



Chartered Accountants
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Corporate Insolvency Law in Ireland

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What to expect:

1. Creditors Voluntary Liquidations
2. Directors Duties
3. Examinership (light)
4. Schemes of Arrangement



1. Creditors' Voluntary Liquidation (CVL)



Creditors' Voluntary Liquidation: No Chance of Survival

** Contrary to what the name suggests, a creditor cannot instigate a Creditors' Voluntary Liquidation*

➤ Creditors' Voluntary Liquidation Process:

- Directors conclude that a company should be voluntarily liquidated where it is insolvent and can no longer pay its debts as they fall due
- Resolution of board of directors to implement a creditors voluntary liquidation and appoint a liquidator – Directors call an AGM and a Creditors Meeting
- Meeting of shareholders and an ordinary resolution is passed to wind up the company – Section 586(2) Companies Act, 2014
- Notice of the Creditor's Meeting must be advertised at least ten days before the date of the meeting, in two daily newspapers circulating in the district of the registered office of the company

Creditors' Voluntary Liquidation: Creditor's Meeting

Purpose:

- Chairman's statement
- Consider a Statement of Affairs
- Confirm appointment of liquidator or appoint a replacement liquidator
- Nominate members of the Committee of Inspection – Section 667 Companies Act, 2014

Notice of Creditors Meeting

IN THE MATTER OF
THE COMPANIES ACTS, 2014

AND

IN THE MATTER OF

<defendant 1>

TO ALL CREDITORS

NOTICE IS HEREBY GIVEN pursuant to Section 587 of the Companies Act, 2014 that a meeting of the Creditors of the above named company will be held at <MeetingLocation> on the day of <CurrentYear> at <MeetingTime> a.m./p.m. for the purpose set out in Section 588 of the said Act.

BY ORDER OF THE BOARD

Dated this day of <CurrentYear>.

NOTE:

The forms of Special and General Proxy are enclosed herewith. Proxies to be used at the Meeting must be lodged at <CompanyRegisteredOffice> the registered office of the Company not later than 4.00 p.m. on the day before the meeting. Please note that the original proxy signed or on behalf of the creditor must be lodged at the address mentioned.

THE COMPANIES ACT 2014

GENERAL PROXY

[defendant 1] (the "Company")

I/We _____

of _____

(1) _____

of _____

or, failing him

(2) _____

of _____

to be my/our General Proxy at Extraordinary General Meeting to be held in the above matter
on the _____ day of _____ 20____, or at any adjournment thereof.

Dated this _____ day of <CurrentMonth> <CurrentYear>.

SIGNED : _____

Creditors' Voluntary Liquidation: Creditor's Meeting

Possible questions for the Directors:

- Why did it take so long for you to take the decision to wind up the company?
- In 20 when the company was clearly in difficulties, what steps did you take then to prevent the rising value of creditors?
- Were you aware that to knowingly incur debt which a reasonable person ought to have known would not be paid exposed you to personal liability for the debt?
- How much did you invest in the company? Have you been re-paid? Can you demonstrate how this money was invested? Was the investment in return for share capital?
- What do you intend to do now? Have you any other companies? Do any of your fellow directors have other companies? Are they in the same line of business?
- How many employees were there? Were they paid up to date? Will any of them follow you to new employment?
- Were any of your debts owed to the creditors, and if so, how much?

Creditors' Voluntary Liquidation: Directors questions continued

- Did you personally guarantee the debts of the company? Did you give any suppliers or any other third parties personal guarantees? Did any of the other directors?
- Did you get any loans from the bank? Who was your bank? Have they been prepaid? Were these loans guaranteed?
- Who was responsible for the day to day management of your company? Who kept the books and records? Why were there no management accounts?
- How did you expect to know the financial health of the company?
- Did you operate from the premises? Were there any other premises? Was the rent personally guaranteed?
- Have any creditors been paid in the last six months? Have any charges been created in the last year?
- Did the director's loans to the company appear in any annual accounts?
- Do any of the debts relate to work done and goods supplied to the Directors personally?

2. Directors Duties

Pre- Insolvency Considerations:

Company in financial difficulties

- Directors' Duties:
 - Company directors must be able to recognise when the business becomes insolvent
 - Directors should be able to recognise “symptoms” of insolvency such as reaching borrowing limits, making late payments to suppliers, creditor threats
 - Important to regularly carry out “cash-flow” test or a “balance sheet” test to assess solvency of the business

Pre- Insolvency Considerations:

- As soon as directors of a company become aware that the company is in financial difficulty, they should seek professional advice
 - The directors should follow such advices
 - It may be reasonable for a company to try to continue to trade out of the financial difficulties for a period of time
 - *Dublin Heating Company Ltd v Hefferon et al*, High Court, 14 January 1993
- A director's meeting should be held to assess the company's financial condition

Pre- Insolvency Considerations for Directors:

- Regular board meetings should be held thereafter to continue to review the situation and to consider appropriate contingency plans
- Detailed minutes should be kept of each meeting
- Directors should seek, obtain and act on professional advice from IP
- Directors must then consider at what stage they cannot continue to trade and consider the options available
- Risk of personal liability (Section 610 Companies Act, 2014)
 - *Re Appleyard Motors Ltd; Toomey Leasing Group Ltd v Sedgwick et s [2016] IECA 280, Court of Appeal, Hogan J, 13 October 2016*

Director's Duties in an insolvent Liquidation

- Provide accurate information in the Statement of Affairs
- Duty to co-operate with the liquidator, including:
 - Returning all assets, books and records of the company., including share register, minute book and company seal;
 - Providing information as regards the company's premises, the details of ownership, any leases, insurance etc.;
 - May be requested to compile and inventory of company assets or stock.

3. Examinership



What is Examinership?

- Court managed restructuring process for insolvent companies
- Contained in Part 10 of the Companies Act, 2014
- Company is protected from its creditors for 70 days
(extendable to 100 days)
- Company's debt is crammed-down in a scheme of arrangement
- Company exits examinership totally solvent



Examinership: Petition for protection

- Generally companies seek to enter into examinership to avoid liquidation, receivership or onerous contracts
- Petition can be brought by the company, its members or a creditor
- Petition is heard ex-parte before the Court
- Independent Experts Report
- Initial requirements to be met – reasonable prospect of survival



Examinership: Effect of appointment of Examiner

- No proceedings / resolution to wind up the company
- No receiver may be appointed
- No enforcement against company or any guarantor
- No payment of pre-petition debt, unless authorised by the Court
- Debt incurred during protection period – certified or not?

Examinership: Examiner's Duties

- Examiner's role – to examine the company's affairs, secure investment and prepare a scheme of arrangement with creditors
- Ensure each class of creditor obtains a dividend which is more than they would obtain if the company went into liquidation
- Convene creditors meetings and secure support of at least one impaired class of creditor – ensure no class is *unfairly prejudiced*
- Report to the Court and obtain Court approval for scheme of arrangement

Examinership: Preparation of Scheme of Arrangement

- Specify each class of members and creditors or the company
- Provide equal treatment for each claim/interest of a particular class
- Provide for the implementation of proposals
- Prepare an up to date statement of assets and liabilities
- Co-ordinate with potential investors

Examinership: Treatment of secured and unsecured debt

- Examiner may dispose of assets subject to a fixed and/or floating charge with the leave of the Court
- Secured debt will usually be restructured, refinanced at a sustainable level or repaid at a level at or above the market value of the security held by the bank
- *Re Birchport Limited [2008] Unreported*
- Unsecured debt is usually crammed down and unsecured creditors will receive a minimal % of their debt
- Invoice discounting facilities - *Bank of Ireland v Eteams (International) Ltd [2017] IEHC 393*

Examinership: Timeline

Day	Timeline
1	The petition is presented to the Court, provided the Court is satisfied the requirements are met, the company is placed under the protection of the Court. An interim examiner may be appointed.
4	Within 3 days of presentation of petition the Registrar of Companies must be notified of the appointment of the examiner and the status of the Company will change to "In Examinership". Notice of the appointment of examiner will also usually be published in 2 daily newspapers and copies of the petition papers will be delivered to certain creditors such as the Bank.
10-14	The Company must apply to the High Court for confirmation of the protection and the appointment of an examiner (or confirmation of the appointment of an interim examiner).
21	Within 21 days of the appointment, notice of examiner's appointment must be published in Iris Oifigiúil.
35	35 days post appointment, the examiner must report to the Court on proposals on this date. The examiner must file a S.534 Report to High Court.
70	Day Seventy Post-Petition - deadline for Scheme of Arrangement. Alternatively, the examiner can make an application to the Court for an extension of the protection period, up to 100 days.
70-100	The examiner must give 3 day's notice to creditors of any creditors' meeting to consider a Scheme of Arrangement (S.543 CA14)
70-100	A Bank must serve a notice on a personal guarantor within 48 hours of receipt of notice of the creditors meeting to consider a Scheme of Arrangement (S.549 CA14)



Examinership Light

- Small and Medium Enterprises can apply for examinership through the Circuit Court
- Entry requirements for an SMEs to access the Circuit Court for examinership:
 - Have a balance sheet of less than €4.4million
 - Have turnover of less than €8.8million
 - Have no more than 50 employees
- The company must satisfy at least two of the above conditions

4. Schemes of Arrangement

- Formal - Chapter 1 of Part 9 of the Companies Act, 2014
- Informal

Scheme of Arrangement

- A Scheme is usually invoked where a company wishes to enter into an amicable arrangement by way of reconstruction and not necessarily born out of a dispute.
- The legislation provides a structure for the negotiation of a Scheme for either or both the rearrangement of the company's capital structure amongst its members and, the rearrangement (including compromise) of a company's obligations and liabilities to its creditors.

Convening a meeting for a Scheme (Section 450)

- Where a compromise or arrangement is proposed between a company and
 - a) its creditors or any class of them, or
 - b) its members or any class of them,
- the directors of the company may convene—
 - i. the appropriate scheme meetings of the creditors or the class concerned of them, or
 - ii. the appropriate scheme meetings of the members or the class concerned of them
- Section 450 (3) provides that the Court may order the meetings on application of the company, a creditor or member of the company or the liquidator of the company.

Information to be provided to members and creditors (Section 452)

- Section 452(1) provides that once a meeting is proposed, a Scheme Circular should be sent to all members and creditors with the Notice of the meeting:
 - i. *explaining the effect of the compromise or arrangement;*
 - ii. *stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons*
 - iii. *where the compromise or arrangement affects the rights of debenture holders of the company, giving the like explanation in relation to the debenture trustees as it is required under subparagraph (ii) to give in relation to the company's directors*

Voting at Meetings

- Section 453 (2) (a) provides that in order for a Scheme to become binding,
“a special majority at the scheme meeting, or, where more than one scheme meeting is held, at each of the scheme meetings, votes in favour of a resolution agreeing to the compromise or arrangement”.
- Section S. 449 (1) defines ‘special majority’ as
“majority in number representing at least 75 per cent in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the scheme meeting”.

The test is therefore two fold – at least 75% in *value* and at least 50% on *number* of each class must support the Scheme.

Limitations to Schemes of Arrangement

- The applicant must have *locus standi* to apply to Court to summon meetings under Section 450 (1).
- The company (represented by the Board of Directors or liquidator if the company is in liquidation) must support the application.
- Schemes must not be contrary to law or *ultra vires*.
- Where capital is reduced the normal rules will apply (Section 84 of the Act and the SAP procedure).
- There must be compliance with the rules of the Irish Takeover Panel.

Scheme of Arrangement

- Scheme is binding when:
 - A special majority at the scheme meeting votes in favour of the resolution agreeing to the Scheme;
 - Notice of the resolution and the court application is published in at least two daily newspapers in the district of the registered office;
 - The Court, in exercising its discretion, sanctions the Scheme under Section 453 (2) (c) of the Act.

Informal Scheme of Arrangement

- Restructuring is achieved by approaching the company's creditors to negotiate a private agreement, without the input of the Court.
- The creditors agree to defer and/or write down the amount owing to them by the company.
- More suitable to companies with a smaller number of creditors and where creditor support is likely.

Corporate Insolvency Law in Ireland

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Swimming against the Economic Tide

2 December 2020

BRENDAN O'DONOGHUE

HEAD OF RESTRUCTURING & INSOLVENCY

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Perspective – Creditor

Scenario

- > You (or a client) receives Notice of a Creditors' Meeting
- > Convened under Section 587 of The Companies Act 2014
- > Creditors' Voluntary Liquidation (CVL)
- > 10 days' notice of Creditors' Meeting is given
- > In writing and in 2 newspapers



Perspective – Creditor

Rights and Remedies

> Attendance at Creditors' Meeting

- > Proxy duly completed
- > Virtual meetings now permitted due to COVID-19 *Companies (Miscellaneous Provisions) (COVID-19) Act 2020*
- > Director's Estimated Statement of Affairs c. 1 hour before the meeting
- > Entitlement to receive a list of creditors, on request



Perspective – Creditor

Rights and Remedies

- > **Question Time at the Creditors' Meeting**
 - > Last opportunity to question directors as to collapse of company
 - > Listen to others' questions (e.g. Revenue, landlord, employees)
 - > Bring matters to attention of proposed liquidator

Perspective – Creditor

Rights and Remedies

> Voting at the Creditors' Meeting

- > Voting rights are linked to proportion of your debt
- > Ensure that your vote is counted – via your proxy
- > Proxy submitted on time
- > Proxy accurately executed
 - Individual or sole trader – signature
 - Corporation – signature and seal OR signature or “a duly authorised officer of the company”
 - Partnership – signature and “ by [John Jones], a partner in the said firm”



Perspective – Creditor

Rights and Remedies

- > **Alternative Nominations at the Creditors' Meeting**
 - > At the Members' Meeting preceding the Creditors' Meeting, liquidator is nominated
 - > At the Creditors' Meeting, members' nominee is confirmed
 - > Creditors' have right to nominate a Creditors' Nominee
 - > Considerations
 - Source an alternative nominee
 - Cost
 - Realistic asset valuation
 - You may be asked to contribute to costs
 - Chasing losses? “Throwing good money after bad?”

Perspective – Creditor

Rights and Remedies

- > **Committee of Inspection appointed at Creditors' Meeting**
 - > Nominations are requested by Chairperson
 - > Made up of members and creditors
 - > Role
 - To assist to Liquidator in his/her duties
 - To represent the interests of all creditors
 - To approve Liquidator's costs and remuneration
 - To receive reports from Liquidator as to progress of the Winding Up
 - > Pros
 - Creditor nominees have greater understanding and oversight of the liquidation process
 - Creditors can offer insight into specifics of company/industry
 - > Cons
 - More time, unpaid role
 - Limited benefit when dividend prospect is unlikely



Perspective – Creditor

Differing Creditor Interests

> Landlord

- Engage on day of appointment with Liquidator re.
 - Continued occupation or forfeiture of the lease
 - Cost of rent, rates, utilities, insurance during occupation by Liquidator

> Employee

- Liquidator will engage with employees on Day 1 of appointment
 - Gather personal information re. processing Insolvency and Redundancy Claims
 - Collective Redundancy Process

> Suppliers having Retention of Title (ROT)

- Make claim for ROT known to the Liquidator to
 - Ensure recovery of product supplied
 - Mitigating supplier loss
- Proof of ROT entitlement inc. invoicing and Terms and Conditions of Sale (simple or all sums clause)

Perspective – Business Owner

Entering 2021

- > Uncertain times for businesses
- > Significant periods of non-trading or partial trading
- > Support and subventions
 - Revenue debt warehousing
 - Commercial Rates Waiver
 - TWSS, now EWSS
 - COVID-19 Pandemic Unemployment Payment
 - COVID-19 Credit Guarantee Scheme
 - Various loans, grants, vouchers and schemes
- > Addressing the debt pile when unable to re-commence to trade



Perspective – Business Owner

Continue to trade (or not)

- > Assess the funding requirements to recommence to trade
- > Adaptability (online presence)
- > What are your competitors doing? Is CapEx needed?
- > Sources of new funding (investment or debt)
- > Employment prospects – risk versus reward
 - Family business
 - Employees
 - Other skills

Perspective – Business Owner

Impacts personally

> Personal guarantees

- Bank debt
- Leases
- Franchise agreements



> NewCo

- Limited liability affords protection
- Entitlement to earn a living
- Transfer of business or assets at market value
- Caution: Phoenix Companies

Perspective – Business Owner

Liquidator's Role

- > **Insolvent company enters into CVL, Liquidator will investigate**
 - the collapse of the company
 - the conduct of the directors

- > **Directors found to have not acted honestly and responsibly may face**
 - Restriction or
 - Disqualification

- > **Section 610 of The Companies Act 2014**
 - Reckless trading
 - Personal liability

Perspective – Business Owner

COVID-19 Considerations

- > ODCE Guidance – June 2020
- > Cognisant of directors' concerns re: insolvent trading

Perspective – Business Owner

COVID-19 Considerations

- In considering directors' conduct Liquidators and ODCE will have regard to:
 - whether and how the directors monitored the company's financial position on an ongoing basis;
 - whether and how the directors sought professional advice relating to the insolvency
 - whether and how the directors formed the view that the company would be able to trade out of its difficulties within a reasonable timeframe
 - the length of time that trading continued after the insolvency
 - the extent to which the company's financial position continued to deteriorate during the insolvency
 - the treatment of tax liabilities
 - whether and how the directors reduced costs and/or restructured the business.

Perspective – Business Owner

COVID-19 Considerations

- > **Directors' decisions and judgements should be:**
 - made on the basis of objectively verifiable evidence
 - based on assessments and assumptions that were reasonable in the context of the circumstances pertaining at the relevant times;
 - made in good faith and the directors otherwise acted honestly and responsibly



Perspective – Business Owner

Conclusion

- > Not a *carte blanche*
- > Some latitude and regard to events outside of directors control
- > Emphasis
 - Record decisions made
 - Regular review
 - Reasonable assumptions
 - Acting in good faith
 - Acting honestly and responsibly
 - Seeking and acting on professional advice

RBK Corporate Recovery Helpline

- > *A confidential, no obligations helpline*
- > *A free initial consultation will be provided by our Corporate Recovery team at a time that suits you*

Tel. 01 644 0103

Email CorporateRecovery@rbk.ie

Open	Monday to Friday	9am to 5.30pm
	Saturday	10am to 1pm

Q & A Session




Thank you

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