



Insolvency Act 2011

An overview

Introduction

The new Insolvency Act 2011 (“the Act”) will prove to be a landmark in Gibraltar. It is an exciting piece of legislation for insolvency practitioners, financial institutions and other key business and commercial players.

This newsletter explores the ways in which the Act modernises and consolidates Gibraltar’s outdated insolvency and bankruptcy laws into a single workable Act that will allow recourse for creditors and debtors that are more in line with 21st century practises.

The Act replaces the Bankruptcy Act 1934 and the sections under the Companies Act 1932 that deal with companies’ liquidations, except members’ voluntary liquidations (“MVLs”) which remain unaffected. Our observations are limited to the most important changes made by the Act. These include:

- Company Voluntary Arrangements (“CVAs”) and Individual Voluntary Arrangements (“IVAs”);
- Administrations;
- Receivers and Administrative Receiverships;
- Liquidations;
- Bankruptcies; and
- Disqualification Orders and Malpractice.

CVAs & IVAs

CVAs and IVAs allow companies or individuals to evade liquidations or bankruptcy by entering into a legally binding compromise between them and their creditors. The agreement describes how the company’s or individual’s liabilities and debts will be repaid and the extent of such repayment.

In the case of companies, the process is generally started by the directors who submit a proposal to the creditors and appoint an insolvency practitioner (“IP”); with IVAs, however, it is the debtors themselves who submit the proposal to the creditors and appoint an IP. In both cases, the IP acts as a supervisor whose role is to report to the creditors and call a meeting which would allow the creditors to vote in favour or against the submitted proposal.

Administrations

The aim of placing a company in administration is to either rescue the company as a going concern or to achieve a better result for the creditors than if a company is wound up.

The process requires either court approval or appointment under a floating charge. Further, during the period the company is in administration, it is managed by an appointed IP that takes the role of administrator.

Receivers & Administrative Receiverships (“ARs”)

A receiver or administrative receiver is appointed either by a court order or under a debenture or other debt instrument where there is a charge over all or the majority of a company’s assets.

Administrators and receivers enjoy the same powers under the Act. There is, however, a crucial difference between the two: the former’s powers are primarily exercised for the benefit of the general body of creditors (i.e. unsecured creditors); the latter works for the benefit of a single debenture-holder (i.e. secured creditor).

The practical consequence being that an administrative receiver would primarily be concerned in realising sufficient assets to cover the secured creditor’s debt and would not, in principle, be too concerned about whether there is a surplus of funds to be distributed amongst unsecured creditors.

Liquidations

Companies in Gibraltar are usually dissolved in one of two ways:

- by the members (i.e. shareholders) of the company (“MVLs”); or
- by the courts.

The difference between the two procedures is that with an MVL a company must be in a solvent state (i.e. that its assets exceed its liabilities) for it to be liquidated.

Conversely, court order appointments take place when a company is illiquid (i.e. the company is unable to pay its debts as they fall due).

Consequently, the role of the liquidator differs in either case.

In an MVL, the liquidator is solely concerned in distributing the available assets between the shareholders.

In court order appointments, the liquidator has to recover and realise (i.e. sell) as many of the company's assets as possible and distribute the proceeds with the general body of creditors (i.e. the unsecured creditors). Compulsory liquidations therefore involve greater complexities.

In addition, court order appointments generally commence when a creditor(s) of a company issues a petition to the Gibraltar's Supreme Court to have the company wound up. Ordinarily, petitions are issued on the premise that a company is unable to settle its debts or that it is unwilling to do so. If a petition is to be issued on this ground, the creditor would firstly need to demonstrate that a statutory demand was served against the company and that the same failed to settle the debt within the statutory period.

Bankruptcies

A creditor can, if it so wishes, disregard the option to enter into an IVA with a debtor and issue a bankruptcy petition. The same grounds have to be satisfied as with corporate entities. The Act allows for an Interim Receiver to be appointed to secure the assets of a debtor and, if the petition is successful, the Court will grant a bankruptcy order against the debtor and a Trustee in Bankruptcy will be appointed.

The role of the Trustee is to realise all of the debtor's assets and to settle the claims received from his or her creditors.

Disqualification Orders and Malpractice

The Act incorporates much awaited changes in malpractice and directors' disqualifications.

Under the Act, a company director may be disqualified from acting as such if:

- They are found guilty of fraud;
- They have an order against them in connection with insolvent or fraudulent trading;
- They have been convicted on indictment of an offence in connection with the activities of the company; or
- The court is convinced that the person is unfit to be a director of the company.

There is a limitation period of 6 years within which a petition can be made and the order lasts for a maximum period of 10 years.

The Act also contains provisions that prevent a director of a company that has gone into insolvent liquidation to be appointed a director or take part in any way in the promotion or business activities of a company that shares a similar or same name as that of the company that has gone into compulsory liquidation.

Disqualification orders cannot be made against corporate directors. This is relevant as it is customary in Gibraltar for company-managers to appoint corporate directors when companies are set up. However it is important to note that such orders may be taken out against any individual other than a director who has been involved in the promotion or business activities of the company.

The penalties imposed may include disqualification, repayment or compensation of the company or fines and imprisonment for a period of up to 5 years.

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