

# Corporate Insolvency

## INTRODUCTION

Corporate insolvency procedures can take several forms:

- Voluntary Arrangements
- Administration Orders
- Receiverships
- Voluntary Liquidations
- Compulsory Liquidations

These are set out in the Insolvency Act 1986.

Although not all procedures under the legislation relate to companies that are insolvent, all procedures under the legislation must be supervised by a licensed insolvency practitioner. These are individuals who are either qualified accountants or solicitors, or those otherwise authorised by the Department of Trade and Industry.

## POSITION OF THE DIRECTORS

One of the duties of the insolvency office holder is to send a report to the Secretary of State regarding the conduct of all directors (executive and non-executive) during the last three years before the commencement of the insolvency procedure. If the Secretary of State considers the conduct of the directors was in serious breach of their duties as directors, the Secretary of State can seek to impose disqualification orders on such directors.

## VOLUNTARY ARRANGEMENTS

These take place at the instigation of the directors, when wishing to seek agreement with the creditors of the company. An approach is made by the company to an insolvency practitioner who will effect the appropriate application (through solicitors if they are not themselves solicitors) to the court for formal approval of the Arrangement. Alternatively, if a Liquidator or Administrator has been appointed, they can apply to the court for such an order, if they consider such a procedure appropriate.

If the Nominee approves the proposal, he reports this to the Court and calls the appropriate meeting of the company's creditors. If the creditors approve the proposal, the Nominee becomes the Supervisor of the Arrangement and supervises it for the duration of the Arrangement. The Supervisor sends a report to the Registrar every 12 months during the Arrangement.

## ADMINISTRATION ORDERS

Such an Order is made by the Court directing that during the period of the Order the affairs, business and property of the company shall be managed exclusively by the Administrator.

## PURPOSE

- To enable the survival of the company, or the survival of a part of its undertaking; or
- The approval of a Voluntary Arrangement; or
- The sanctioning of a compromise between the company and its creditors and members; or
- A more advantageous realisation of its assets than would be effected on a winding up.
- The company, its directors or one or more of its creditors can apply for an order. Creditors can be existing, contingent or prospective.

## CONSEQUENCES OF AN ADMINISTRATION ORDER

Once in force, no Administrative Receiver can be appointed, and if one is in office, such office must be vacated. Neither is it possible for the company's property to be forcibly sold, nor for any proceedings to be started against the company in the courts. An Administrator must advertise his appointment in the Gazette and a newspaper published locally to the company.

## **FUNCTIONS OF THE ADMINISTRATOR**

A Proposal will be prepared by the Administrator setting out the manner which it is proposed the Administration will follow. He will call a creditors' meeting to review the Proposal and vote on it. Provided the appropriate majority vote in favour of such proposals, it is the duty of the Administrator to implement the proposal (or modifications thereof).

If the requisite majority is not obtained for whatever reason, in practice the company will be likely to proceed into liquidation.

## **ADMINISTRATIVE RECEIVERS**

An Administrative Receiver is appointed at the behest of a debenture holder to manage the entire affairs of a company.

He has the authority to sell or otherwise realise the assets covered by the floating charge, and, subject to his own remuneration, pass the proceeds of such realisations to the debenture holder. The appointment can be made after formal demand has been made on the company and the company has not made repayment within the time demanded.

The appointment must be advertised in the Gazette and an appropriate newspaper. The Registrar must also be notified within 7 days of the appointment being made and also must be notified when the Receiver ceases to act.

## **DUTIES**

If a company is not in liquidation as well as receivership, then the receiver is liable to pay the preferred creditors in priority to the debenture holder who appointed him.

He is empowered to take or defend proceedings in the company's name, appoint solicitors and generally conduct the business of the company.

A receiver has various statutory reporting duties both to the Registrar of Companies and the company's creditors. Such reports must include details explaining the circumstances of the appointment, the action to be, and being, taken by the receiver and the provision of a statement of affairs. The creditors can decide to appoint a committee to 'assist the receiver', which in practice involves attending meetings and receiving the receiver's reports.

## **VOLUNTARY LIQUIDATION**

### **Members' Voluntary Liquidation**

This can only take place where the company is not insolvent and requires the directors to swear a declaration of solvency. The liquidation commences at the time when the members pass the resolution and appoint the liquidator. Notice of the resolution must be published in the Gazette. A members' voluntary liquidation can be converted into a creditors' voluntary liquidation in the event that the liquidator discovers that the company is, in fact, insolvent.

### **Creditors' Voluntary Liquidation**

This is an appropriate form of liquidation where the company is insolvent. The company passes an extraordinary resolution to the effect that it cannot meet its liabilities and cannot accordingly continue trading. The resolution must be advertised and a meeting of creditors called within 14 days of the passing of the resolution. Notice of such meeting must be given to the creditors at least 7 days before the meeting. The directors must prepare a statement of affairs for the meeting setting out the company's financial position, showing its assets and liabilities.

### **Duties**

It is the duty of the liquidator to realise the assets of the company for the benefit of the creditors. His appointment must be notified to the registrar and published in the Gazette.

Statements of receipts and payments must be sent to the Registrar in respect of the first 12 months and thereafter at 6 monthly intervals until the close of the liquidation.

## **CONCLUSION**

A final account is presented to the members and creditors of the company. The final meeting must be advertised in the Gazette at least one month before the final meeting. The Registrar must be advised within 7 days of such meeting, and unless deferred by the court, dissolution will take place 3 months after notification to the registrar.

## **COMPULSORY LIQUIDATION**

A Compulsory Liquidation is when a company is ordered to be wound up by the court following the presentation of a winding up petition. A petition is usually presented by a creditor on the grounds that the company cannot meet its liabilities. A creditor's petition cannot be presented for less than £750. A petition can also be presented by the company itself, its directors or members, the FSA or the Official Receiver. The petitioner must advertise the existence of the petition in the Gazette.

## **THE LIQUIDATOR IN A COMPULSORY WINDING UP**

Immediately following the making of the Order, the Official Receiver fulfils the role of the liquidator. He will call a meeting of the creditors and contributories for the purpose of appointing a liquidator in his stead. Such alternative liquidator will immediately give notice of his appointment to the Registrar. In default of an alternative liquidator being appointed, the Official Receiver continues to assume this function.

## **DUTIES**

The liquidator's duty is to investigate the affairs of the company; he must call an annual meeting of shareholders and creditors. Where there is no liquidation committee, the Secretary of State fills such role. When the liquidator is not the Official Receiver, the liquidator has a duty to furnish the Official Receiver with information, produce documents as requested and offer any assistance as may be required to enable the Official Receiver to fulfil his role.

## **MATTERS APPLICABLE IN COMPULSORY AND VOLUNTARY LIQUIDATIONS**

Liquidators have various powers granted to them by statute. They can, for example, disclaim leaseholds and onerous contracts, exercise statutory set off and adjust prior transactions. Commencing, discontinuing and compromising proceedings are also exercisable by liquidators. They must realise the company's assets deal with proofs of debt, and effect distribution of the company's assets to the creditors before they can seek the company's dissolution.

## **IF YOUR BUSINESS IS IN TROUBLE**

If you are being pursued by creditors and are not able to meet their demands, it is important to take some positive action to address the situation, rather than delay what may be difficult decisions. Unless you are satisfied that the company can trade out of its problems in a very short space of time, the best course of action would be to seek the advice of an insolvency practitioner. Any prospect of a solution is dependent upon early identification and resolution of the problems. Do not be tempted to use government agencies, such as the Inland Revenue or HM Customs & Excise, as a source of available short-term credit; there is ample case authority to indicate that the courts regard such conduct as a reason for directors' disqualification.

## **IF YOUR DEBTORS GO INTO A STATE OF INSOLVENCY**

As a trade creditor of an insolvent company, be prepared to wait a considerable time before expecting any dividend. As well as the insolvency practitioner's costs, there are various preferred creditors, such as the employees, whose entitlements take priority over trade creditors. An insolvency practitioner is obliged to notify a committee of creditors about the cost of liquidations, administrations, and voluntary arrangements, under a Statement of Insolvency Practice. Likewise, they must advise creditors how fees and costs are charged and what creditors can do if dissatisfied.

Insolvency law is very much a creature of statute; the foundation of the present law is to be found in the Insolvency Act of 1986, the Insolvency Rules 1986 and subsequent amending statutes and statutory instruments.

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