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.

<table>
<tr><th></th><th>Out-of-court appointment (ie without a court hearing)</th><th>Appointment by court following petition</th></tr>
<tr><td>Company acting either through its directors or shareholders, in both cases by passing a valid resolution in accordance with the company's articles</td><td>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.
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.</td><td>Only if the company is insolvent and five day's notice is given to any qualifying floating charge holder(*) and others so entitled.</td></tr>
<tr><td>Qualifying floating charge holder (*)</td><td>Only if two day's prior notice is given to any holder of prior qualifying floating charge.
It is not necessary to show that the company is close to insolvency but the company must be in default of the charge.</td><td rowspan="2">Only if the company is close to insolvency and notice is given to the company, other qualifying floating charge holders and others so entitled.</td></tr>
<tr><td>Any other creditor</td><td>Not available</td></tr>
<tr><td>Liquidator</td><td>Not available</td><td>To replace liquidation with administration</td></tr>
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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.

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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.

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.

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Advantages and disadvantages of administration

Advantages	Disadvantages
▪ 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.	▪ 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.