Forms of Corporate Insolvency

There are five categories of insolvency procedure for companies:

- Company Voluntary Arrangement;
- Administration;
- Administrative Receivership;
- Creditors' Voluntary Liquidation;
- Compulsory Liquidation (winding up the by Court).

Receivers may also be appointed under fixed charges (Fixed charge receiverships) on specific assets owned by a company. These are not technically insolvency appointments as such appointments may be made irrespective of the solvency of the company.

There is also members' voluntary liquidation (MVL), but this only applies to solvency companies and is instituted by the shareholders.

Of the above the first three may be employed as a vehicle for business rescue, whilst either form of liquidation is a terminal process and usually marks the end of the business activities.

Rescue Procedures

When a company reaches the stage where formal insolvency procedures are necessary the primary objective for the directors and the insolvency practitioner is to realise the greatest return for the company's creditors. Depending on the stage at which the company realises it is in trouble, the best return is almost always most likely to be achieved by keeping the company's business operating. This enables two possibilities, either the business can continue to operate and generate cash for the creditors or it can be sold on as a going concern. Companies with businesses that are sold on as going concerns almost always achieve a much higher realisable value than the liquidated value of its assets or its businesses and therefore, provide a greater return to creditors.

Company Voluntary Arrangement (CVA)

A company voluntary arrangement is a procedure which enables a company to put a proposal to its creditors, whereby they agreed to accept a certain sum of money in settlement of the debts due to them. The procedure is extremely flexible and the form which the voluntary arrangement takes will depend on the terms of the proposal agreed by the creditors.

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For example, a CVA may involve delayed or reduced payments of debt, capital restructuring or an orderly disposal of assets.

The proposed arrangement requires the approval of at least 75% in value of the creditors who vote, and once approved is legally binding on the company and all its creditors, whether or not they voted in favour of it. There is limited involvement by the Court, and the scheme is under the control of an insolvency practitioner acting as Supervisor.

Administration

Administration is a procedure available to a company that is, or is likely to become, insolvent. It places the company under the control of any insolvency practitioner and the protection of the Court with the following objectives:

- Rescuing the company as a going concern;
- Achieving a better result for the creditors as a whole than would be likely if the company were wound up without first being in administration;
- Realising property in order to make a distribution to secured or preferential creditors.

While a company is in administration creditors are prevented from taking any actions against it expect with the permission of the Court.

An administrator may be appointed:

- By an order of the Court, on application by the company, its directors, one or more creditors, or, if it is in liquidation, its liquidator;
- Without a Court order, by direct appointment by the company, its directors or a creditor who holds security of a type which qualifies him to make an appointment.

A secured creditor who is qualified to make an appointment may also intervene where the company has made an application to the Court. This means that in practice the secured creditor's choice of administrator will prevail.

An administrator's powers are very broad. They include powers to carry on the company's business and realise its assets. The administrator displaces the company's board of directors from its management function and has the power to remove or appoint directors. The administrator must prepare proposals for approval by the creditors setting out how he intends to achieve the purpose of administration.

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There is a one year time limit within which the administration must be concluded, but this period can be extended with the agreement of the creditors or permission of the Court if more time is needed to achieve the purpose of administration., The Administration may also come to an end if the administrator thinks the purpose of administration has been achieved or cannot be achieved.

On conclusion of administration:

- The company may be returned to the control of its directors and management;
- The company may go into liquidation;
- The company may be dissolved (if there are no funds for distribution to unsecured creditors;
- If a company voluntary arrangement has been agreed during the administration, the arrangement may continue according to its terms. (It is therefore possible for a voluntary arrangement to run concurrently with an administration).

Administrative Receivership (often abbreviated to "Receivership")

Administrative receivers are normally appointed by a bank or other lending institution which has as security for a loan (under a floating charge) the whole or substantially the whole, of a company's property. The ability to appoint normally arises when the company is in default or in breach of the terms of its borrowing.

The charge is contained in a document known as a debenture, which will frequently also include fixed charges on certain assets and the lender is referred to as the debenture holder.

The administrative receiver has similar powers to the administrator described above. He can continue to operate the business, and often does, whilst trying to sell it as a going concern.

An administrative receiver has no authority to deal with the claims of unsecured creditors (eg trade creditors). Therefore if funds become available for distribution to unsecured creditors they must be dealt with by a separately appointed liquidator.

It is no longer possible to appoint an administrative receiver under a debenture created after 15 September 2003. Instead, creditors with floating charge security can appoint an administrator.

Liquidations

A liquidation may be solvent or insolvent. (As mentioned above, a solvent liquidation is known as a members' voluntary liquidation ((MVL), in which the liquidator is appointed by the shareholders and the company's assets are sufficient to settle all its liability, including statutory interest, within 12 months.)

An insolvent liquidation will be either a creditors' voluntary liquidation (CVL), which is begun by resolution of the shareholders, or a compulsory liquidation, which is instituted by petition to the Court.

Liquidation may occur following a receivership or administration or the company's directors or shareholders may recommend that the company be put directly into liquidation via either a CVL or MVL.

Alternatively, a Court can make a Winding-up Order for a compulsory liquidation on the application of a creditor or of the company itself.

If an MVL the liquidator is appointed by shareholders. In a CVL the appointment is made by the shareholders, subject to confirmation or replacement at the creditors' meeting by the creditors. In a compulsory liquidation the Official Receiver will initially be appointed liquidator, but creditors can then nominate another insolvency practitioner.

There are a number of possible reasons for making a Winding-up Order. The most common is because the company is insolvent.

Insolvency can be established by failure to comply with a statutory demand requiring payment within 21 days, or a by execution against the company's goods which remains unsatisfied.

A Winding-up Petition may also be presented by the Secretary of State for BIS on the grounds of public interest.

A CVL is a liquidation begun b y resolution of the shareholders, but is under the effective control of the creditors, who can appoint a liquidator of their choice at the meeting of creditors that must be held. Recent changes in legislation have p0laced a greater onus of responsibility on the directors of a company.

The CVL is now the most common way for directors to take action at an early stage, in order to minimise the risk of personal liability for wrongful trading. Furthermore, unlike a compulsory liquidation, a CVL does not bring the directors' conduct under the scrutiny of the

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Official Receiver, although the liquidator is required to report to the Department for BIS on the conduct of the directors.

It is also possible for a liquidation to proceed as a DVL without the need for a creditors' meeting, which it follows immediately on the conclusion of an administration and there are funds available for the unsecured creditors. The liquidator will be administrator, or other person previously approved by the creditors.

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