

Appointment of a liquidator to an insolvent company incorporated in the British Virgin Islands

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A company incorporated in the British Virgin Islands (the “BVI”) can be placed into insolvent liquidation either by:

- a shareholders’ qualifying resolution; or
- a court order, following an application to the court and a hearing.

The effect of an insolvent liquidation is to put the affairs of the company in the hands of an independent insolvency practitioner who is required to take possession of, protect and realise the company’s assets for the benefit of the company’s creditors.

An application to court can be made by:

- the company itself;
- a creditor (including a judgment creditor);
- a shareholder;
- the supervisor of a company creditors’ arrangement; or
- in limited circumstances, the Attorney General, the International Tax Authority or the Financial Services Commission (FSC).

We will focus, in this note, on insolvent liquidations commenced at the instigation of a creditor.

Appointment of liquidator

The court may appoint a liquidator when any of the following are applicable:

- the company is insolvent (see below for definition of insolvent);
- in the court’s opinion, it is just and equitable for a liquidator to be appointed; or
- in the court’s opinion, it is in the public interest for a liquidator to be appointed.

A company is regarded as being insolvent under the Insolvency Act, 2003 (the “Insolvency Act”) if:

- it is balance sheet insolvent (value of its assets does not exceed the value of its liabilities);
- it is cash flow insolvent (it is unable to pay its debts as they fall due); or
- it is deemed insolvent, as a result of a failure to comply with a valid statutory demand or execution issued on a judgement or other order of a BVI court against it is returned wholly or partially unsatisfied.

Consent and approvals

The applicant must serve a copy of the application on the company. The company is entitled to attend the hearing and present its own evidence before the court.

Notice of the hearing of the application must be advertised, and other interested parties (such as other creditors) can appear and make submissions at the hearing if they have filed a notice of their intention to appear. Upon hearing the application, the court can:

- appoint a liquidator;
- dismiss the application;
- adjourn the hearing (conditionally or unconditionally); or
- make any other interim order that it considers fit.

Supervision and control

The liquidator must be an insolvency practitioner licensed to practice and be resident in the BVI (although a joint appointment with a foreign insolvency practitioner may be permitted).

Once appointed, the liquidator has custody and control over the assets of the company. The directors and other officers remain in office but they cease to have any powers, functions or duties, unless specifically authorised by the liquidator or under the Insolvency Act.

Furthermore, no share in the company may be transferred (unless ordered by the court), no member may exercise any power under the memorandum or articles of association (the "M&A") and no amendment may be made to the M&A following commencement of the liquidation.

Protection from creditors

With the exception of secured creditors, and subject to a court order to the contrary, once the liquidator has been appointed no person can:

- commence or proceed with any action or proceedings against the company;
- commence or proceed with any action in relation to the company's assets; or
- exercise or enforce, or continue to exercise or enforce, any right or remedy over or against the assets of the company.

The appointment of a liquidator does not infringe upon the right of a secured creditor to enforce its security.

Where an application for the appointment of a liquidator has been filed with the court but not yet determined, the court may, upon application, appoint a provisional liquidator. In general terms, a provisional liquidator's purpose is to maintain the status quo and maintain the value of the company's assets pending the determination of the application for the appointment of a liquidator.

Length of procedure

The application for the appointment of a liquidator must be determined by the court within six months or it will be deemed dismissed. The court can extend the period for determining the application, each extension not exceeding three months at a time.

Once the liquidator is appointed, the length of the liquidation process is indeterminate and depends on a number of factors including the:

- value, type and location of the company's assets; and
- speed with which the liquidator can deal with creditors' claims and collect, realise and distribute the company's assets.

Conclusion of the liquidation

At the conclusion of the liquidation, and once any distributions are made to the creditors, the liquidator must prepare a final report and serve it on every creditor of the company whose claim has been admitted and all shareholders of the company. That report must also be filed with the BVI Registrar of Corporate Affairs.

The liquidator will then apply to the court to be released from his/her appointment and the company is then dissolved.

If you require any further information on the appointment of liquidators to an insolvent company please contact one of the Carey Olsen team.

Continued



Key contacts

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