



Directors' Liability Survey 2022

# Insolvency

Mark Sutton, Clyde & Co

Insolvency risk does not feature in the top five concerns for respondents but, nonetheless, globally, 31% considered it a 'very' or 'extremely significant' risk for directors and officers and that concern has grown since the previous survey was undertaken.



It is felt most keenly by those in the transportation and retail industry, which is no surprise given the significant impact the pandemic has had on these sectors.

Most countries implemented emergency legislation, providing financial support and relaxing insolvency rules in order to allow companies to navigate the difficult circumstances. This translated into record low numbers of insolvencies in 2020 and through to mid-2021.

In the U.K., statistics show Creditors' Voluntary Liquidation numbers are currently more than double the level in February 2021 and are 40% higher than pre-pandemic levels. However, the number of other insolvency procedures, such as compulsory liquidations for companies and bankruptcies for individuals, remains very low.

It is our view that now government protections have largely ceased numbers will rise and we can expect a greater number of filings in the coming months and years.

Claims against directors and officers related to insolvency events are common and already represent a large risk exposure. Insolvency practitioners are duty-bound to closely examine the decisions and conduct of the directors and senior management in the period leading up to insolvency, which could see the directors and officers investigated for breach of duties to the company and for breaches of company and insolvency legislation.

Further, during difficult economic times, there is a higher risk of fraudulent, dishonest or wrongful actions. Liability in relation to any of these breaches is not only grounds for disqualification but can also lead to actions against directors for the recovery of any sums lost by the company. There may also be claims by the bodies which regulate pensions if the directors' actions negatively impacted the company's pension.

In the U.K., an Act was recently passed which further widens the potential for liability following an insolvency, the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021. This Act provides that existing and former directors can be subject to disqualification even after a company has been dissolved and, if creditors have suffered financial loss due to the director's actions, an order can be made for the director to be personally responsible for those losses.

The aim is to prevent companies from being dissolved (rather than going through a formal liquidation process) with outstanding debts and liabilities, only for the company to be re-established under a new name, a process known as phoenixism.

The Government considers there is a particular risk that some companies will seek to dissolve the company in order to avoid repaying government loans given during the pandemic, such as the Bounce Back Loan. The Act does away with the previous need for the company to be restored to the register, meaning that we can expect an increase in the number of investigations against directors and officers.

## Regional views from Clyde & Co and WTW

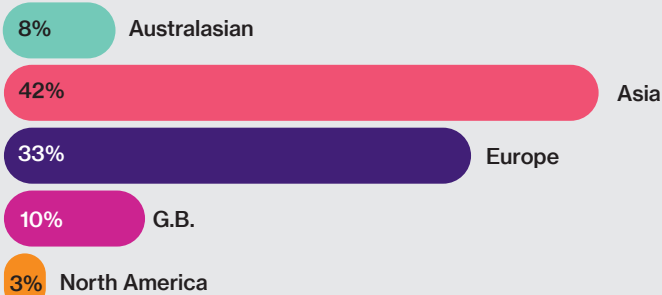
### Australia - Christopher Smith

Corporate insolvencies have been falling year on year in Australia since 2016. Last year was again one of the quietest years in memory for many in the field of insolvency and restructuring. The tsunami of insolvencies predicted at the start of the pandemic in 2020 has not materialised. This is due in large part to temporary legislative relief, government support, rent deferrals and leniency from creditors and tax office enforcement, much of which will end soon.

Ironically, as the economy bounces back, the number of insolvencies is likely to increase. Challenges ahead include a shortage of employees, global supply chain issues, and increasing interest rates. The consensus is there will be an uptick in insolvencies at some future point, but perhaps not on the scale envisaged at the start of the pandemic.

Sentiments expressed in the survey reflect the low priority afforded to insolvency in Australia. Only 8% of Australasian participants indicated insolvency, bankruptcy, or corporate collapse risk was 'very significant' or 'extremely significant' to directors. This was significantly lower than participants in some other regions (Asia 42%, Europe 33%) but on par with others (G.B. 10%, North America 3%).

### Insolvency, bankruptcy, or corporate collapse



Percentage perceived the risk 'very significant' or 'extremely significant' to directors

Source: Directors' Liability Survey 2022

## France – David Meheut

Like in almost every other region, the economic climate has come out as one of the top two risks for organisations' business operations. This it is unlikely to change given the current geopolitical crisis and the resulting supply chain disruption and inflation, in a climate which was already under stress due to the pandemic.

In terms of the translation of that risk into D&O exposures, with the COVID-19 crisis, it was widely expected insolvency risks would be on the rise in 2021, especially as claims against directors have become more systematic in certain jurisdictions.

However, in most European countries, the filings for insolvency have been much lower than expected, and even decreased in certain countries, largely due to financial supports and schemes put in place by the various governments. With the increased tension, things may change.

## India – Sumeet Lall

As with many other countries, the Central government in India took steps to avoid enterprises from being pushed into insolvency during the pandemic, increasing the threshold to initiate insolvency proceedings and suspending the initiation of the insolvency process.

Despite the suspension now having been lifted, the number of applications has not dramatically increased, potentially due to the multiple subsequent waves of the pandemic which affected the ability of the Adjudicating Authority to hear such cases.

The Adjudicating Authority has now recommenced its functioning and a surge in applications is anticipated. Moreover, recent amendments to the insolvency regulations require resolution professionals to report their opinion and determination in respect of avoidance transactions, namely, preferential transactions, undervalued transactions, extortionate credit transactions, fraudulent trading and the like to the Insolvency and Bankruptcy Board of India.

Consequently, a resolution professional is now duty-bound to actively find out if a corporate debtor has been subject to the aforesaid avoidance transactions. Accordingly, it is anticipated the number of proceedings alleging avoidance transactions against directors and officers is also going to increase and there exists a significant risk in this regard.

## Spain – Ulysses Grundey

The recent extension (until 30 June 2022) of a measure to waive the obligation for companies that are in a situation of bankruptcy to file for insolvency proceedings, seeks to hold back a wave of potential business failures. But although the expectation is that the economic situation will improve, according to data from the Bank of Spain one in five companies is at risk of insolvency due to the impact of COVID-19. In addition, a reform of the current insolvency law is on the way which will add obligations to an already very complex law.

## South Africa – Graeme Griffiths

COVID-19 has undoubtedly had a substantial impact on the solvency of businesses in South Africa over the last two years. The impact was not just felt in the small, medium, and micro enterprises (SMME) sector, which employs up to 70% of South Africa's workforce, but also amongst well-established corporates which were also forced to implement severe cost cutting measures to thwart the risk of liquidation.

From April 2020 to September 2021, South Africa's official unemployment rate jumped from 23.3% to 34.9%. This equates to approximately 3.3 million more South Africans being unemployed (7.6 million in total), a significant proportion of which can be attributed to retrenchments or business liquidations.

South Africa saw a spike of liquidations in 2020, which from January 2021 to date is now fortunately following a downward trajectory as economies around the world recover. This is hopefully one sign the most severe short-term financial impacts of COVID-19 appear to be behind us.

## U.A.E. - Mark Beswetherick

Insolvency regimes across the region are still in their infancy and we have not yet seen a raft of insolvencies or litigation following the financial fallout from the COVID-19 crisis.

However, in a landmark bankruptcy case judgment issued on 10 October 2021, the Dubai Court of First Instance has held the directors and managers of an insolvent Dubai-based Public Joint-Stock Company to be personally liable to pay the outstanding debts of the previously listed company (now in liquidation) pursuant to the U.A.E. Bankruptcy Law.

This decision represents a very significant milestone in the U.A.E. insolvency landscape since the enactment of the Bankruptcy Law in late 2016, being the first known instance of a case where such personal liability has been ordered.

The approach taken by the Dubai Court has also confirmed that duties of directors and managers of a U.A.E. company are clearly owed towards the company's creditors. However, this approach is the subject of a current appeal for which the decision is awaited with interest.



# Disclaimer

Willis Towers Watson offers insurance-related services through its appropriately licensed and authorised companies in each country in which Willis Towers Watson operates. For further authorisation and regulatory details about our Willis Towers Watson legal entities, operating in your country, please refer to our Willis Towers Watson [website](#).

It is a regulatory requirement for us to consider our local licensing requirements. The information given in this publication is believed to be accurate at the date of publication shown at the top of this document. This information may have subsequently changed or have been superseded and should not be relied upon to be accurate or suitable after this date.

This publication offers a general overview of its subject matter. It does not necessarily address every aspect of its subject or every product available in the market and we disclaim all liability to the fullest extent permitted by law. It is not intended to be, and should not be, used to replace specific advice relating to individual situations and we do not offer, and this should not be seen as, legal, accounting or tax advice. If you intend to take any action or make any decision on the basis of the content of this publication you should first seek specific advice from an appropriate professional. Some of the information in this video may be compiled from third party sources we consider to be reliable, however we do not guarantee and are not responsible for the accuracy of such. The views expressed are not necessarily those of Willis Towers Watson. Copyright Willis Towers Watson 2022. All rights reserved.

Each applicable policy of insurance must be reviewed to determine the extent, if any, of coverage for losses relating to the Ukraine crisis. Coverage may vary depending on the jurisdiction and circumstances. For global client programs it is critical to consider all local operations and how policies may or may not include coverage relating to the Ukraine crisis. The information contained herein is not intended to constitute legal or other professional advice and should not be relied upon in lieu of consultation with your own legal and/or other professional advisors. Some of the information in this publication may be compiled by third-party sources we consider reliable; however, we do not guarantee and are not responsible for the accuracy of such information. We assume no duty in contract, tort or otherwise in connection with this publication and expressly disclaim, to the fullest extent permitted by law, any liability in connection with this publication. Willis Towers Watson offers insurance-related services through its appropriately licensed entities in each jurisdiction in which it operates. The Ukraine crisis is a rapidly evolving situation and changes are occurring frequently. Willis Towers Watson does not undertake to update the information included herein after the date of publication. Accordingly, readers should be aware that certain content may have changed since the date of this publication. Please reach out to the author or your Willis Towers Watson contact for more information.

## About WTW

At WTW (NASDAQ: WTW), we provide data-driven, insight-led solutions in the areas of people, risk and capital. Leveraging the global view and local expertise of our colleagues serving 140 countries and markets, we help you sharpen your strategy, enhance organizational resilience, motivate your workforce and maximize performance. Working shoulder to shoulder with you, we uncover opportunities for sustainable success — and provide perspective that moves you. Learn more at [wtwco.com](#).



[wtwco.com/social-media](#)