

INDIVIDUAL VOLUNTARY ARRANGEMENTS

Overview

Under English law, there is a procedure which enables a debtor to make a voluntary arrangement with his creditors. An individual voluntary arrangement (usually referred to as an IVA) avoids bankruptcy and the disabilities, obligations and stigma that it can carry. The debtor may maintain control of some of his assets by excluding them from the arrangement, subject to the agreement of his creditors. Provided that 75% in value of creditors agree to the arrangement, it will bind all creditors. If the IVA is not approved by 75% in value of creditors, it is likely that the debtor may be made bankrupt.

Under an IVA, the inducement for creditors is that they believe that they are likely to have more money repaid than under a bankruptcy. The IVA must be a better deal for the creditors than bankruptcy or they will not support it. The duration of an IVA is likely to be for more than one year, particularly in relation to income contributions. The administrative costs of running an IVA are less than those for a bankruptcy.

An insolvency practitioner (IP) will generally be involved in an IVA. The IP may act as an adviser, nominee or supervisor. The IP should ensure a fair balance between the interests of the debtor, creditors and any other parties involved. The nominee and supervisor need not be a licensed insolvency practitioner. It is sufficient that they are a member of one of the recognised professional bodies who may act in relation to IVAs.

A debtor will often formulate an IVA proposal in consultation with an IP. A nominee, who will usually be an insolvency practitioner will be required. The debtor will generally have to pay the nominee's costs and fees.

The IVA offer should be reasonable to creditors. If assets are to be excluded, some other counterveiling compensation should be given to creditors. Third party funding (e.g. from a relative) may be available. The debtor should produce a statement of

affairs and liabilities. Under the proposal, the debtor may propose to continue in business. A business plan may be required to justify the proposal.

Full and accurate disclosure must be made. A debtor commits an offence, if he makes any false representation for the purpose of obtaining approval for an IVA. Any agreement between the debtor and any creditor not disclosed in the arrangement is unenforceable. It is essential that the debtor acts with full candor and honesty.

The IVA proposal is a contractual agreement between the parties. They are therefore free to make whatever provision they see fit subject to general law and the IVA legislation. The insolvency rules make provision for the contents for an IVA and certain standard terms and conditions for inclusion.

Application for Enforcement Moratorium

It is possible to obtain Court assistance to prevent creditors taking action while the IVA proposal is being considered. The debtor may make an application for an "interim order" from Court before the nominee reports as to whether a creditors' meeting should be called to consider the proposal.

The interim order provides for a moratorium on enforcement. The Court makes the interim order for the purpose of facilitating, considering and implementation of the debtor's proposal. Persons given notice of the hearing, may make representations at it. The Court will not make an order if the proposal is not viable. It will not make an order if it is simply a means to postpone an inevitable bankruptcy order.

The Court has a discretion in reaching its decision. The proposal must have a real prospect of being implemented in the manner proposed. The Court should look to see if the IVA offers a reasonable prospect of a better recovery for creditors than would be achieved from bankruptcy.

The decision on the merits or otherwise of a proposal, is not a one for the Courts. The creditors must be left to decide. Where it becomes evident that there is no prospect that the support of the majority of creditors can be achieved, no creditors' meeting will be called.

The effect of an interim order is to put a moratorium in place on legal action against the debtor for 14 days beginning with the day after the Order is made. This prevents any bankruptcy petition or other legal proceedings. A Landlord may not forfeit a lease without leave of Court. No other proceedings, execution or legal process may be commenced or continued without the leave of Court. A secured creditor may enforce its security.

Nominee's Report

Before the interim order expires, the nominee must submit a report to the Court. The report must state whether in the nominee's opinion, the proposal has a reasonable chance of being approved. If the Court views the proposal as positive, it will order a creditors meeting to be summoned.

In order for the nominee to prepare a report, the debtor must submit a copy of the draft proposals. The nominee must state in his opinion, as to whether the proposal has a reasonable prospect of being approved and implemented and whether a creditor's meeting out to be summonsed.

Unless the Court directs otherwise, the nominee will call a creditor's meeting following a positive report and will stipulate the time, date and place. All creditors of which the nominee is aware must be notified of the meeting.

It is possible for a debtor to propose an IVA without applying for an interim order. An IVA may be applied for by a bankrupt or a person entitled to petition for his bankruptcy.

IVA Meeting

At the creditors' meeting, votes are calculated according to the amount of the debt, as at the date of the interim order. In the case of an undischarged bankrupt seeking an IVA, debts are calculated according to the amount of the debt at the date of bankruptcy order. In the case of a debt where the amount cannot be ascertained,

the creditor may vote in respect of the debt. Such a debt shall be valued at £1.00, unless the Chairman agrees to put a higher value on it.

The Chairman will usually be the nominee. If the chairman is in doubt whether a claim should be admitted, he should mark it as "objected to" and allow the votes to be cast in respect of it. Votes may subsequently be declared invalid, if the Court sustains an appeal.

Modifications to the proposal may be consented to by the debtor at the meeting. This cannot affect the right of the secured creditors, unless the secured creditor concerned consents.

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The creditors of the debtor can appeal the Court against decisions of the Chair in relation to entitlement to vote, leaving out of all or part of claim and identifying a person as an associate. The application to Court must be made within 28 days of the Chair's report.

More than three quarters in value of creditors present, in person or by proxy, is needed to approve the IVA. Only unsecured creditors can vote. A secured creditor may only vote in respect of a part of his debt which is unsecured. The resolution is invalid if those voting against it include more than half in value of the creditors with notice of the meeting who are entitled to vote and who are not "associates" of the debtor.

When a creditors' meeting approves the IVA, it binds every person who was entitled to vote at the meeting or would have been entitled if he or she had notice of it, as if he was party to the arrangement.

Application to Court to Object

It is possible for objecting parties to apply to Court on the basis that the IVA is unfairly prejudicial of their interests or there has been some material irregularity. Persons that may apply to Court include any person entitled to vote at the creditors' meeting, whether or not they received notice.

If the Court is satisfied that the IVA is unfairly prejudicial to the creditors' interests or there was some material irregularity, it may revoke or suspend the arrangement or direct a further meeting to be called to reconsider the proposal or to consider a revised proposal. A creditor who is aggrieved at the approval of an IVA, has the right to petition for the bankruptcy of the debtor. The grounds for petition are as follows:

- that the debtor has failed to comply with his obligations under the IVA;
- that false or misleading information was given or material information was omitted;
- that the debtor has failed to do anything which may reasonably have been required by the IVA supervisor.

The time limit for application is 28 days. It is necessary that the prejudice arise from the unfairness of the proposal (e.g. treating different types of creditor differently). It must affect the creditor in some way. A material irregularity on the other hand, involves a procedural matter. The Court may take a practical approach and only intervene where the irregularity affected the outcome of the meeting. The Court can make such order as it thinks fit including ordering another meeting.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.