KNOWLEDGE BRIEFING

Company in Distress
- Solutions Explained

OPUS
RESTRUCTURING & INSOLVENCY

Non-statutory solutions

Non-statutory solutions have no formal basis in the legislation which makes them a more flexible and less costly solution to the Company's problems, but because they are not defined in legislation they may not be binding on all parties, and they tend to result in a higher level of risk for the Company and its directors.

1. Do nothing

The Company could continue to trade; however, the directors have a duty to not continue to trade when the Company is insolvent and doing so may leave the directors personally liable for any losses that the Company suffers when they knew or ought to have known that the Company was insolvent.

In addition to any personal liability, if the Company subsequently enters a formal insolvency procedure the directors may be disqualified from acting as a director for up to 15 years if they traded when they knew or ought to have known that the Company was insolvent.

2. Informal agreement

When a Company is experiencing only short-term difficulties and the directors consider that it is only technically insolvent, they may be able to take steps to reach an informal agreement with creditors to postpone or re-structure debts and give the Company time to recover. As with the "do nothing" option above, this could lead to personal liability or disqualification if the Company subsequently enters a formal insolvency procedure, so it is only usually an option when a specific re-financing package or alternative solution has been identified and the outcome is fairly certain.

3. Re-financing

A wide range of re-financing options are available. Many, but not all, will require some form of personal guarantee from the directors and/or the granting of specific security over one or more of the Company's assets.

The availability of a re-financing solution will depend on a variety of factors including the Company's past credit history, the willingness of the directors to guarantee any borrowing, whether the Company has any free assets to offer as security and the amount of secured borrowing it already has.

4. Sale

It may be possible to sell the Company if there is a buyer who is willing to take responsibility for the outstanding liabilities. This is more likely to be an option where the Company has a strong brand identity or some intellectual property that has a value to the purchaser beyond the physical value of its assets. In a recession, however, buyers may be difficult to find, and they may only be willing to pay for parts of the Company (e.g. the brand or intellectual property) without assuming the liabilities.

Statutory solutions

There are a variety of solutions set out in the legislation, primarily the Insolvency Act 1986. These solutions are generally binding on the parties involved and there is a body of case law to assist with resolving any disputes. By entering into a statutory insolvency solution as soon as they become aware that a Company is insolvent, directors are usually protected from personal liability for the Company's losses, although there are still circumstances where their prior conduct could leave them liable financially and/or subject to disqualification proceedings

Administration

An Administration (ADM) is designed to protect a business while plans are formed either to put in place a financial restructuring to rescue the Company, or to sell the business and assets to produce a better result for creditors than a Liquidation.

Once the Administrator is appointed they take over the running of the Company from the directors and is responsible for any decision to continue or discontinue trading and he has control over how the Company and/or its assets are disposed of. The ability to continue trading depends on the availability of funds for working capital.

Company Voluntary Arrangement

A Company Voluntary Arrangement (CVA) is a procedure which enables an insolvent Company to reach an agreement with its creditors to delay or compromise the payment of its debts.

A CVA is flexible and can be adapted to meet the needs of any business. In essence, a CVA will replace the terms of the Company's existing contracts with its creditors with new terms as set out in the CVA proposal. For example, the proposal might require the Company to pay a fixed monthly sum into the arrangement for a set number of years so that creditors receive a minimum dividend of Xp in the £. While the payments are maintained and no further action is necessary, the directors retain control of the Company and once the arrangement is successfully concluded the Company remains in the control of its existing members and management.

Creditors will usually agree to support such a CVA where it can be shown they will achieve a better outcome than if the Company was liquidated and the business and assets sold.

For smaller companies, a moratorium is also available which allows the Company a 'breathing space' in which to propose and implement a CVA without the threat of proceedings from creditors. For larger companies, protection from creditors may be obtained by use of the Administration procedure prior to proposing a CVA.

Creditors' Voluntary Liquidation

Creditors' Voluntary Liquidation (CVL) is the process where the directors of an insolvent company can voluntarily take steps to wind up the Company. The directors call meeting a of the Company's shareholders to consider resolutions to wind up the Company and to appoint a Liquidator, although the creditors may decide to appoint an alternative insolvency practitioner as Liquidator.

Once appointed, the Liquidator takes control of the Company from the directors and although a short period of trading may take place to complete outstanding contracts, it is more common for the Company to cease trading and its assets are sold to repay the costs of the liquidation with any surplus being paid to creditors in priority set out in the legislation.

Compulsory Liquidation

Compulsory Liquidation (WUC) is the process where the court orders that the Company is wound up.

Once appointed, the Liquidator takes control of the Company from the directors and continued trading is highly unlikely as the effect of the winding-up order is to terminate all employment contracts. Thus, on the granting of the winding-up order (if not earlier), the Company ceases trading and the Liquidator sells its assets to repay the costs of the liquidation with any surplus being paid to creditors in priority set out in the legislation.

What are your options?

We always say, the earlier business owners contact us, allows for more options available and time to consider those options.

If you would like to speak to one of our Partners about your business, it's position and options available, please contact your nearest office so that we can connect you with the right Partner.

Full contact details can be found at https://opusllp.com/contact-us or call our Head Office on +44 (0) 20 3326 6454.