A guide to creditors' meetings

Creditors' meetings under the Insolvency Act 1986

Introduction

Creditors' meetings provided for under the Insolvency Act 1986 (the Act) vary in purpose according to the type of insolvency procedure and to the stage of the insolvency at which they are called. Some meetings allow creditors to choose the insolvency practitioner who will administer the insolvency procedure, whilst others are intended to keep creditors informed and in some cases allow the wishes of creditors to be taken into account in the administration of the insolvency.

The over-riding intention in all cases is that creditors should have a chance to protect their position by attending and voting at such meetings, either in person or through a representative. This brief is an outline of the meetings that take place under the Act in England and Wales and the purpose of those meetings. The Act, and the accompanying insolvency rules, contains detailed procedures for each meeting but these have been generalised for the sake of clarity.

Company voluntary arrangements

The voluntary arrangement procedure allows a company, whether solvent or insolvent, to propose a legally binding scheme of arrangement or composition of its debts with its creditors.

The proposal may be made by the company's directors, or its administrator or liquidator, and must set out why creditors should be expected to concur with it and must include full details of the company's affairs. A voluntary arrangement must be implemented and supervised by an insolvency practitioner.

Separate meetings of both creditors and members (in that order) must be held on at least 14 days' notice to consider the proposed scheme (section 3). The proposal must indicate how the various classes of creditors are to be dealt with and the quantum and timing of distributions. Neither the scheme, nor any modifications, can affect the rights of secured or preferential creditors unless those creditors agree. Copies of the proposal and a statement of affairs must be sent out with the notices of the meetings.

The majorities required to approve the scheme are:

- Creditors – at least 75% by value of creditors present in person or by proxy and voting must be in favour, however, a resolution approving the scheme is invalid if those voting against it include more than half of the creditors who were sent notices (and also have submitted claims) and are unconnected with the company. To be entitled to vote, creditors must have submitted a claim either at the meeting or before;

- Members – a simple majority of those voting.

Notice of the results of the meetings must be sent to every person who received notice of the meetings. The scheme supervisor must keep those creditors bound by the scheme informed of progress every 12 months and on completion of the scheme. An approved voluntary arrangement is binding on every creditor who was entitled to vote at the meeting, whether or not he was present or represented at the meeting.

Administration orders

The administration procedure imposes a moratorium on legal steps being taken against the company and is aimed mainly at achieving the survival of the company. An application to the Court for an administration order may be made by a creditor, the directors or the company. An administration order will not be made if an administrative receiver is in office (unless his appointer agrees, or the charge is open to attack) or if the company is already in liquidation.

Until 15 September 2003 the only way to enter administration required an application to court supported by an independent accountant's report and a formal court hearing at which a barrister argued the case for an order to be made. This was often quite time consuming (2 or 3 weeks) and expensive (a minimum of £15,000 to £20,000) effectively ruling it out as an option for smaller businesses. Post 15 September in all cases the independent accountant's report is replaced by a simple written consent of the proposed administrator. For floating charge holders (typically banks), the company (resolution of shareholders), or the board of directors, there is a new without court order entry route into administration which will be much quicker (2 or 3 days) and less costly (£3,000 to £5,000). It is intended that this will become the "gateway procedure" into insolvency.

The purposes of administration are replaced by a hierarchy of objectives:

- **First** company rescue
- **Second** a better result for creditors than would be obtained through an immediate winding up
- **Third** realise property to make a distribution to secured and/or preferential creditors

The administrator must consider the first option and only if this is not reasonably practicable would he move onto the second objective and likewise the third objective. Unlike administrative receivers the administrator owes an express duty of care to creditors as a whole and must not unnecessarily harm their interest.

- There are much shorter timescales for reporting to creditors and an overall one year limit.
- The administrator will have new powers to make distributions to creditors together with simplified exit routes.

Taken together these changes are aimed at simplifying administrations, reducing costs and making them accessible to medium and smaller businesses. **In our view the new legislation goes a good way to allowing directors to take control of their company's destiny rather than handing control to their bank or other creditors.**

The administrator, within months of his appointment must call and hold a meeting of creditors of the company and present his proposals for achieving the objective within 10 weeks of the administration order (section 23). Fourteen days' notice of this meeting must be given and a copy of the proposals must be sent to all known creditors.

The meeting of creditors will, subject to any modifications accepted by the administrator, approve or reject the proposals but, if the meeting declines to approve the proposals, the administrator must refer the matter back to the Court which may then make any order that it sees fit. Creditors may vote at the meeting only if they have submitted a claim to the administrator before the meeting, together with, if necessary, a proxy. A simple majority by value of those present and voting in person or by proxy is required for the approval of the administrator's proposals.

Where the administrator's proposals are approved, the meeting of creditors may establish a creditors committee to assist the administrator in discharging his duties. Notice of the result of the meeting must be sent to every person who received notice of the meeting, and the administrator must advise creditors of the progress of the administration every six months and on completion.

The administrator has the power to call a meeting of creditors at any time and he has a duty to do so if requested by 10% in value of the creditors or if so directed by the Court.

Administrative receiverships

An administrative receiver is appointed by a debenture holder secured by a floating charge over a company's assets, in order to recover monies due to that debenture holder. Prior to the Act there was no legal requirement for the administrative receiver to advise unsecured creditors of any matter relating to the receivership.

Under the Act, the administrative receiver must not only notify all creditors of his appointment within 28 days but, unless the company goes into liquidation, he must within three months of his appointment, call a meeting of creditors (section 48) on 14 days' notice and present a report dealing with the events leading up to his appointment, a summary of the statement of affairs, details of his trading and disposal of assets, the quantum of secured and preferential creditors and the possible outcome for other creditors. Where the company goes into liquidation within the three months, the administrative receiver is relieved of this obligation, as it will be dealt with by the liquidator. The administrative receiver may apply to the Court to be released from the duty to call a meeting of creditors, but his report must state that he intends to do this and must be circulated or advertised not less than 14 days before the application.

The meeting may resolve to establish a creditors committee to assist the administrative receiver in carrying out his duties and, if required, obtain information from him.

Creditors may vote at the meeting only if they have submitted a claim to the administrative receiver before the meeting, together with, if necessary, a proxy.

Compulsory liquidations (winding-up by the Court)

A company can be wound up by order of the court upon presentation of a petition either by the company or its directors, or by any creditor or creditors, contributory or contributories, or by all or any of those parties together or separately.

The possible grounds for such a petition are contained in section 22 of the Act and include where a company had not traded for a year, where the number of its members has dropped below two, where the Court is of the opinion that it is just and equitable to wind up, and where the company is unable to pay its debts. This latter ground is usually evidenced by the non-payment of a judgement debt or statutory demand for payment served on the company by a creditor.

Where a winding-up order is made, the Official Receiver, by virtue of his office, usually becomes the liquidator. He has a duty to decide within 12 weeks whether there is any benefit in summoning meetings of creditors and contributories for the purpose of choosing someone else to be liquidator (section 135). At a first meeting of creditors, the only resolutions that may be passed are those relating to the appointment of a named insolvency practitioner to be liquidator and the appointment of a liquidation committee. Creditors may vote at their meeting only if they have lodged a proof of debt and, if necessary, a proxy. A majority in value of those present and voting, in person or by proxy, is required to pass a resolution.

Whether or not the Official Receiver decides to exercise his power to summon meetings, he may be forced to do so if requested by 25% of in value of the company's creditors. Such a meeting may also establish a liquidation committee, or the liquidator may, if he thinks fit summon separate general meeting of the company's creditors and contributories to consider that question.

Under section 168, the liquidator may also from time to time summon general meetings of creditors and contributories to ascertain their wishes, or he may be directed to do so by a members' resolution or by 10% in value of the company's creditors. When the winding-up is complete, a liquidator who is not the Official Receiver summons a final general meeting of creditors under section 146 at which the creditors consider the liquidator's report and determine whether or not he should be released from office.

During the liquidation, a liquidator may be removed by an order of the court or by a general meeting of the creditors summoned for that purpose (section 172). Section 195 (which applies to all liquidations) allows the court to direct meetings of creditors or contributories to be held, in order to ascertain the wishes of those creditors or contributories.

Creditors’ voluntary liquidations

Where no statutory declaration of solvency has been made by the directors in a voluntary liquidation, to the liquidation is termed a creditors’ voluntary liquidation (“CVL”), as opposed to a members’ voluntary liquidation (“MVL”). A CVL requires a meeting of creditors and this is held under section 98 on at least seven days’ notice within 14 days of the company meeting at which it is initially decided to put the company into liquidation. At a section 98 meeting, the directors must lay a statement of affairs before the creditors, who have a chance to ask questions of the directors, and of the liquidator nominated by the company if he has already been acting. The creditors also decide whether to accept the liquidator nominated by the company or to appoint a liquidator of their choice. They may also appoint a liquidation committee, the rules relating to which are broadly the same as those applying in a compulsory liquidation (see above). Creditors may vote only if they have submitted such proof of debt as is required in the notice of meeting (usually a statement of claim) and if they have lodged a proxy, where one is required, before the meeting. A majority in value of those present and voting, in person or by proxy, is required to pass a resolution.

In members’ voluntary liquidation, if the liquidator forms the opinion that the company is insolvent and will be unable to pay its debts in full, he must summon a meeting of creditors to convert the MVL into a CVL. Such a creditors’ meeting is held under sections 95 and 96 of the Act and has the same effect as a section 98 meeting.

In a continuing liquidation, annual creditors’ meetings are held at which the liquidator presents an account of his acts and dealings and of the conduct of the liquidation during the preceding year, he may apply to the Department of Trade for dispensation from holding the meeting if the expense of acting it outweighs any benefit that would be gained.

Similarly, at the end of a liquidation, when the company’s affairs are fully wound up, a final meeting of the company and of the creditors is called prior to dissolution. During the liquidation, a liquidator may be removed from office by an order of the Court or by a general meeting of the company’s creditors summoned specially for that purpose in accordance with the Rules (section 171).

Insolvency of individuals

An individual may propose a voluntary arrangement or a petition may be made to the court, by the individual or one of his creditors for a bankruptcy order to be made. The purpose, effect and timing of meetings of creditors held under these procedures are similar to those in company voluntary arrangements and liquidations.

Notices and proxies

The Act stipulates three matters for all meetings of creditors in any insolvency procedure

- the venue must have regard to the convenience of the creditors;
- all meetings must commence between 10.00am and 4.00pm on a business day;
- proxy forms must be sent out with every notice summoning a meeting of creditors.

Individuals can attend meetings in their own right or can appoint a representative to attend as a proxy on their behalf. A company, as such, cannot attend a meeting and must appoint a person who will represent it. The representative of either an individual or a company is appointed by use of the proxy form sent out with the notice of every meeting and the notice must state the place to which, and by what time, the proxy must be returned to enable the representative to attend.

A company may be represented at a meeting without the need to complete a proxy if it passes a resolution of its directors authorising any person it considers fit to act as its representative at any meeting of creditors of a company of which it is a creditor. The person authorised to act may exercise the same powers as the company itself would be able to exercise if it were an individual creditor. This includes the ability to vote on any resolutions for the appointment of a liquidator (section 375 Companies Act 1985).