

37. English Voluntary Arrangements (IVAs)

Overview

Under English law, there is a procedure which enables a debtor to make a proposal for a voluntary arrangement with his creditors as an alternative to bankruptcy. An individual voluntary arrangement (usually referred to as an IVA) avoids bankruptcy and the disabilities, obligations and stigma that it can carry. The debtor can maintain control of his assets and can exclude assets from the arrangements subject to the agreement of his creditors. Provided that 75% in value of creditors agree the agreement will back all creditors. The cost should be lower than bankruptcy.

Under an IVA, the inducement for creditors is that they are more likely to have more money repaid than under a bankruptcy. The administrative costs of running an IVA are less than those for a bankruptcy.

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 must be a better deal for the creditors than bankruptcy or otherwise they will not support it. If the IVA is not approved by 75% in value of creditors, it is likely the

debtor may be made bankrupt. The IVA is likely to be for a period of years, particularly in relation to income contributions.

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. The offer should be reasonable to creditors. If assets are to be excluded, some other countervailing 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.

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. Full and accurate disclosure must be made.

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 legislation. The insolvency rules set out the contents for an IVA and standard terms and conditions for inclusion.

Application for Enforcement Moratorium

It is possible to obtain Court assistance to prevent the 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 nominee reports on the proposal to the Court and if the Court views the proposal as positive, it will order a creditors meeting to be summoned.

The application for an interim order is made to Court. The application to Court provides for a moratorium on enforcement. The Court may make an 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 proposed is not viable. It will not make an order if it is felt that 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 prescribed. 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 there is no prospect that the majority of creditors can be achieved, no creditors meeting should be called.

The effect of an interim order is to put a moratorium in place against 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.

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.

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, debts are calculated according to the amount of the debt at the date of bankruptcy order.

In the case of amount that 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 ~~obj~~ected to+ and allow the votes to be cast in respect of it. Votes may subsequently be declared invalid, if the Court sustains an appeal.

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 are the debtor or 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.

IVA Proposal

A comprehensive and correctly drawn proposal is fundamental. The proposals should explain their desirability and the reasons why creditors might be expected to concur. This might include details of the background and extract from trading accounts.

There must be a statement of affairs which must include details of all assets and liabilities, personal and business. It must include all assets, national and international, as well as contingent and prospective assets together with the likelihood of realisation. Ideally, professional valuations should be available. The nominee should ensure that values are prudent. The costs of realisation must be included. Details of which assets are subject to mortgages,

liens, reservation of title and hire purchase must be set out.

If it is proposed to exclude assets, these must be set out. These may be the assets automatically excluded from bankruptcy, such as tools of trade, domestic equipment. If assets are proposed to be excluded, it should be explained how creditors are to be compensated e.g. by a third party contribution or by a buy out of a debtor's share by a spouse. If assets are excluded because the realisation is too expensive or difficult, the proposal should say so.

If a third party is making a contribution, a letter of confirmation should be available. The nominee must ensure the third party has an opportunity to take advice.

The nature of debtor's liabilities must set out. The nominee should ideally contact each creditor with a view to obtaining particulars of the liability. A liability could be excluded, but the proposal must say how this is to be dealt with. Claims and potential claims must be set out.

The treatment of preferential and secured creditors must be set out. The rights of secured and preferred creditors may not be affected or excluded without their consent.

The duration of the arrangement must be stated. For example, the period may be for two or three years where a proposal is for rapid sale and distribution. It may be longer if there is litigation, a depressed market or if proposals are based on paying out of income from business revenue. Provision can be made for an extension of the period.

The debtor must propose the intended nominee. The nominee must consider whether or not to act. It is likely, in practice, that the nominee will have assisted in the drafting of the proposal in which event, consent is a formality.

Proposals for interim and final distributions to the creditors must be stated. Provision for remuneration of the nominee and his expenses must be made. The expenses should be quantified and described. The manner in which the supervisor is to be remunerated and expenses paid must also be set out.

The manner in which funds are to be held and banked must be dealt with. Funds should be paid to the supervisor and not the debtor. The supervisor should be empowered to open accounts and invest.

The manner in which the debtor's business is to be conducted must be provided. There may be provision for supervision by an IP e.g. obligation to provide information

and maintain accounts, records and arrangements.

It may be necessary to attach previous trading accounts, forecasts, cash flow statements and projections. If there are problems in relation to retention of suppliers and staff, these should be explained. If further credit facilities are proposed, particulars should be set out as to how they are to be paid. These may be necessary, for example, to complete work in progress.

The details of the supervisor must be set out. The supervisor should be given power to call meetings.

The proposal should set out what would happen in the event of a default. This may include presentation of a bankruptcy petition by the supervisor.

The proposal should give a comparison between the estimated outcome of the arrangement and bankruptcy, including comparative costs. It should make proposals in respect of after acquired assets. The proposal should state whether a committee of creditors is to be appointed and what its duties will be.

The proposal should contain confirmation that once the IVA is successfully completed, the creditors will no longer be entitled to pursue the debtor for the

balance of their claim and that the rights for the creditor under the IVA is in full and final settlement. It should set out the requisite majorities required to pass the resolutions. There should be a provision for creditors who have not made claims.

Supervisor's Duties

The supervisor's duty in relation to an IVA, is to ensure that that arrangement proceeds in accordance with the agreed proposal. The supervisor has a duty by law to keep all those interested in the arrangement informed of its progress. Where the supervisor carries on business, realises assets or administers or disposes of funds, he must prepare a note of receipts and payments at least every 12 months together with comments. This must be sent to the Court, the debtor and all creditors bound by the IVA.

The supervisor obtains his powers from the arrangement itself. It sets out his responsibilities. The arrangement should ensure that the supervisor has sufficient powers to undertake his role. If a supervisor or debtor consider that the terms of the arrangement cannot be achieved, he should take steps to discuss the situation with the interested parties.

A proposal could itself provide for post acceptance amendments and variations. There may be a provision for creditors'

meetings and voting on variations. Where no provision is made for an amendment it is debatable as to whether the proposal can be modified. It is likely the Court will direct a creditors meeting to be held, in these circumstances.

Default

The terms of the arrangement will set out what constitutes a default or failure of the arrangement and what should happen in these circumstances. It is usual for a bankruptcy petition to be issued.

There are three grounds for presenting a bankruptcy petition namely:-

- ❖ failure to comply with the voluntary obligation;
- ❖ giving false misleading information or making a material omission;
- ❖ failing to comply with supervisor's reasonable requests.

The voluntary arrangement assets will continue to be held for the benefit of the arrangement creditors. The arrangement creditors can prove in bankruptcy for so much of the debt which remains due after payment has been made out of the assets in the IVA.

The trustee in bankruptcy or official receiver may take possession of non arrangement assets on behalf of creditors.

The arrangement creditors can prove in bankruptcy for so much of the debt as remains after payment of what has been recovered from the IVA assets.

Upon completion of the arrangement, the supervisor must send all creditors notice of completion and must report to summarise all receipts and payments. There is a special fast track IVA for undischarged bankrupts.

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