Preface

Corporate rescue, as an alternative to liquidation, has gained considerable popularity in insolvency practice on both sides of the Atlantic during the last three decades and in continental Europe in recent years. The pre-pack approach, in particular, has emerged as an innovative corporate rescue method that incorporates the virtues of both informal (out-of-court) and formal (judicial) insolvency proceedings. At the same time, an expedited and transaction cost-oriented approach to insolvency might prejudice the interests of certain classes of creditors negating, to an extent, time-honoured essential features of insolvency law like creditor participation as it is their interests that are at stake.

This book provides a critical analysis of corporate rescue, drawing on a variety of legal and policy-making sources both at the national and the international level. It examines the pre-pack approach to corporate rescue using a comparative angle and offers a discussion and evaluation of mechanisms that facilitate corporate rescue in comparing those of the UK (in terms of economic importance), EU jurisdictions and the USA. The book goes beyond the well-known advantages of the pre-pack approach to examine the undesirable effects it may have as it gives rise to the risk that corporate rescue practice might develop under the shadow of the law and give rise to a far greater potential for self-serving behaviour that existing law could otherwise tightly curtail. Clearly, conflict of interests and even the likelihood of self-dealing by management are less well regulated in the context of pre-pack proceedings than under formal insolvency law and this intensifies the concerns over potential abuses or just opportunistic behaviour by insiders who might attempt to game the system to benefit themselves at the expense of others. To properly and thoroughly discuss these issues, the book is structured around the examination of eight questions, which are each the subject of study of a specific chapter.

To this effect, the first chapter deals with the concept of ‘corporate rescue’: the challenges corporate rescue efforts may face, and how the pre-pack approach, as a hybrid of out-of-court (informal) and formal ways of rescue, copes with those challenges. Is this pragmatic approach capable of accommodating different goals in corporate rescue? Chapter 2

vi
considers how pre-pack administrations fit into the development of the English corporate rescue system, and why they are developed so rapidly in practice, despite their controversial reputation. What are the practical effects of the pre-determination feature of pre-packs on the conventional role of administrators? In Chapters 3 and 4, the book examines what contributes to the particular risks of the opportunistic use of pre-pack sales to connected parties. What are the possible solutions to address the concerns that have been raised? Would heightened standards of disclosure and newly fashioned professional regulations be sufficient to achieve their set goals, namely, protection of general creditors from management’s opportunistic behaviour?

After this general discussion and examination of pre-packs in the UK law context, the book proceeds, in Chapters 5 and 6, to examine how the pre-pack approaches have changed the insolvency landscape in the USA. Two increasingly popular US practices possess ‘pre-pack’ characteristics by fast-tracking the US Chapter 11 reorganisation procedure: pre-packaged bankruptcy filings and section 363(b) pre-plan sales. They are both examined in Chapters 5 and 6 respectively.

The key inquiry as regards pre-packaged bankruptcy filings relates to the requirement of pre-petition solicitation of votes and their implications on creditor protection. Moreover, s 363(b) pre-plan sales as a substitute for true reorganisation may be the closest to UK pre-pack sales in the sense that both processes aim at value realisation through expedited going-concern sales coupled with a denial of creditor participation in the process. In this context the following issues are examined in depth in Chapter 6: What are the standards the US bankruptcy courts apply when permitting a particular s 363 pre-plan sale? Is the judicial scrutiny adequate and effective in distinguishing expedited sales in which speed is essential and those in which it is merely tactical? How does the US approach in ameliorating the concerns of abuse raised in the accelerated sale process in insolvency differ with that of the UK?

In recent years and in part as a response to forum shopping by continental European companies nearing bankruptcy, many European countries have enacted reforms to their insolvency framework in order to meet the challenges of the changing economic environment. Accordingly, Chapter 7 examines the pre-pack or equivalent mechanisms that have been implemented or are under consideration in select European jurisdictions, namely, France, Germany and the Netherlands. What are the strengths and weaknesses of each system in utilising the pre-pack and similar approaches in corporate rescue while limiting the negative impact that the speed through which proceedings are concluded has on accountability to and adequacy of safeguards for creditors?
Chapter 8 examines the implications of the UK pre-pack proceedings on insolvency forum shopping for companies that are mindful to effectuate a quick pre-packed business sale through the administration procedure. What are the challenges this phenomenon poses amid recent changes that the EU policy-makers are contemplating in order to provide a common set of rules to first regulate conflict-of-law issues at the European level and, then, to act as a driver for domestic legislative changes that are intended to address the challenge of forum shopping in Europe?

Finally, Chapter 9 provides the conclusion. It consolidates the findings of analysis undertaken in the preceding chapters, including comparative analysis. On that basis this chapter makes a number of proposals to augment control mechanisms in order to limit the controversy surrounding the pre-pack business sales to connected parties in the UK, and improve the levels of scrutiny and transparency in the key decision-making process.