A creditor's guide to creditors' voluntary liquidation ('CVL')

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A licensed insolvency practitioner ('IP') has given you this because you, or your business, may be owed money by a company in respect of which a CVL process is imminent or where the company is in a CVL.

This guide aims to help you understand your rights as a creditor and to describe how best these rights can be exercised. It is intended to relate only to England and Wales. It is not an exhaustive statement of the relevant law or a substitute for specific professional or legal advice.

We have made every effort to ensure the guide is accurate, but R3 cannot accept responsibility for the consequences of any action you take in reliance on its contents. If, having read the guide, you remain in any doubt about your rights, you should consult a licensed IP or solicitor.

We hope that you will read this guide carefully and consider whether taking an active role as a creditor in this case would benefit you or your business.

What is a CVL?

This occurs where the members (registered shareholders of the company), usually at the request of the director(s), decide to place a company into liquidation because it is insolvent. Either the company cannot pay its debts as they fall due or it has more liabilities than assets.

The purpose of the liquidation is to appoint a responsible person who has a duty to collect and realise the company assets and distribute them to its creditors in accordance with the law and to investigate the affairs of the company and its directors. That person is the liquidator, who must be a licenced IP.

When is a company placed into CVL?

The most common circumstances are where the directors recognise that the company is insolvent (there is a separate procedure for winding up a solvent company), cannot continue to trade outside of an insolvency process and there is no appropriate rescue procedure available; or, where following another insolvency process (for example an administration or administrative receivership), there are funds available for distribution to unsecured creditors.

What involvement do creditors have in putting a company into CVL?

As mentioned above, the directors take the initial steps to place the company into liquidation by deciding to convene a meeting of the company's members at which the shareholders will consider a special resolution that the company be wound up voluntarily and nominate an IP (or in some cases more than one) to act as liquidator(s). Should this resolution be passed[1] (which requires a majority of at least 75% in value), the directors will deliver a notice to the company's creditors seeking their decision on the nominated liquidator. The company's creditors can ratify the members' appointment or propose the appointment of a different liquidator(s). Such decision should be made by either:

- A virtual meeting of creditors (although creditors have the right to request a physical meeting if certain conditions are met); or

[1] It is at this point the company is formally in liquidation.

- By the deemed consent of creditors - (In this instance, a document will be provided stating that *name of IP* will be appointed liquidator. If there is no objection to that appointment within 14 days, it will be deemed that the creditors have consented. Deemed consent can only be used for the appointment of a liquidator, with a separate process required to agree the liquidator's remuneration/fees).

The notice to creditors will include the date of the resolution to wind up the company (place it into CVL) and the identification details of any nominated liquidator. It will provide details of the process (noted above) for decisions to be taken.

The directors will produce a statement of affairs which summarises the assets and liabilities of the company including details of the creditors. It also provides estimated realisable values of the assets, with an estimated deficiency to creditors. This will be provided to creditors either with the notice or no later than the business day before the decision date. In addition, the insolvency practitioner assisting the directors will prepare a report which will include a brief trading history, extracts from the company's accounts and a deficiency account (which details the financial movements between the date of the last accounts and the date of liquidation). This information should ordinarily be available to creditors not later than the business day before the decision date and may be made available via a website of the IP's choosing.

What are the powers and duties of the liquidator?

The powers and duties of the liquidator are set out in law by the Insolvency Act 1986 and the Insolvency (England and Wales) Rules 2016. Such powers are wide and include powers to sell the company assets, to bring and defend legal proceedings and to pay dividends to the company's creditors. In addition, the liquidator must investigate the affairs of the company and the actions of its directors. Liquidators have a general duty to act in good faith, and to exercise their powers with reasonable care and skill, and for proper purposes in the interests of creditors and members. They must act impartially and independently.

Can the unsecured creditors form a liquidation committee?

Yes, a liquidation committee may be appointed using one of the decision procedures and must consist of at least three, but not more than five, creditors.

The liquidation committee receives reports from the liquidator and may meet periodically. Broadly, the committee's function is to be consulted and to give guidance to the liquidator (where the liquidator seeks the committee's assistance), as well as to approve the liquidator's remuneration and expenses. The first meeting of the committee must be called by the liquidator within six weeks of its establishment and subsequent meetings will be held as agreed, requested or needed.

The liquidator must report to the committee on the progress of the liquidation at least every six months unless the committee directs otherwise.

If no creditors' committee has been previously formed, the liquidator must invite creditors to form a committee when any decision of the creditors is sought.

Creditor committee members are not paid but may have their expenses reimbursed.

R3 has produced a separate guide explaining insolvency creditors' committees, which is available here or from the person who provided you with this guide.

Does the liquidator pay unsecured creditors the amount owed to them?

There is an order of priority set out in law for paying creditors - any payment is dependent upon what funds, if any, have been realised from the company's assets. In simple terms, secured and preferential creditors are paid before unsecured creditors. Secured creditors are those that have some form of security over the company's property, for instance a bank with a fixed and floating charge debenture. Secured creditors with a fixed charge are entitled to be repaid their debt out of the proceeds of sale of the specifically secured asset in priority to ordinary unsecured creditors. Whilst security under a, a floating charge (a charge over assets which change in the course of business, for example stock) will similarly entitle the security holder to payment in priority, this is subject to the deduction of a priority fund set aside for unsecured creditors. The liquidator must ring fence a proportion of the net floating charge realisations for payment to unsecured creditors (up to certain financial limits) - which is known as "the prescribed part".

Preferential creditors are a special category of unsecured creditor. Preferential creditors consist of:

- certain debts due to employees and the Redundancy Payments Service

and

- in insolvency procedures commencing after 1 December 2020, there is a secondary class of preferential creditor for specified HMRC debts. In addition to VAT, these are debts that relate to the following taxes (where the business is required to deduct taxes from payments they make to another person and pay those deductions to HMRC and the payment to HMRC is credited against the liabilities of the other person):

-Pay As You Earn (PAYE) Income Tax

-Employee National Insurance contributions (NICs)

-Students loan repayments

-Construction Industry Scheme deductions

Preferential creditors are paid in priority to all other unsecured creditors.[2]

If sufficient funds are available to pay a dividend to unsecured creditors, the liquidator will adjudicate all claims prior to declaring a dividend. Typically, the dividend will be a percentage (pence in the pound) of each creditor's total claim, according to the total cash available for distribution. Funds are distributed equally across all agreed unsecured claims.

2 It should be noted that in the case of UK Banks and Building Societies, certain deposits owed to depositors that are not otherwise protected by the Financial Services Compensation Scheme are afforded preferential status too. The appointed Liquidator will make this known if this applies.

In summary, the monies realised from the realisation of assets are used in the following order of priority:

1. Secured creditors holding a fixed charge.
2. Costs of the liquidation, including the liquidator's fees and expenses.
3. Debts to preferential creditors.
4. A prescribed part fund for unsecured creditors, where applicable.
5. Amounts owed to floating charge holders.
6. All other unsecured creditors whose claims rank pari passu (equally).
7. Interest payable on debts, where creditors have been paid in full.

Six months after writing off the debt in your account you may claim bad debt relief from HM Revenue and Customs for VAT you have paid in respect of that written-off debt.

What if I have a 'retention of title claim'?

If you believe that you own something in the company's possession, you should contact the liquidator as soon as possible with full proof of ownership and be prepared to identify what you are claiming. The liquidator will examine your claim carefully before deciding whether to release the goods in question, pay you for them, or otherwise.

How do I make a claim in the liquidation?

The liquidator will write to all known creditors asking them to submit claims. You must submit your claim to the liquidator in writing, providing sufficient supporting evidence of your claim for example copy statements, invoices, correspondence etc to allow the liquidator to decide whether your claim is valid. Any costs incurred in submitting your claim will not be reimbursed. Your claim does not need to be on a specific form, although you may find it easier to use the form provided by the liquidator.

If you have a debt of £1,000 or less this is regarded as a small debt and provided the liquidator has clear and undisputed evidence of the small debt from the statement of affairs or accounting records, the debt may be deemed proved, meaning that you do not need to submit a formal claim in the liquidation. However, the small debt provision is subject to the liquidator's discretion.

You may only claim interest on your outstanding debt up to the date of liquidation if:

- it bore interest,
- it was payable at a previous date under a written instrument, or
- you had previously demanded it in writing with notice that you would claim interest.

You will not get interest on your claim accruing after liquidation unless all creditors are paid in full.

How will the liquidator adjudicate my claim?

The liquidator will compare your claim to the company's records and any other information available and may discuss the claim with the director(s). The liquidator may ask you for additional information or evidence if they are unable to agree the quantum of the claim submitted. Where the claim cannot be adequately substantiated, the liquidator may agree your claim in part, or reject your claim if he/she does not think it is valid.

What can I do if I believe the liquidator has unfairly rejected all or part of my claim?

Contact the liquidator in the first instance to discuss any amounts under dispute. If you cannot reach agreement, you can appeal to the court, within 21 days of receiving the liquidator's statement of reasons for the rejection. After 21 days, if you do not apply to court, the adjudication is final.

Does the appointment of liquidator prevent a creditor taking legal action against the company?

No, not automatically. Whilst creditors may still pursue actions against the company, creditors are not entitled to enforce recovery and the Court may order (on the liquidator's application or otherwise) that any particular proceedings may be stayed under its general discretionary power. The continued pursuit of an action might lead only to more unsecured claims in the liquidation, alongside increased costs of the process.

It is only in certain specific instances (for example if the company has insurance cover in place that may be used to pay your claim or you claim ownership of specific assets) that it may be appropriate to commence legal action against the company. You should always take legal advice before commencing any action against a company in liquidation.

Is the liquidator bound by contracts entered into by the company prior to his/her appointment?

No. The liquidator may refuse to perform or formally disclaim any onerous or unprofitable contract entered into by the company prior to liquidation. The other party may then have a claim for breach of contract which would rank as an unsecured claim. However, a contracting party that has acquired a beneficial interest in property of the company may still be able to enforce it.

Is the liquidator liable for sums due under contracts entered into by the company subsequent to his/her appointment?

The liquidator can cause the company to enter into new contracts and absent any agreement to the contrary any associated liabilities arising would rank as an expense of the liquidation. These would be payable from the estate in priority to other costs and creditor claims.

As an unsecured creditor, what information am I entitled to?

Within two months after the end of the first year and of each succeeding year the liquidator will send to creditors a progress report. This will include a receipts and payments account for the period and a report setting out the liquidator's conduct of the liquidation.

A further report is provided upon the completion of the liquidation, as noted below.

How is the liquidator's fee determined?

The creditors' committee (if there is one) or the general body of creditors agree the liquidator's fee, failing which it will be determined in accordance with the statutory scale or fixed by the court. The fee can be fixed:

- As a percentage of the assets realised or distributed (or both); or
- By reference to the time properly spent by the liquidator and their staff taking into account the complexity of the case; any exceptional responsibility borne by the liquidator; the effectiveness with which the liquidator carries out their duties; and the value and nature of the company's assets; or
- As a set amount.

A combination of the above may also be appropriate.

R3 has produced a separate guide explaining insolvency officeholders' remuneration, which is available here or from the person who gave you this guide.

When is liquidation complete?

The liquidation is complete when all the assets have been realised, and where there are funds available to creditors, their claims have been adjudicated and net realisations (after expenses of the liquidation) have been distributed to them.

The liquidator has statutory formalities to address including providing creditors with the final account of the winding up.

What should I do if I am dissatisfied with the liquidator's handling of the case?

You should first contact the liquidator to try to resolve the problem. If you are still not satisfied, you can submit a complaint to the IP's regulator via the Insolvency Service complaints portal, or discuss the issue you are concerned about with your legal adviser.

R3 is the UK's leading trade association for licensed insolvency practitioners and business recovery professionals.

R3 does not license or discipline its members; this is the responsibility of the practitioner's regulatory body. The regulatory bodies are:

The Institute of Chartered Accountants in England and Wales
Tel: 01908 248100 www.icaew.com

The Insolvency Practitioners Association
Tel: 0330 122 5237 www.ipa.uk.com

The Institute of Chartered Accountants of Scotland
Tel: 0131 347 0100 www.icas.com

Disclaimer
Information in this guide is intended to provide an overview only and relates to Company Voluntary Arrangements in England and Wales. It is not a replacement for seeking advice specific to your circumstances.