creditors may also claim funds distributed to them (but not banked by them) after the closure of the proceedings.

16 Who is to bear the costs and expenses incurred in the insolvency proceedings?

The costs and expenses incurred in insolvency proceedings should be met through funds ingathered from the estate. However if there are insufficient funds to cover the costs and expenses of the proceedings, and the Accountant in Bankruptcy is the trustee, then these costs will be met by the public purse. If the trustee is an insolvency practitioner and not the Accountant in Bankruptcy, then the trustee may look to the petitioning creditor to cover any shortfall in circumstances where insufficient funds have been ingathered to pay the costs and expenses of the proceedings. Costs and expenses must be paid (from realisations) before funds are returned to creditors.

17 What are the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors?

Gratuitous alienations, unfair preferences and other fraudulent transactions are subject to challenge at common law, and in accordance with sections 98(11) and 99(8) of the 2016 Act.

A gratuitous alienation by a debtor is challengeable by any creditor who is a creditor by virtue of a debt incurred on or before the date of insolvency, or before the granting of the trust deed or the debtor's death. It is also challengeable by the trustee, the trustee acting under the trust deed, or the judicial factor, as the case may be.

A challenge to a gratuitous alienation applies where, by the alienation, any of the debtor’s property has been transferred or any claim or right of the debtor has been discharged or renounced, and any of the following has occurred:

the debtor’s estate has been made insolvent (other than, in the case of a natural person, after their death); or

the debtor has granted a trust deed which has become a protected trust deed; or

the debtor has died and within 12 months after death, their estate has been made insolvent; or

the debtor has died and within the said 12 months, a judicial factor has been appointed under section 11A of the Judicial Factors (Scotland) Act 1889 to administer their estate and the estate was absolutely insolvent at the date of death; and

the alienation took place on a relevant day.

The day on which an alienation took place shall be the day on which the alienation became completely effectual, and “relevant day” means if the alienation has the effect of favouring:

a person who is an associate of the debtor, a day not earlier than 5 years before the date of insolvency, the granting of the trust deed or the debtor’s death, as the case may be; or

any other person, a day not earlier than 2 years before the said date.

On a challenge being brought the court shall grant decree of reduction or for such restoration of property to the debtor’s estate or other redress as may be appropriate, but the court shall not grant such a decree if the person seeking to uphold the alienation establishes:

that immediately, or at any other time, after the alienation, the debtor’s assets were greater than his liabilities; or

that the alienation was made for adequate consideration; or

that the alienation -

was a birthday, Christmas or other conventional gift; or

was a gift made, for a charitable purpose, to a person who is not an associate of the debtor,

which having regard to all the circumstances, it was reasonable for the debtor to make, without prejudice to any right acquired in good faith and for value from or through the transferee in the alienation.

An unfair preference by a debtor is subject to statutory challenge. The challenge may be by a creditor who is a creditor by virtue of a debt incurred on or before the date of insolvency, the granting of the protected trust deed, or the debtor’s death. There may also be a challenge by the trustee, the trustee acting under a protected trust deed, or a judicial factor. The transaction must have had the effect of creating a preference in favour of a creditor to the prejudice of the general body of creditors, being a preference created not earlier than: 6 months before the insolvency, the granting by the debtor of a trust deed which has become a protected trust deed, or the debtor’s death where within 12 months after death the estate has been made insolvent or a judicial factor has been appointed. However a transaction shall not be challengeable where it was in the ordinary course of trade or business, a payment in cash for a debt which when it was paid had become payable (unless the transaction was collusive with the purpose of prejudicing the general body of creditors), a transaction whereby the parties undertook reciprocal obligations (whether the performance by the parties of their respective obligations occurs at the same time or at different times) unless the transaction was collusive, or the granting of a mandate by a debtor authorising an arrestee to pay over the arrested funds or part thereof to the arrester where there has been a decree for payment or a warrant for summary diligence and the decree or warrant has been preceded by an arrestment on the dependence of the action or followed by an arrestment in execution. On a challenge being brought, the court, if satisfied, shall grant decree of reduction or for such restoration of property to the debtor’s estate or other redress as may be appropriate, provided that this shall be without prejudice to any right acquired in good faith and for value from or through the creditor in whose favour the preference was created.

In corporate insolvency, if the company has preferred a particular creditor in the approach to formal insolvency, or they had entered a transaction at an undervalue, then an office-holder may pursue the recipient. On application of the office-holder in a liquidation or administration, a court may reverse either type of transaction and order that the recipient restore the position to what it would have been if the transaction had not taken place.

Claims to reverse preference payments must relate to transactions which occurred in the 6 months prior to appointment of the administrator or commencement of the winding-up, or 2 years in the case of a preference payment made to an associate.

Claims to reverse transactions at undervalue must relate to transactions made in the 2 years prior to those events.

An office-holder in administration, liquidation or a voluntary arrangement may apply to the court for an order reversing a transaction which defrauded creditors. Such an application may also be made by a victim of the transaction, with the leave of the court.

In administration and liquidation proceedings the office-holder may also take reparation action against any director of the company involved in trading with knowledge of insolvency which caused further losses to creditors, fraudulent trading, or misfeasance.

In a case where a petition for winding-up is presented to the court, any dispositions of property made after presentation of the petition are void unless the court orders otherwise.

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