

Administration

Overview

Administration can be a powerful way for a company to obtain a breathing space from the actions of any creditor. It involves the appointment of an independent insolvency practitioner, called an administrator, who works with the company to put together proposals for creditors as to how the company will move forward.

The process has been made considerably simpler by the implementation of the Enterprise Act 2002 on 15 September 2003 which reflects the Government's desire to make the process more available to smaller businesses and to focus more on saving companies for their proprietors rather than simply selling their businesses for better values for creditors.

How does the procedure work (after the implementation of the Enterprise Act 2002 on 15 September 2003)

An administrator can be appointed either by a court or through a new simplified out-of-court procedure introduced by the Enterprise Act to enable secured lenders or the company to appoint quickly. This power has been given to secured lenders to compensate them for the abolition of administrative receivership for charges created after 15 September 2003.

Those parties that principally can initiate the appointment are set out in this table.

	Out-of-court appointment (ie without a court hearing)	Appointment by court following petition
Company acting either through its directors or shareholders, in both cases by passing a valid resolution in accordance with the company's articles	<p>Only if company is close to insolvency, but is not already subject to a procedure and has not had an administration or CVA within the previous 12 months.</p> <p>Five day's prior notice is given to any qualifying floating charge holder (*) and others so entitled, so that it can appoint its own choice of administrator if it chooses to do so.</p>	<p>Only if the company is insolvent and five day's notice is given to any qualifying floating charge holder(*) and others so entitled.</p>
Qualifying floating charge holder (*)	<p>Only if two day's prior notice is given to any holder of prior qualifying floating charge.</p> <p>It is not necessary to show that the company is close to insolvency but the company must be in default of the charge.</p>	<p>Only if the company is close to insolvency and notice is given to the company, other qualifying floating charge holders and others so entitled.</p>
Any other creditor	Not available	
Liquidator	Not available	To replace liquidation with administration

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(*) A qualifying floating charge holder is any creditor holding a floating charge over substantially over all of the assets purporting to allow it to appoint an administrative receiver (whether or not it is now actually allowed to do so) or alternatively where the charge specifically states that it is a qualifying floating charge entitling the holder to appoint administrators.

To secure an administration appointment:

- by court order, a simple affidavit is required from the petitioner setting out key details about the company with an outline of what is proposed, together with a statement of opinion from the administrator that the purpose of administration is likely to be achieved. The court is not obliged to grant an administration order and can make any conditions or other order as it sees fit.
- without a court hearing, a simple notice of appointment and statement of opinion by the proposed administrator needs to be filed at court.

Once a court is notified that an appointment is intended, the company has wide protection from any creditor action whilst the various creditors entitled to notice decide whether to exercise their prior rights. This protection ends automatically after ten days. If an appointment is made, then the protection extends into the administration. This protection includes preventing the initiation of other insolvency procedures and stopping creditors taking action against assets, including finance creditors, landlords and retention of title creditors.

The purpose of administration is to achieve any one of three objectives, which need to be addressed in this order of priority:

1. Rescuing the company as a going concern.
2. Achieving a better result for the company's creditors as a whole than would be likely if the company were in liquidation.
3. Realising property in order to make a distribution to one or more secured or preferential creditors.

An administrator must always try the first objective first and can only follow the second objective once he is satisfied either that first objective is no longer practical and/or the second objective would provide a better recovery for creditors as a whole. Overall, an administrator is required by law to carry out his function in the interests of the creditors as a whole and to carry out his duties as quickly and efficiently as reasonably practical. Ultimately, an administrator is an officer of the court.

An administrator has wide powers to trade and sell the business like an administrative receiver. Unlike a receiver, he will not usually have automatic access to funding from a bank and needs to make his own arrangements.

An administrator has the powers and duty to investigate the events leading up to his appointment but cannot bring a wrongful trading action. He also reports to the DTI on the directors' conduct.

An administrator has to prepare his proposals for achieving the purpose of the administration within eight weeks and has a further two weeks to convene a meeting of creditors to consider them. It is possible to dispense with a creditors' meeting and instead passing the resolutions by correspondence if creditors so agree. The proposals are approved if a majority in value vote in favour. Subsequent significant variations require further formal approval by creditors.

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An administration is only intended to be a temporary state. The law encourages the administrator to act promptly and the procedure automatically ends after twelve months unless extended by the court or creditors. An administration will end either with the company being restored to solvency, perhaps through a CVA; the company being placed into liquidation normally with the administrator acting as liquidator; or, if the administrator finds he is only able to distribute funds to secured creditors, he can arrange for the company to be dissolved.

Advantages and disadvantages of administration

Advantages	Disadvantages
<ul style="list-style-type: none">▪ Quick to initiate, particularly through the out of court procedure.▪ Very wide protection from creditor action including finance companies and landlords.▪ Whilst in practice, an administrator will wish to work closely with directors who are not automatically dismissed, his appointment does take the ultimate responsibility for an insolvent company and its creditors away from the directors. It therefore avoids further risk of wrongful trading.▪ It is possible to save the company, which is one of the purposes, possibly by affording a realistic period to devise CVA proposals.▪ An administrator has wide powers to trade on or sell the business as a going concern without encumbrances, according to his judgement of the best way forward. It can be used to complete sale negotiations begun by the directors.▪ Subject to the agreement of creditors, this procedure allows for a restructuring of the company including addressing onerous assets by negotiation or binding them into the creditors' proposals.	<ul style="list-style-type: none">▪ The court petition process can add cost compared to a receivership.▪ Floating charge holders have a right of veto before the order is made. Historically secured lenders have preferred receivership but the trend is towards administration particularly now that charges created after 15 September 2003 can no longer allow for receivership.▪ The process can still result in a discount on asset values, although not normally as large as in liquidation.▪ The administrator does need to secure the creditors' approval of his proposals, which can prove problematical unless creditors are committed to the recovery.▪ Administration trading supervision can be expensive, although in practice an administrator may delegate more control to the directors than in a receivership.

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Company voluntary arrangements (CVA)

Overview

A **CVA** is a powerful tool that can be useful for creating a breathing space from creditors' actions whilst an orderly reconstruction or disposal of assets takes place or simply to allow the company to survive by achieving profitability and making contributions to repay creditors over a period of time.

A CVA has to involve either a composition (ie creditors receiving less than they are owed) or a scheme of arrangement (ie a rescheduling of the company's liabilities). The terms are binding on all creditors if the requisite majorities approve the terms at a meeting. In either case, creditors would need to be convinced that it offered a better outcome than a winding up to be prepared to approve it.

CVAs work well in many situations because they are flexible and can be tailored to the particular circumstances. Where they tend to fail, it is because the directors leave it too late, the company's business is inherently not viable, because management deficiencies are not addressed or because the company cannot find the necessary funding for trading, including taking into account more restrictive terms from concerned suppliers.

How does the procedure work?

CVAs are normally initiated by the directors acting as a board and can also be proposed by an administrator as a means of concluding his appointment. Rarely, a liquidator can also propose a CVA.

The directors (or an administrator) draft proposals to creditors as to how their debts will be discharged, normally by payment of less than 100% or through a delay in payment over a period of some years.

Unless there is an administrator, the directors arrange for an independent insolvency practitioner (the nominee) to be appointed. His function is to certify that the proposal satisfies the disclosure requirements, assess whether the financial information is correctly stated and that the CVA has a reasonable prospect of being approved and implemented. If the nominee then believes it is appropriate to proceed with the proposal, he reports this to the court and calls meetings of shareholders and creditors at 14 days' notice to consider the terms of the CVA.

Shareholders and creditors can put forward modifications to the proposals. Creditors will approve the proposals (with any modifications) if at least 75% by value vote in favour. The shareholders' resolution requires a simple majority.

The proposals are implemented under the supervision of an insolvency practitioner (the supervisor) who normally has no executive powers but is required to declare whether the directors are in practice implementing the proposals.

A creditor entitled to appoint a receiver is not prevented from doing so at any time. Unless the preferential creditors agree otherwise, the CVA must provide for them to be paid in full before anything is paid to other unsecured creditors.

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Company voluntary arrangements (CVA)

The speed of the process depends on the time taken to prepare the proposals (say three days) and the 14-day meeting notice period. The company has no protection from its creditors in the meantime, unless it qualifies for the moratorium procedure when it has wide court protection from any legal or other creditor process including distraint initially for a 28 day period.

The moratorium procedure became available from 1 January 2003. It currently only applies to small companies, ie those that satisfy two of the following conditions: (i) net assets below £1.4m, (ii) turnover below £2.8m and (iii) less than 50 employees. A qualifying company secures the 28 day moratorium simply by filing the proposal and documents at court but in the period before the creditors' meeting, there are obligations placed on the directors and particularly the nominee who has to be satisfied continually that the CVA has a reasonable prospect of being approved and implemented. As a result, it is probably best only to use the moratorium if it is clear that the protection is necessary. Even then, it is likely that the revised administration procedure implemented by the Enterprise Act 2002 will be more expedient.

A supervisor has no powers to manage the company's affairs, except in the unlikely event that the proposals provide for them. The directors retain the powers they previously had unless limited by the proposals.

Although the approval of a CVA prevents creditors taking action in respect of their debts, in practice the company may find suppliers prepared to allow less credit in the future. It will probably still need additional funds to trade within the CVA period.

The supervisor has no powers or duty to investigate the events leading up to his appointment and cannot bring a wrongful trading action. He does not report to the DTI. The directors are required to make a formal declaration to the effect that there are no events that could be challenged by a liquidator if one were appointed.

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Company voluntary arrangements (CVA)

Advantages	Disadvantages
<ul style="list-style-type: none">▪ Cost effective and flexible.▪ Directors remain in charge; the supervisor only ensures they do what they have committed to do. This normally allows for the lowest cost of all the procedures apart from striking off.▪ The procedure is intended to ensure a breathing space from creditor action, which might in itself be sufficient to save the company within the current ownership if future profits can be generated and/or a refinancing takes place.▪ Even if a disposal of the company and/or business is unavoidable, then the breathing space should ensure a proper marketing process and the best prospects for obtaining the sales price.▪ The Crown respects the spirit of the CVA and is prepared to agree to deferred terms over an extended period, normally five years, whereas outside a CVA it normally restricts any such period to around six months	<ul style="list-style-type: none">▪ Does not bind in hostile chargeholders or finance companies, which can still exercise their security (unless the CVA is done in conjunction with administration).▪ Would not protect the company against eviction by the landlord if a lease allows forfeiture upon insolvency.▪ The process can last for some time if required to repay creditors and this can damage the goodwill, although unlikely in retail situations.▪ The company still needs to move forward to the benefit of creditors. The directors do not have protection from future criticism for wrongful trading.▪ It can be difficult to persuade creditors to accept proposals where the proposals are not commercially realistic compared to other options available.▪ The company is sometimes exposed to creditor action in the period before the meeting approves the proposals, depending on the action that creditors have already taken (unless the CVA is done in conjunction with administration or a moratorium).

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Receivership

Overview

Receivership arises when a secured creditor appoints an insolvency practitioner of its own choosing to recover its lending by selling the company's business and assets. It can be a powerful tool to effect a sale of a business as a going concern, ie it has a constructive role, but it does not save the company and shareholder value is normally lost. It is a useful tool to achieve a cost effective winding up when the only likely beneficiaries are the secured and preferential creditors and the chargeholders are not concerned about being seen to enforce the company's demise, even at the directors' invitation. In some cases, particularly with high street banks, the lenders are concerned about the possible profile and management cost implications of appointing and only do so where there is a real benefit.

NB: Following the Enterprise Act 2002, only floating charges created before 15 September 2003 can contain the power to appoint administrative receivers.

How does the procedure work?

A receiver is appointed by a secured creditor to take charge of the charged assets and sell these in order to repay the secured loan. The receiver's primary duty of care is to his appointer. Although a receiver may be appointed over all the company's assets, he is not formally responsible for the company itself, which remains with the directors. However, a receivership can also be a powerful tool to save the business (not the company) by facilitating a sale as a going concern. Although receiverships have been known to lead to the restoration of the company, this is very rare.

Only a creditor with a charge over the company's assets can appoint a receiver. That creditor needs to be owed money that the company cannot repay and the company will need to be in default of its borrowing agreement. Banks typically appoint receivers, as do asset-based lenders.

A charge can be specific over a certain asset such as a property (often called a "fixed charge") or a "floating charge" over classes of assets, such as trading stock. The holder of a floating charge (or fixed and floating charges) over substantially all the company's assets has the power to appoint an administrative receiver. Most banks take fixed and floating charges over all the company's assets.

An administrative receiver has wide powers to control the company's assets, to continue trading and to dispose of the business and assets as a going concern. The receiver would usually control the business personally and not necessarily involve the directors in strategic decisions.

The secured lender does not need approval from either the directors or the shareholders to appoint a receiver, nor is a meeting of creditors required prior to his appointment. However it is common for the lender to ask the directors to invite an appointment so as to avoid unnecessary disputes later. All that is required is for the borrower to be in default of the lending agreement, for the lender to demand immediate repayment and for the borrower to fail to do so. The elapsed time between demand and appointment need only be hours.

If a receiver is able to repay his appointer in full (and in the case of an administrative receiver, pay the preferential creditors the amounts due to them from the floating charge assets), then he merely resigns and returns any surplus to the company. In practice the company then normally enters into liquidation to distribute any funds to the rest of the creditors.

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Receivership

A receiver does not have any powers to investigate the events leading up to the insolvency and if such investigations were required then a liquidator would need to be appointed subsequently. An administrative receiver is however still required to report to the DTI on the directors' conduct.

An administrative receiver is obliged to call a meeting of unsecured creditors within three months to report on the conduct of the receivership.

Advantages	Disadvantages
<ul style="list-style-type: none">▪ Takes responsibility for an insolvent company and its creditors away from the directors. It avoids further risk of wrongful trading.▪ Immediate appointment means that it can be a quick and efficient way of realising assets for the benefit of creditors.▪ Wide powers to trade on and sell the business as a going concern without encumbrances, which can result in enhanced realisations for the creditors.	<ul style="list-style-type: none">▪ A chargeholder is not required to appoint and would only do so if it perceived a benefit for it, eg to ensure a practitioner of its own choosing dealt with its security.▪ The process can be expensive if there is extended trading, because of the close control normally exercised by the receiver during this period, although this is often offset by the enhanced going concern values achieved for the assets.▪ Only normal outcome is a disposal of the business and assets (possibly as a going concern), therefore unlikely to save the company.▪ Liquidation might still be required to distribute funds to creditors, leading to a duplication of cost.

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Creditors' voluntary liquidation (CVL)

Overview

Creditors' voluntary liquidation is generally appropriate if there are insufficient assets to pay all the creditors in full, where there is no obvious need to preserve a business by continuing to trade or because the other options are not available. An insolvency practitioner is appointed to dispose of the assets, which in suitable cases could involve completing negotiations already started for the sale of the business or seeking a purchaser from scratch, but timescales would be short. This is the most obvious procedure if the company is insolvent, there is no prospect of obtaining a premium value for the assets from a going concern sale and a cost effective winding up is required to distribute money to unsecured creditors. In this case, it is not immediately clear that unsecured creditors will receive any dividend but to establish this point would be one of the objectives of an options review.

How does the procedure work?

A board meeting is held to agree that the company cannot continue to trade because of its liabilities and a resolution is passed to call meetings of shareholders and creditors. The directors must also swear a statement of affairs and appoint one of their number to chair the creditors' meeting.

The shareholders' meeting takes place to pass an extraordinary resolution to place the company into liquidation because of insolvency. Fourteen days notice is required for the meeting unless 95% by value of shareholders consent to short notice (possibly 90% shareholder consent in the case of some private companies). This is known as the Centrebind procedure. Furthermore, five days notice now needs to be given to any holder of a floating charge created after 15 September 2003. A majority of 75% is required for an extraordinary resolution.

Even where a Centrebind procedure is adopted, whereby the shareholders appoint a liquidator at short notice, the liquidator is unable to dispose of assets without prior approval by the court unless their value is deteriorating.

A creditors' meeting must take place within fourteen days of the shareholder's meeting and seven days' notice must be given. The purpose of the meeting is to ratify the shareholders' choice of liquidator or appoint another practitioner in his or her place, and to consider appointing a committee of creditors to assist the liquidator.

In practice, the board's proposed liquidator normally undertakes the procedural work required to call the meeting. The shareholders' and creditors' meetings take place on the same day and around three weeks notice is given.

It is unusual to dispose of assets until the liquidator is appointed, unless the value of assets will significantly diminish. The company is in a hiatus period when trading may have ceased and only steps to preserve the assets, complete work in progress and collect in debts are undertaken.

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Creditors' voluntary liquidation (CVL)

The liquidator's duties are to realise the assets, agree creditors' claims and pay a dividend to them should there be sufficient funds.

The liquidator also has a duty and powers to investigate the events leading up to the insolvency as detailed earlier. This includes reporting to the DTI on the directors' conduct, on which any disqualification proceedings are based.

Advantages	Disadvantages
<ul style="list-style-type: none">▪ Takes responsibility for an insolvent company and its creditors away from the directors. It avoids further risk of wrongful trading.▪ Allows for creditors' claims to be agreed and paid, including those that are disputed.▪ A liquidator has wide powers to adopt or abandon contracts, which often helps to bring disputes to a head. Suitable for winding up companies cost effectively once a disposal has taken place and for verifying the benefits of a pre-appointment sale.▪ A liquidator has wide powers to investigate pre-appointment events if required to enhance creditors' recoveries.	<ul style="list-style-type: none">▪ Unless a Centrebind is used, it is slow to initiate and therefore not ideal for a disposal of a business where asset value quickly dissipates.▪ Does not afford protection from repossession by finance creditors or distraint by landlords.▪ It is more difficult to continue trading in liquidation than in other procedures.▪ The process can result in considerable discounts on asset values, particularly intellectual property and goodwill.

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Compulsory liquidation

Overview

Compulsory liquidation is so called because a court orders that the company be liquidated and appoints the first liquidator, normally the Official Receiver.

A compulsory liquidation mostly takes place if a creditor is not paid and seeks a court order for a winding up. It is normally best to avoid this outcome if possible as the process is more complicated and costly than a voluntary liquidation and less able to respond to commercial situations. The exception to this is where there are insufficient unencumbered assets even to meet the costs of a creditors voluntary liquidation, when a compulsory liquidation can be an effective and inexpensive way for directors to deal with the responsibility of winding up the company.

How does the procedure work?

A creditor or the directors can present a petition for the company's compulsory winding up. There are various allowable grounds but the usual one is that the company is insolvent or that it is just and equitable to wind it up.

In order to petition successfully, a creditor needs therefore to be able to show evidence that the company is insolvent. Typically this is done by way of a statutory demand, an unsatisfied judgment or a dishonoured cheque.

Once the petition is presented, it is advertised after a minimum period of seven days. This can encourage other creditors to join in the petition. In practice, this publicity normally forces the company to cease trading.

It can take about six weeks for the court to hear a petition, assuming that the company or others do not challenge it.

Once a petition is granted, any disposition of assets of the company after the presentation of the petition is void and can be overturned by the liquidator. As a result, once the petition is presented, a common practice is for a bank to close any bank account and not allow the company to make payments from a credit balance unless there is a validation order from the court allowing such payments.

Once a petition is granted, the Official Receiver is appointed as liquidator. If there are assets in the company or an investigation to undertake, the usual practice is to call a creditors' meeting to appoint a commercial liquidator. This process can take at least a further four weeks.

The duties and powers of a compulsory liquidator are similar to those of a liquidator in a creditors' voluntary liquidation.

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Compulsory liquidation

Advantages	Disadvantages
<ul style="list-style-type: none">▪ Takes responsibility for an insolvent company and its creditors away from the directors. It is an effective way to deal with an insolvent company where there are no assets even to meet the fees of a creditors voluntary liquidation.▪ It avoids further risk of wrongful trading. Allows for creditors' claims to be agreed and paid, including those that are disputed.▪ A liquidator has wide powers to adopt or abandon contracts, which often helps to bring disputes to a head.▪ In some case, it is the only remedy available to an unsecured creditor to achieve some legal redress for non-payment of his debt, particularly if directors refuse to act responsibly.	<ul style="list-style-type: none">▪ It is even slower than a creditors' voluntary liquidation and the presentation of the petition can make further trading impractical. It is not suitable for a disposal of a business where asset value quickly dissipates.▪ Does not afford protection from repossession by finance creditors or distraint by landlords.▪ The process can result in large discounts on asset values, particularly intellectual property and goodwill.▪ There are government fees payable based on the amounts realised. This can make this a more expensive procedure than a voluntary liquidation.▪ It is not in practice a useful process for creditors to initiate an investigation into the directors' conduct or events that have caused loss to the creditors, unless the creditors are prepared to arrange for a commercial liquidator to be appointed and fund the investigation.

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Members' voluntary liquidation (MVL)

Overview

Members voluntary liquidation is a winding up procedure for cases where there is sufficient money to pay everyone in full, which involves similar steps to an insolvent liquidation without the investigative aspects.

How does the procedure work?

A board meeting normally resolves that the company should be wound up and a shareholders' meeting held to pass the necessary resolutions. The directors need to make a statutory declaration of solvency confirming that the company can meet its liabilities in full together with interest within twelve months. This must be made no more than five weeks before the shareholders' resolution to wind up the company.

The shareholders' meeting takes place to pass a special resolution to place the company into liquidation and appoint a liquidator. Twenty one days notice is required for the meeting unless 95% by value of shareholders consent to short notice (possibly 90% shareholder consent in the case of some private companies). A majority of 75% is required for an extraordinary resolution.

The liquidator's duties are to realise any remaining assets, agree any outstanding creditors' claims and pay a dividend to them and then distribute the balance to shareholders. In many cases, the only assets and liabilities are inter-company claims.

An MVL is essentially the same process as a creditors voluntary liquidation (CVL) (ie an insolvent liquidation) with the following exceptions:

- The directors need to make a statutory declaration of solvency confirming that the company can meet its liabilities in full together with interest within twelve months.
- There is no creditors' meeting. As a result, the costs tend to be lower.
- The liquidator is not required to report on the directors' conduct.
- The liquidator normally has no cause to scrutinise the events leading up to the company's liquidation.
- Whilst the MVL liquidator still needs to have an insolvency licence like a CVL liquidator, the independence rules allow the company's auditor to undertake an MVL.

There is a process to allow a MVL to be converted into a CVL if it transpires that creditors cannot be paid within twelve months, eg because liabilities are higher than expected. It is however a criminal offence to make a statutory declaration without reasonable grounds for believing it to be true.

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Members' voluntary liquidation (MVL)

Advantages	Disadvantages
<ul style="list-style-type: none">▪ An MVL is less expensive than a CVL. There is less formal procedure and more scope to delegate to directors.▪ In an MVL, there is no stigma of being a director of an insolvent company compared to CVL.▪ There is no report on directors' conduct.▪ The onus on realising all assets and including all creditors is placed on the liquidator, whereas in a striking-off approach (see later) the directors would have to discharge these duties.▪ It is easier for a liquidator to distribute funds and assets to shareholders than it is for directors.▪ The company is dissolved after the liquidation is concluded and can normally only be reinstated within two years. (Those pursuing personal injury claims can have it restored at any time.)	<ul style="list-style-type: none">▪ There are penalties for overlooking creditors and incorrectly making a statutory declaration of solvency.▪ The liquidation is advertised, which might attract unwelcome attention.▪ It is potentially more expensive than a striking off.

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Striking off

Overview

In the case of a private company, a **striking off procedure** might be a cost-effective procedure following a sale of the assets and payment of creditors in full. It is not strictly an insolvency procedure, since it is not governed by the Insolvency Act or does it require a licensed insolvency practitioner. It is however an alternative to an MVL as a means of addressing an unwanted solvent company.

How does the procedure work?

As an alternative to an MVL in a solvent situation, it is possible simply to realise the assets, repay liabilities and distribute the cash to shareholders, although this should only be done with professional advice.

The company could then apply to the Registrar to strike the company off the Registrar once the directors have certified that the company has no assets or liabilities. It is advisable to hold a shareholders meeting to seek the shareholders' approval.

The Registrar would normally decide to strike off the company as long as he believes that the Inland Revenue, any third parties with an interest in the company and any creditors have been satisfied.

There is a fast track procedure for private companies. The directors can apply to the Registrar on prescribed form 652(a). The Registrar then publishes a notice in the Gazette inviting objections to be made within three months. The directors must distribute a copy to every notifiable person: shareholders, employees, creditors, directors and pension fund.

An application cannot be made if within the previous three months the company has changed its name, traded or otherwise carried on business, sold property or rights or engaged in any other activity

It is an offence for anyone to apply for striking off when the company is ineligible, to provide misleading information to support an application, not to copy the application to all relevant parties and not to withdraw the application if the company becomes ineligible for striking off. The penalties are a fine and/or imprisonment, together with the risk of being disqualified as a director.

Once a company has been struck off, it ceases to exist. Therefore any assets or rights to income which it might subsequently discover would be lost. The liabilities of directors for breach of fiduciary duties also continue.

Within twenty years of striking off, the company can be restored to the register and the court can make such orders as it thinks fit to place the company and those connected with it in the same position as if it had not been struck off. (Those pursuing personal injury claims can have it restored even after the twenty years have expired.)

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Striking off

Advantages	Disadvantages
<ul style="list-style-type: none"> ▪ Little professional cost ▪ It is not actually an insolvency procedure and avoids insolvency stigma altogether. 	<ul style="list-style-type: none"> ▪ Risk of restoration on application by a notifiable person within 20 years. In this event, the fiduciary liabilities and statutory responsibilities for directors continue. ▪ There can be a delay in proceeding whilst the three month dormant period passes. ▪ If the share capital exceeds £2,500, then there is a cumbersome procedure to make a distribution to shareholders. ▪ Overlooked assets can become Crown property

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Bankruptcy

Overview

Bankruptcy is intended to relieve individuals from liabilities when they are no longer able to settle them. It is appropriate where there are no obvious advantages in arranging a rescheduling or reduction of those debts through an individual voluntary arrangement (IVA).

It is not however an efficient way of realising assets for the benefit of creditors, with many of its procedures dating back to 19th and early 20th Century when attitudes to bankruptcy were different. Assets are usually sold piecemeal and continuing to trade a business to preserve value for creditors is almost impossible. The trustee who manages the bankruptcy does however have wide powers to deal with previous transactions that have adversely affected creditors and so bankruptcy can often follow fraud situations.

The Enterprise Act 2002 has updated the bankruptcy procedure. These changes are intended to differentiate between the "honest" and "delinquent" bankrupt, generally making bankruptcy a more attractive procedure for those in the former category. These changes are due to come into force in 2004.

Even after the Enterprise Act 2002 upgrade, bankruptcy will continue to offer poor returns for creditors because of the unwieldy nature and the costs involved.

How does the procedure work?

A court is responsible for making a bankruptcy order against an individual if it is satisfied the debtor is insolvent. A bankruptcy order may be made on the petition of either a creditor owed more than £750 or the debtor. A supervisor of a creditor bound by an IVA can also petition if the debtor has failed to honour the terms of the proposal or provided misleading information to the creditors.

Once an order is made it must be advertised in The London Gazette. The bankrupt's assets fall under the control of a trustee. In the first instance, the Official Receiver (a civil servant) is appointed as trustee. He has a duty to investigate the bankrupt's affairs and send a report to the creditors. The bankrupt is required to attend an appointment with the Official Receiver who will question him and require details of his financial affairs to be provided, in particular a statement of affairs, comprising details of the debtor's assets and liabilities. He may decide to call a meeting of creditors within four months to allow them to appoint an insolvency practitioner as trustee and to establish a creditors' committee.

The trustee is responsible for realising the bankrupt's assets and distributing the proceeds to the creditors in the correct order of priority. If the debtor fails to co-operate with the trustee, the trustee may apply to the court for the debtor to be examined on oath in the presence of a judge. If the debtor continues to fail to co-operate he can be held in contempt of court and imprisoned.

Bankrupts are allowed to retain furniture and other basic domestic chattels, the tools of their trade and, in certain circumstances, a car or other transport if it is required for their work. A trustee may claim and realise any normally exempt items that he considers to be of excessive value, although he must provide the debtor with a reasonable replacement from the proceeds of realisation.

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Bankruptcy

As with companies, any organisation or person who holds security, such as a mortgage, has first claim over the mortgaged assets. Any equity in excess of the debts of secured creditors in a property, even in the form of a house, must be realised. The trustee in bankruptcy may apply to the court at any time seeking an order for possession of a property to effect a sale. In the case of a matrimonial home, the bankrupt's spouse has various rights and the court will not normally grant an order in favour of the trustee at the expense of the spouse's rights of occupation in the first twelve months of the bankruptcy. Thereafter the creditors' interests are considered paramount. Trustees are permitted to consider a sale of the bankrupt's interest in a property to a third party such as the wife, avoiding the distress of an eviction and forced sale of the property.

The trustee in bankruptcy has the power to apply to the court to seek to set aside certain transactions that happened before his appointment, with a view to enhancing the value of the estate for the benefit of creditors. Typically such transactions could be making payments to favoured creditors but not others (preferences), disposals of assets at undervalues and putting assets beyond the reach of creditors.

The bankrupt must declare to the trustee all sources of income. If the trustee considers that the bankrupt has more income than is required to meet the reasonable domestic needs of the bankrupt and his family he may apply to the court for an income payment order requiring the 'surplus' income to be paid to him. The court will consider average incomes and costs of living in determining what is reasonable and not the lifestyle that the bankrupt may have enjoyed in the past.

Certain debts cannot be dealt with in a bankruptcy and are considered "non provable". These include matrimonial debts, gambling debts, and foreign taxes. These debts survive the bankruptcy and the debtor is not released from them.

During a bankruptcy until discharge, a bankrupt is subject to certain disabilities, the most important of which prevent him from the following.

- Acting as a director of a company, or being involved in the formation, promotion or management of a company
- Carrying on business under any name other than his own
- Incurring credit of £250 or more without disclosing his bankruptcy
- Sitting in either House of Parliament
- Acting as an elected local government officer

Bankrupts are not however legally prevented from operating bank accounts.

Bankrupts are usually discharged after three years, or two years in some smaller cases; the debtor will no longer be subject to the bankruptcy disabilities.

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Bankruptcy

After the bankrupt is discharged he is released from the debts, which were provable in the bankruptcy, but the property comprised in his estate at the time of the bankruptcy order remains under the control of his trustee notwithstanding the discharge.

There are substantial costs of administering a bankrupt estate. In a case with £20,000 of realisations the costs deducted, before funds are available to creditors will usually exceed £12,000. These costs include the petitioning creditor's legal fees, the fee of the official receiver, the fee levied of up to 15% on all monies paid into the insolvency services account and the fee of the trustee.

Enterprise Act 2002 changes, which are due to come into effect for bankruptcies starting after April 2004

The main changes are

- Where there are no irregularities and the debtor has co-operated, the length of the bankruptcy period could be shortened to twelve months or even earlier.
- In other cases, the trustee has powers to apply to court for a bankruptcy restriction order so that the debtor is subject to the restrictions of bankruptcy detailed above for a longer period of up to fifteen years
- A trustee has three years in which to decide whether to realise his interest in the matrimonial home, failing which it reverts to the debtor.
- In cases where the debtor has substantial income, a trustee can more effectively apply to court for an income payment order or reach an out of court settlement with the debtor.

Advantages	Disadvantages
<ul style="list-style-type: none">▪ Deals effectively with liabilities that a debtor is unable to meet. Particularly suitable for consumer debt cases where the restrictions placed on a bankrupt do not have any material impact.▪ A trustee has wide powers to pursue a debtor and other parties when transactions have occurred that adversely affect creditors.	<ul style="list-style-type: none">▪ Costs are significant and often out of proportion to the assets realised, particularly in smaller cases.▪ It is difficult to continue trading and any value associated with goodwill is lost.▪ Creditors do not often receive any worthwhile recover on their debts.▪ Depending on personal view, a debtor might consider that there is a stigma attached to bankruptcy.▪ Some professions prevent a bankrupt from acting.

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Individual voluntary arrangement

Overview

An **IVA** is a flexible procedure that allows a debtor to agree with creditors to a scheme that provides a better recovery than bankruptcy under the circumstances.

An IVA has to involve either a composition (ie creditors receiving less than they are owed) or a scheme of arrangement (ie a rescheduling of the debtor/s liabilities). The terms are binding on all creditors if the requisite majorities approve the terms at a meeting. In either case, creditors would need to be convinced that it offered a better outcome than a winding up to be prepared to approve it.

IVAs work well in situations because they are flexible and can be tailored to the particular circumstances. In many cases however, particularly involving consumer debt where the restrictions placed upon a bankrupt are not regarded as onerous, many debtors prefer to enter into bankruptcy, which offers a shorter timescale to release from liabilities and lower future commitments.

How does the procedure work?

IVAs are initiated by the debtor as a means of avoiding bankruptcy. Rarely, the Official Receiver can also propose an IVA following the passing of a bankruptcy order, although after April 2004 there will now be a new fast-track IVA procedure available to the Official Receiver.

The debtor drafts proposals to creditors as to how their debts will be discharged, normally by payment of less than 100% or through a delay in payment over a period of some years. Most debtors are best advised to seek the professional guidance of an insolvency practitioner to do so.

The debtor then arranges for an independent insolvency practitioner (the nominee) to be appointed, normally the same person who helped him to draft the proposals. His function is to certify that the proposal satisfies the disclosure requirements, assess whether the financial information is correctly stated and that the IVA has a reasonable prospect of being approved and implemented.

If the position requires it because of pressing liabilities, the debtor is able to petition the court for an interim order which protects him from creditor action whilst the nominee carries out his function.

If the nominee then believes it is appropriate to proceed with the proposal, he reports this to the court and calls meetings of shareholders and creditors at 14 days' notice to consider the terms of the IVA.

Creditors can put forward modifications to the proposals. Creditors will approve the proposals (with any modifications) if at least 75% by value vote in favour.

The proposals are implemented under the supervision of an insolvency practitioner (the supervisor) who normally has no executive powers but is required to declare whether the debtor is in practice implementing the proposals.

A creditor who is entitled to enforce security cannot be prevented from doing so at any time. Unless the preferential creditors agree otherwise, the IVA must provide for them to be paid in full before anything is paid to other unsecured creditors.

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Individual voluntary arrangement

A supervisor has no powers to manage the debtors' affairs, except in the unlikely event that the proposals provide for them.

The supervisor has no powers or duty to investigate the events leading up to his appointment and cannot bring the various actions that a trustee can to recover assets. The debtor is required to make a formal declaration to the effect that there are no events that could be challenged by a trustee if one were to be appointed.

Advantages	Disadvantages
<ul style="list-style-type: none">▪ Cost effective and flexible.▪ The debtor remains in charge; the supervisor only ensures he does what he has committed to do. This normally allows for lower cost than bankruptcy.▪ The Crown respects the spirit of the IVA and is prepared to agree to deferred terms over an extended period, normally five years, whereas outside a IVA it normally restricts any such period to around six months	<ul style="list-style-type: none">▪ Does not bind in hostile chargeholders or finance companies, which can still exercise their security.▪ Does not protect the debtor against eviction by the landlord if a lease allows forfeiture upon insolvency.▪ It can be difficult to persuade creditors to accept proposals where the proposals are not commercially realistic compared to other options available.▪ In many situations, bankruptcy is a softer option. This allows a debtor to be release from liabilities within 2-3 years with no more commitment than the realisation of his assets. Creditors can insist that an IVA continues for more than three years and that extra recoveries are secured compared to bankruptcy.

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