

Insol Europe Survey

Insolvency Regulation in the UK

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1. Introduction

The UK is not a homogenous region for the purpose of insolvency regulation. Insolvency legislation in England & Wales, which constitute some 85% of the UK population differs in certain respects to that in Scotland and Northern Ireland. For simplicity, this document will provide a high level commentary on the position in England & Wales, and where key differences exist, these will be noted but not detailed in full.

2. Types of insolvency office holder (IOH)

Insolvency procedures in the UK are divided into corporate procedures, which can be applied to companies, (and via supporting legislation, to partnerships), and personal procedures, for insolvent individuals. For both corporate and personal insolvency procedures, there are both “rescue” procedures, aimed at the financial rehabilitation of the company or individual, and procedures whose aim is simply to sell assets and distribute their proceeds to creditors.

Company insolvency - Rescue procedures

Company voluntary arrangement (CVA)

The purpose of a CVA is to put proposals to the creditors of a company, for the forbearance and / or forgiveness of a proportion of the debt it is owed. A CVA is an agreement between a company, its shareholders and its creditors. It requires the approval of the proposals by 75% or more of the company’s unsecured creditors, and a majority of creditors. When used as a rescue procedure, the company will continue to trade under the control of the directors, subject to the supervision of the IOH until completion of the arrangement. CVAs can also be used as a mechanism for distributing realised funds following administration and liquidation.

Administration

In administration, the IOH is appointed to pursue one of three objectives:

- to rescue the company as a going concern – as opposed to selling its business and leaving a “shell”;
- to achieve a better result for the creditors as a whole than if the company were wound up;
- or to sell the business or its assets in order to pay secured and/or preferential creditors.

Administration provides a moratorium against legal action by creditors, it is designed as a streamlined procedure where the IOH takes over the management of a company, and pursues their chosen objective. If the first objective is achieved, the company will be restored to solvency, either directly or using a CVA (or potentially a Scheme of Arrangement*). If the second or third objective are pursued, the company will either move to liquidation or be dissolved once all assets have been distributed.

**A Scheme of Arrangement is UK Companies Act as opposed to an insolvency process but is often used in restructurings and in conjunction with some insolvencies as a useful tool.*

Receivership

A receiver may be appointed by the holder of a fixed or floating charge granted by a company. The receiver’s task is to recover sums due to the secured lender or to realise the lender’s security. A receiver of fixed charge property need not be an authorised IOH. The primary duty of the IOH in such cases is to the holder of the security who appoints the Receiver rather than to the general body of creditors. This is most commonly used in relation to real estate assets and shares in companies.

An administrative receiver is appointed by the holder of a floating charge covering the whole, or substantially the whole, of the company’s property. They must be an authorised IOH, their job is to maximise the realisation of the business and assets for their appointor. Administrative receivership,

however, is now uncommon, as it requires the appointing charge to have been created on or before September 15, 2003, or for the company to be in specific and limited sectors (eg railways).

Company Insolvency - Non-rescue procedures

Members' voluntary liquidation (MVL)

A members' voluntary liquidation (a solvent liquidation) can only take place where the company is able to pay its creditors in full. The directors must swear that the company will be able to pay all its debts, together with interest, within 12 months. The company, at a general meeting, then passes a special resolution to wind the company up and appoints an IOH as liquidator. Their job will be to realise any assets left, and distribute them to creditors and / or shareholders.

Creditors' voluntary liquidation (CVL)

A creditors' voluntary winding-up is begun by the shareholders, who pass a resolution saying that the company cannot by reason of its liabilities continue its business and that it is advisable to wind it up. A meeting of creditors is then convened at which the IOH who is their choice of liquidator will be ratified, or another IOH appointed.

The role of the IOH is the same as that of a liquidator in a MVL.

Compulsory liquidation

A compulsory liquidation is a court driven procedure. A petition is filed at court, and at a hearing some weeks later the court decides whether to make a winding-up order. If it does, the company is then in liquidation. The petition is usually filed by creditors, due to non-payment of debts. In Scotland, a similar procedure is known as Court Liquidation.

Personal insolvency - Rescue procedures

Individual voluntary arrangement (IVA)

An IVA operates in a similar way to the CVA detailed above in corporate procedures. A proposal is put to the individual's creditors that a proportion of their debt (or all of it over an elongated period) is to be paid to them, either by way of asset disposals, a contribution from a third party on the individual's behalf, or from future income over a period of years. These amounts would then be paid over to the IOH, acting as Supervisor of the IVA, for the purpose of distributing the amounts to creditors. A similar procedure in Scotland is known as a Trust Deed.

Personal insolvency – non-rescue procedures

Bankruptcy

Similarly to a compulsory liquidation, this is a court driven procedure. A petition is filed at court, and at a hearing some weeks later the court decides whether or not to make a bankruptcy order. If it does, the debtor is made bankrupt. The petition is usually filed by creditors, due to non-payment of debts, but debtors may petition for their own bankruptcy. In Scotland, a similar procedure is known as Sequestration.

3. Size of the profession

As at 1 January 2015, there were 1,745 licensed insolvency practitioners, of whom 1,359 were actively taking insolvency appointments. There are no restrictions on the size of the profession, other than the qualifying requirements for authorisation and acceptance of appointments detailed below.

4. Practicing norms

UK IOHs range from senior partners of the global accountancy firms to sole practitioners who run their own small and micro-businesses. In between these extremes, there are many medium sized firms, either specialising in restructuring and insolvency work, or providing such services as part of a range of accountancy, audit and other financial services.

5. Qualification, training and entry into the profession

An IOH is required to be licenced. In order to obtain a licence the person must have passed the Joint Insolvency Examination Board (JIEB) exams, or hold equivalent qualifications obtained in a European Economic Area State. The JIEB exams comprise three papers, "Liquidations", "Administrations, Company Voluntary Arrangements (CVAs) and Receiverships", and "Personal Insolvency". The pass rate for those who sit all three papers is approximately 50%.

In addition the IOH is required to show their ability to carry out unsupervised the functions and duties of an IOH by spending at least 600 hours over the three years immediately before applying for the licence in work relating to the administration of insolvent estates. Generally an applicant seeking authorisation as an IOH will be expected to have been engaged in insolvency administration for not less than 100 hours per year in each of those three years.

Many IOHs are also qualified accountants and graduates (particularly those recruited by the larger accounting firms).

6. Professional bodies

IOHs are mostly accountants who have chosen to specialise in restructuring and insolvency work, there is a smaller number of lawyers who have qualified as IOHs, but in the main, such lawyers will remain within law firms providing advice to IOHs and not actively take insolvency appointments.

Within the UK there are seven authorising bodies, all of which are long established, and in all cases bar the IPA, conduct insolvency regulation as a subset of their wider remit as authorising bodies for accountants or solicitors generally. They are listed below:

- Association of Chartered Certified Accountants (ACCA)
- Chartered Accountants Regulatory Board (CARB)
- Institute of Chartered Accountants in England & Wales (ICAEW)
- Institute of Chartered Accountants of Scotland (ICAS)
- Insolvency Practitioners Association (IPA)
- Law Society of Scotland (LSS)
- Solicitors Regulation Authority (SRA)

The Insolvency Service, a government department which provides oversight regulation of the authorising bodies, also directly authorised some IOHs until October 2015. The Insolvency Service is responsible for ensuring that the authorising bodies seek consistent and appropriate standards of behaviours from the IOHs that they authorise.

The authorising bodies also produce common principles and codes including Statements of Insolvency Practice (SIPs) and Insolvency Code of Ethics which set out the basic principles and essential procedures that UK IOHs are expected to comply with. These common standards are designed and agreed by

unanimous vote by the Joint Insolvency Committee (JIC), a committee on which all of the authorising bodies are represented, together with the Insolvency Service.

Each authorising body is responsible for the monitoring of its IOHs, each IOH appointed on at least one insolvency case as IOH should be subject to routine monitoring visits and should be visited at least once every three years, during which their case files will be reviewed.

The Insolvency Service operates a central complaints gateway from which complaints about the conduct of an IOH are passed to the relevant authorising body for them to follow up. Where conduct of an IOH is found to have failed to meet the designated standards, the disciplinary committee of their authorising body is responsible for determining the appropriate sanction, which ranges from fines to withdrawal of the IOH's licence to take appointments in extreme circumstances. The sanctions imposed are published, naming the IOH, the sanction, and the action or omission that led to it.

7. Continuing professional education

All of the authorising RPBs require the IOHs that they continue to demonstrate that they are maintaining their fitness to practice via continuing professional education, by achieving targets set for structured education (typically formal training courses or seminars) and unstructured education (technical reading or other informal learning), to be confirmed annually. As part of their monitoring framework, the RPBs audit such confirmations to ensure authenticity.

8. Body corporate or individual

IOHs are in all cases individuals, and take appointments either singly or jointly in a personal capacity, but they may be employees or partners of a corporate entity or partnership. Typically the IOH will utilise their firm's resources to assist in undertaking their role.

9. Sanction for acting as an IOH without proper authorisation

If an unauthorised person accepts an IOH appointment, they will (if a member of one of the authorising bodies) face sanction from that body. Due to the publicly accessible registers of IOHs which are maintained by the Insolvency Service, it would be unusual for an individual who is not a properly authorised IOH to be able to successfully hold themselves out as an IOH.

10. Bonding and insurance

In order to be able to seek appointment as an IOH, in addition to the required qualifications detailed above, IOHs must hold a bond which would be available to compensate the insolvent estate for any losses caused by the fraud or dishonesty of the IOH. This takes the form of a general enabling bond, in addition to which a specific surety is also required which relates to the value of the assets of the specific insolvent estate over which the IOH is appointed. The cost of these bonds are borne by the insolvent estate.

It is a requirement of the individual authorising bodies that members should hold professional indemnity insurance (PII) if they wish to accept appointment as IOHs. PII cover is provided by a number of insurance firms, the market is relatively competitive, and IOHs do not self-syndicate their cover. Certain of the larger accounting firms self-insure PII above a substantial amount (circa £100m).

11. Appointment of IOHs

Typically IOHs are chosen because of their experience and reputation, however the following provide further details by insolvency procedure.

- CVAs – IOH may be nominated by the directors, the liquidator (if in liquidation), or the administrator (if in administration). The selection must be ratified by the approval of the proposal by the creditors and shareholders.
- Administration – IOH may be appointed by the company or its directors, or by a qualifying floating charge holder (QFCH) either via court application, or by an out of court process. The QFCH must receive notice of a proposed appointment, and may appoint its own selection of IOH. The company's creditors may appoint an IOH via court only.
- Administrative receivership – IOH appointed by QFCH only
- CVL – nominated by the directors, ratified by the creditors.
- Compulsory liquidation – Official Receiver (OR) appointed by the court, IOH nominated by OR (creditors can ask the OR to appoint a specific IOH).
- IVA – nominated by the debtor, ratified by the approval of the proposal by creditors.
- Bankruptcy – OR appointed by the court, IOH nominated by OR (creditors can ask the OR to appoint a specific IOH).

12. Remuneration

The remuneration of an IOH and indeed the costs of the insolvency procedure are drawn from the proceeds of the assets of the insolvent estate. Authorisation and approval of the IOH's remuneration is dictated by insolvency legislation, which places responsibility for such approval in the hands of the creditors of the insolvent estate.

If a committee of creditors has been established, it will be for them to approve the remuneration of the IOH, in the absence of such a committee it will be the creditors generally, or the court (in certain circumstances).

The basis on which the IOH may fix their remuneration is either as a percentage of the value of the property which the IOH has to deal with, by reference to the time spent in dealing with the case, or as a set amount. Any one of these bases or any combination may be used.

Creditors have rights under UK insolvency legislation to request further information to that provided by the IOH, and to challenge the level of remuneration in court if they believe it is excessive in the circumstances. The IOH also has recourse to the court if they believe the remuneration approved by the creditors is insufficient.

Provision of information to the stakeholders is governed by a Statement of Insolvency Practice (SIP) which sets out matters which must be communicated to the approving parties to enable them to have sufficient information to determine if the work performed justifies the remuneration requested. Revisions made to legislation and to the relevant SIP in 2015 included a requirement to provide an estimate of anticipated remuneration before seeking approval for the basis or bases chosen.

13. Personal liability of IOHs

As stated above, IOHs act in a personal capacity, and are therefore potentially personally liable for their actions in relation to the insolvent estate. UK insolvency legislation provides protection for IOHs who are deemed to act as agent of the insolvent company when acting as administrators, administrative receivers,

and in bankruptcies as trustee of the assets. In addition, the IOH has the right to be indemnified for his reasonable actions out of the assets of the insolvent estate.

Notwithstanding the above, there are a number of circumstances that can lead to exposure of the IOH to personal liability. Where an IOH pursues litigation on behalf of the insolvent estate, they must be careful not to abuse their position, as in cases where unsustainable actions have been pursued against defendants who had no prospect of recovering their own costs from the insolvent estate (on whose behalf the IOH had acted), the courts have ruled that these should be borne by the IOH. In effect this makes IOHs generally cautious when approaching litigation.

In addition, by accepting responsibility for the assets of an insolvent estate, and particularly by continuing to trade, the IOH may assume responsibility and thus liability from legislation which makes the controlling individual of a corporate entity responsible for its actions. Such areas of legislation includes matters such as environmental pollution, employee and third party health and safety, fire prevention, and discrimination by the corporate entity against its employees.

Finally, if the IOH acts negligently, or enters into contracts personally and not as agent of the insolvent estate, they may become personally liable.

14. Release of IOHs from liability

Almost all of UK insolvency procedures provide for the discharge from liability of the IOH once they have left office. In most cases, the discharge is effective on completion of their duties, either by filing their final report or return of their period in office, or at a point the IOH determines. Such discharge is subject to the approval of creditors. IOHs cannot be discharged from liability for acts of their own negligence.

15. Independence

IOHs are subject to an insolvency Code of Ethics which requires them to identify and avoid or mitigate threats to their objectivity or integrity. The Code of Ethics was produced by the Joint Insolvency Committee and has been adopted by all RPBs. Before agreeing to accept any insolvency appointment IOHs must consider whether acceptance would create any threats to the fundamental principle of objectivity via a conflict of interest or by any significant professional or personal relationships.

In considering whether their objectivity or integrity may be threatened, IOHs should identify and evaluate any professional or personal relationship; and if appropriate safeguards cannot be put in place, the appointment should not be accepted.

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