CLIFFORD CHANCE

STRUCTURAL CHALLENGES FOR HIGHER EDUCATION IN THE UK

The UK is recognised internationally for its offering of top-ranking higher education institutions. However, many UK universities have found themselves facing unprecedented financial distress, prompting conversations about both the contributing factors, and the adequacy of the legal tools available to resolve such difficulties.

Key issues

- Higher education is coming under increasing pressure due to weakening revenue and rising costs. The Office for Students modelling suggests that nearly three quarters of higher education providers could be deficit by 2025 – 2026.
- The Office for Students has stepped up its engagement with providers to review strategic and contingency plans, including market exit plans.
- Various restructuring and insolvency tools are available for higher education providers to restructure existing liabilities, depending on their nature of incorporation.

FACTORS DRIVING FINANCIAL DIFFICULTIES

Several interrelated factors are contributing to the financial strain faced by higher education providers, including universities:

- **Tuition fees:** Universities have financial models that are heavily reliant upon tuition fees, with course fees accounting for more than 54 per cent of sector wide income. Domestic student fees are subject to price caps, which have not kept pace with inflation. The current fee cap of £9,250 is unchanged since 2017, and in real terms is about 25 per cent lower than it was in 2015-16. A modest rise to £9,535 a year for domestic students will take effect from 1 August 2025, but this will not offset the National Insurance rise that will reportedly cost universities a further £372 million.
- **Declining international enrolment:** The decline in real revenue from domestic students increases universities' reliance on international student recruitment to cross-subsidise costs. At the same time, government policy visa changes have resulted in a sharp fall in international enrolments. Postgraduate international students are now prohibited from bringing family members to the UK, and the salary threshold for skilled worker visas has increased from £26,200 to £38,700. Unsurprisingly, the latest figures released by the Home Office have identified a 16 per cent decline in visa applications in 2024 from 2023.
- **Declining domestic enrolment**: Cost of living pressures are affecting domestic recruitment. Younger students are increasingly opting for employment-based alternatives, and mature age students are reducing their academic load as they seek to balance study with part-time work. Reduced enrolments result in higher course delivery costs, which jeopardises the sustainability of larger scale models.
- **Rising operational costs:** Universities are grappling with soaring costs related to staff salaries, facility maintenance, and regulatory

compliance. The increasing financial burden of maintaining high-quality education and services strains already tight budgets.

- **Pension contributions**: Higher education providers are affected by large defined benefit pension schemes. The employer contribution rates for a number of schemes continues to rise. For example employer contributions to the main academic scheme for former polytechnics, the Teacher Pension Scheme (TPS), are expected to be 40 per cent higher in 2026-27 then in 2022-2023.
- **Increased competition:** Higher education providers are facing increasingly stronger domestic competition. A number of Russell Group universities have lowered their tariffs to boost enrolments, drawing students from non-Russell Group universities. The proliferation of online education and alternative educational models has further intensified competition. Universities compete for lucrative international student enrolments with overseas schools, albeit constrained by visa rules. For example, Nigeria accounted for the third highest number of international student places in 2022-23 (after India and China). Enrolments of Nigerian students have dropped 44 per cent year on year in 2024, with students preferring to enrol with providers in Canada, the US, Germany and Australia.
- **Debt accumulation:** Many universities have historically taken on substantial debt for capital projects, resulting in significant repayment obligations. In recent years, providers have postponed capital expenditure to maintain liquidity, resulting in a future need for investment.

REGULATORY RESPONSE

The Office for Students ("**OfS**") published their assessment of the financial sustainability of higher education providers in May 2024, together with an update in November 2024 which can be accessed here. This assessment recognised that the business models for a significant number of higher education providers is not financially sustainable. The OfS opened a tender in July 2024 for financial advisors to assess the financial risk and the planning assessments of higher education providers, with one of its objectives being to prepare for certain providers needing to exit the market to ensure continuity of education for students.

IMPACTED INDUSTRIES

A number of industries are sensitive to the higher education sector. Lower levels of enrolment result in lower occupancy levels for purpose built student accommodation (PBSA). The drop in revenue that comes with a smaller student population also results in delayed expenditure in asset upgrades, and cancellations of infrastructure projects, which affects real estate and related service contracts, as well as IT and other equipment manufacturers and suppliers. Staff are also affected, with a large number of universities having announced redundancies in 2024. A number of universities are also key employers and contributors to their local economies. Financial pressure experienced by higher education providers can therefore have a ripple effect on supply chains, interrelated industries and local economies.

POTENTIAL OPTIONS

Faced with these challenges, universities and their creditors may consider several potential avenues for restructuring and financial recovery:

- **Restructuring of indebtedness:** Institutions may look to identify opportunities for raising new debt or restructuring existing financial arrangements to manage liquidity. Any restructuring will require effective stakeholder management given that higher education institutions can carry a mix of bilateral and syndicated loans from clearing and development banks, along with private placement debt. Achieving a consensual solution amongst stakeholders in the absence of an implementable fallback plan and without the benefit of a moratorium on creditor action carries material execution risk.
- **Strategic partnering:** Shared outsourcing, partnering and merging between institutions can provide operational efficiencies, allowing resources to be pooled and costs reduced. The practical realities of implementing this sort of strategy can be challenging and could lead to material disruption to student provision.
- **Teach out and orderly wind down:** In cases where universities cannot sustain operations, a teach-out plan (where an institution stops accepting new students, but allows existing students to complete their course of study) can facilitate a gradual closure while ensuring that students can complete their degrees. Whilst every situation is specific to its facts, the costs associated with such a strategy could be substantial.
- **Insolvency:** If all else fails, institutions may need to enter insolvency proceedings. This hasn't happened often and would need to be carefully managed as the consequences can extend well beyond the university itself, impacting local communities and economies.

AVAILABLE LEGAL TOOLS

Insolvency procedures

Higher education providers across the UK are incorporated as either a limited company, royal charter or HE Corporation. The nature of its incorporation influences the restructuring and insolvency processes available.

Private universities tend to be incorporated as limited companies, thereby having access to the restructuring tools available to companies incorporated under the Companies Act 2006 ("**Companies Act**"), including schemes of arrangement ("**Schemes**") or restructuring plans ("**Restructuring Plans**"), company voluntary arrangements, voluntary liquidation and administration.

Older (pre-1992) universities operate typically under a Royal Charter, which is a formal grant issued by a monarch conferring independent legal personality. Secured creditors of royal chartered institutions may have the power to appoint a receiver to take control of the company's assets to recover any outstanding amounts. Alternatively, a stakeholder may file a petition for the compulsory liquidation of the institution if the company is deemed to be insolvent. Royal Charter companies can also propose Schemes, and likely also Restructuring Plans, but other restructuring and insolvency tools including administration and company voluntary arrangements are not available to them. Compulsory liquidation, which is initiated by a stakeholder or

government body filing a petition for the institution's liquidation is often seen as the ultimate fallback scenario for a Royal Charter entity in distress.

Certain higher education providers, such as former polytechnics were incorporated as a HE Corporation. However, there is more limited access to restructuring and insolvency procedures for HE Corporations. Secured creditors may have the power to appoint a receiver to take control of the company's assets to recover any outstanding amounts. Alternatively, a stakeholder may file a petition for the compulsory liquidation of the institution if the company is deemed to be insolvent. We are not aware of any precedent for a Scheme or Restructuring Plan being used by an HE Corporation, and processes such as administration and company voluntary arrangements which are available to companies incorporated under the Companies Act are not available.

Compromise procedures

Schemes can be used to effect a compromise or arrangement between a company and its creditors, or a class of them (with the support of a majority in number representing 75 per cent in value of the voting creditors), and are available to companies capable of being wound up under the Companies Act, which would include universities incorporated as limited companies.

Restructuring Plans are modelled on Schemes and are available to the same parties but only if the company proposing the plan has experienced, or is likely to experience, financial difficulties. Restructuring Plans can extend the reach of a compromise or arrangement to an entire class of dissenting creditors, by way of the cross-class cram down mechanism.

Schemes are often proposed on a "targeted" basis, e.g. to restructure specific financial liabilities; though we are seeing Restructuring Plans being utilised to compromise liabilities more broadly. Both Schemes and Restructuring Plans are being deployed in increasingly innovative ways, including by regulated entities and/or public bodies. By way of example, Consort Healthcare (Tameside) plc, a special purpose vehicle providing services to the Tameside and Glossop Integrated Care NHS Foundation Trust, proposed a Restructuring Plan as part of its strategy to address significant budgetary pressures and ensure that it could continue delivering essential services as a PFI project entity servicing the public sector. This certainly leaves open the possibility for Schemes and Restructuring Plans to be explored by other institutions providing services of public interest, such as higher education providers, as a means to restructure existing liabilities.

MAKING A CASE FOR A SPECIAL ADMINISTRATION REGIME

Special administration regimes ("**SARs**") are designed to provide businesses or industries that provide a critical service a tailored insolvency procedure with bespoke objectives. There has been a proliferation of the sectors for which special administration is available: investment banks, energy supply companies, postal services, water companies and payment and electronic money.

Although, by their nature, SARs allow for insolvency practitioners to focus on specific objectives (for example prioritising the return of client assets) there are commonalities. The process of a SAR is typically initiated by a regulator or relevant government authority, particularly where an organisation's failure

would cause significant disruption or harm public interests. The benefit of a SAR for an organisation is that a moratorium is imposed, preventing creditors from initiating or continuing legal actions, providing valuable breathing space to implement turnaround measures. Necessary liquidity may also be provided by the government (or other public bodies) with super-priority funding, to support the continuity of the services being provided.

A SAR for Further Education providers, such as colleges, was introduced under the Technical and Further Education Act 2017. The SAR for Further Education providers grants the court the power to make an education administration order to minimise any disruption to students, and to facilitate either rescuing the institution as a going concern, or supporting a form of partnership or merger, or otherwise a teaching out and winding down of the institution. However, this SAR for Further Education providers has had limited application in practice.

As higher education institutions are complex, large-scale organisations, there would be a lot to benefit from a bespoke insolvency procedure. Building upon the current blocks of the SAR for Further Education providers, a SAR for higher education providers could similarly be initiated by a state body or regulator, such as the OfS, appointing a Special Administrator who will prioritise protecting the delivery of education. In turn, a SAR could provide the Court and Special Administrator with the powers needed to preserve the long-term public benefits that higher education institutions provide.

CONTACTS

Iain White
Partner,
London

T +44 20 7006 2825
E iain.white
@cliffordchance.com

Tim Lees
Partner,
London

T +44 20 7006 6253
E tim.lees
@cliffordchance.com

Katelyn Ewart
Senior Associate,
London

T +44 207006 2927
E katelyn.ewart
@cliffordchance.com

Emma Buchanan
Lawyer,
London

T +44 207006 2963
E emma.buchanan
@cliffordchance.com

Isabel Lewis
Lawyer,
London

T +44 207006 2766
E izzy.lewis
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2024

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Houston • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Riyadh* • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

*AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.