



Circular No 16 @ November 2014

Corporate Insolvency

- **Introduction**

The new Insolvency Act 2011 provides for the administration, receivership and liquidation of companies, and for the licensing of insolvency practitioners and cross-border insolvencies.

Forms of Company Insolvency Proceedings

- Administration
- Receivership
- Administrative Receivership
- Liquidation

A company may also enter into a voluntary arrangement with its creditors.

When is a company deemed to be insolvent?

Under section 10 (1) (a) of the Insolvency Act, a company is presumed to be insolvent if:

- (i) it fails to comply with the requirements of a statutory demand that has not been set aside under section 143 of the Insolvency Act; or
- (ii) execution or other process issued on a judgment, decree or order of a Gibraltar court in favour of a creditor of the company is returned wholly or partly unsatisfied.

Under section 10 (1) (b) of the Insolvency Act, a company is insolvent if:

- (i) it is unable to pay its debts as they fall due; or
- (ii) the value of its liabilities exceeds its assets.

COMPANY VOLUNTARY ARRANGEMENTS

If a company is insolvent, it can use a company voluntary arrangement (a CVA) to pay creditors over a fixed period. If the creditors agree, the company can continue trading as normal, and the directors will remain in control of the company.

A CVA must be arranged through an insolvency practitioner, who will be nominated as the **interim supervisor** under a proposal. He will charge to apply for the CVA and also to administer it. Notification must be given to the Registrar within 2 days of the appointment of an interim supervisor or a supervisor.

What happens next:

- The insolvency practitioner will work out a proposal or 'arrangement' covering the amount of debt the company can pay and a payment schedule.
- He will write to creditors about the arrangement and invite them to a meeting to vote on it.
- If the proposal is approved by the creditors, the arrangement becomes binding on the company, the members and the creditors.

The company will then make the scheduled payments to creditors through the insolvency practitioner until these are paid off. If the company does not meet the agreed payment schedule, the company is likely to be liquidated.

Documents to be filed with the Registrar

Section 20	Notice of appointment of Interim Supervisor, within 2 days of appointment
Section 28	Copy of report following Creditors' meeting, within 5 days after creditors' meeting
Section 29	Notice of appointment of supervisor, within 2 days of appointment
Section 33 (3)	Copy of accounts and report every 12 months from appointment of supervisor, up to the date of his ceasing to act, within 60 days from end of accounting period
Section 34 (1)	Notice of completion or termination of arrangement, within 28 days from completion or termination
Section 39	Notice of Court Order appointing supervisor or interim supervisor, within 7 days of date of Order

ADMINISTRATION

Objectives

The objectives of administration are to rescue the company as a going concern when it is insolvent and facing serious threats by creditors, and to achieve a better result for the creditors as a whole than would be likely if the company were to be immediately liquidated. It is also a way of realising assets in order that distributions could be made to one or more secured or preferential creditors.

How is an Administrator appointed?

An administrator may be appointed by an order of the court on the application of the company, the directors, a creditor, the supervisor of an arrangement, the Financial Services Commission where relevant, or a liquidator of the company. The holder of a floating charge is also entitled to appoint an administrator.

The Administrator

An administrator must be a qualified insolvency practitioner. Often more than one administrator is appointed to act jointly. An administrator is an agent of the company to which he is appointed.

What does the Administrator do?

On appointment, an Administrator must take all the company's property into his custody or control (Section 69). An administrator has wide-reaching powers. As the company's agent, he can cause the company to contract with third parties. Sums due under such contracts are paid in priority to the administrator's fees and expenses, and distributions to floating charge holders and unsecured creditors. An administrator has a duty to perform his functions as quickly and efficiently as is reasonably practicable. An Administrator must also file accounts and reports with the Court and with the Registrar.

Documents to be filed with the Registrar

Section 61	Notice of Appointment of Administrator, within 5 days from court order
Section 64 (1)	Where applicable, copy of discharge or variation of administrative order, within 14 days from discharge or variation
Section 68 (7)	Where applicable, notice of order for disposal of perishable assets, within 14 days from date of order
Section 75 (1)	Notice of disposal of charged assets, within 14 days from date of order
Section 80 (1) (e)	Notice of creditors' meeting
Section 82 (3) (a)	Copy of report of result of meeting, within 14 days from meeting

- Section 84 (1) (e) Where applicable, copy of notice of meeting re Administrator's proposed modifications
- Section 84 (4) (a) Copy of the report of meeting with creditors, within 14 days of meeting
- Section 87 (3) Copy of Accounts and Report, within 60 days from end of period covered by the Report
- Section 92 (7) Release of Administrator

RECEIVERSHIP AND ADMINISTRATIVE RECEIVERSHIP

Receivership is a process in which the Court, or a creditor, appoints a receiver over one or more of the insolvent company's assets or properties specified in a legal charge within a secured loan agreement. The Insolvency Act differentiates between a receiver and an administrative receiver. An administrative receiver is a receiver of the whole, or substantially the whole of the business, undertakings and assets of a company, including its goodwill, whereas a receiver is a receiver over specified assets. An administrative receiver is usually appointed under a floating charge or debenture. A receiver's main duty is to the lender that has appointed him, and not to the creditors as a whole. A liquidator may be appointed at the same time as a receiver.

Receiver's role and powers

A receiver's powers arise, where he is not appointed by the court, from the instrument by which he was appointed, and where he is appointed by the court, by the order under which he is appointed. A receiver has power to dispose of charged assets.

An administrative receiver has wider powers: apart from disposing of assets, he may act in the name of and on behalf of the company, including executing documents and using the company seal.

Documents to be filed with the Registrar

- Section 101 (1) Notice of appointment of Receiver, within 3 business days of appointment
- Section 118 Receivership accounts must be filed with the Registrar within 30 days of the last day of the period covered by the accounts
- Section 120 (b) A notice of completion of receivership must be filed with the Registrar
- Section 103 A notice of vacation of office by receiver must be filed within 7 days of the ceasing to hold office
- Section 121 (7) Notice of release of court-appointed receiver

Administrative Receivership

Report

The Administrative Receiver must prepare a report within 3 months of his appointment, file it with the Registrar, and, if he has been appointed by the Court, with the Court. The report must include:-

- The events leading up to the appointment;
- The disposal or proposed disposal of any assets and the carrying on of business;
- The amount of principal and interest payable to the persons on whose behalf he was appointed, and amounts payable to preferential creditors;
- The amount, if any, likely to be available for the payment of other creditors; and
- Matters in respect of the relevant persons who have submitted statements of affairs under section 131 of the Act (e.g. officers, administrator, liquidator, etc.)

Other documents to be filed with the Registrar

Section 130 - Court Order for the disposal of charged assets, within 14 days from date of Court Order

Insolvency Rule 68 - Notice of Death of Receiver

What happens at the end of a receivership?

At the end, if the assets realised are insufficient to pay the debenture-holder in full, there will be no money left to pay unsecured creditors. The company is then likely to be struck off. If there are funds available for unsecured creditors once the receiver has finished, he will pass these funds to a liquidator who will work with the remaining creditors and distribute any surplus to them. The company will be liquidated.

LIQUIDATIONS

A company is put into liquidation by the appointment of a liquidator. A liquidator may be appointed in respect of a company only by:

- (a) the members of the company under section 146; or
- (b) the Court under section 160.

Certain interested parties, such as creditors or an administrator of a company, may apply to the court to appoint a liquidator.

Appointment by resolution

Members of a company may by special resolution appoint an eligible insolvency practitioner as liquidator of the company. The Official receiver may also be appointed as liquidator where a special resolution has been passed by reason of the Official Receiver exercising votes attached to the company's shares (for example, where he is the liquidator of another company). The members may not appoint a liquidator if an application has been made to Court to appoint a liquidator, or if the Court has appointed a liquidator, or if the liquidator has not consented in writing to his appointment.

Appointment by Court

The Court may appoint the Official Receiver or an eligible insolvency practitioner if:-

- the company is insolvent
- number of members is reduced below minimum required
- the Court is of the opinion that it is just and equitable to do so
- the Court is of the opinion that it is in the public interest to do so

Who may apply to Court for an order to appoint a liquidator?

- The Company
- A creditor
- A member
- The directors
- The Minister on public interest grounds
- The Financial Services Commission if the company is authorised under relevant legislation
- The administrator of the company if it is in administration
- An administrative receiver

What are the main duties of a liquidator?

The liquidator is appointed to wind up the company's affairs. The liquidator does this by calling in all the company's assets and distributing them to its creditors. If anything is left over, the liquidator distributes it among the members of the company.

What are the duties of the Official Receiver as liquidator?

The Official Receiver has a duty to investigate the company's affairs and the causes of its failure. He also decides whether to call meetings of the creditors and contributories (that is, those people liable to contribute to the assets of the company if it is wound up) for the purpose of appointing a liquidator in his place.

If he decides not to call meetings, he must notify the creditors, contributories and the court of his decision.

On the other hand, if he decides to call meetings, a liquidator may then be appointed in place

of the Official Receiver. The liquidator must notify the Registrar of his appointment.

What happens when the winding-up is complete?

When the Registrar receives notice from the liquidator of the final meeting of creditors or notice from the Official Receiver that winding-up is complete, the Registrar will register it and publish its receipt in the Gazette.

Documents to be filed with the Registrar

Section 169	Notice of appointment of Liquidator within 14 days from date of appointment
Section 179	Notice of resignation of Liquidator
Section 225	Sealed copy of Court Order terminating liquidation, within 10 days from the date of Order
Section 226 (2)	Final report of Liquidator, as soon as possible after completion
Section 227 (10)	Release of Liquidator

▪ **Guidance Only**

This Circular is intended for general guidance only. Companies House (Gibraltar) Limited does not assume legal responsibility for the accuracy of any particular statement. In the case of a specific problem, we recommend that you seek professional advice.

▪ **Registry**

Companies House Gibraltar
1st Floor
The Arcade
30-38 Main Street
PO Box 848
Gibraltar

☎ +350 200 78193

☎ +350 200 44436

✉ mail@companieshouse.gi

🌐 www.companieshouse.gi