

❖ COMMENCING LIQUIDATION

❖ Sir Alastair Norris

Purpose

Purpose of Session

- Key features
- Key policies
- Key Judicial Approaches

Purpose of Liquidation

- Preservation
- Determination
- Realisation
- Distribution

Broad Categories of Insolvent Liquidations

- Voluntary (shareholders)
 - By resolution
 - Court oversight
- Compulsory (creditors)
 - By petition
 - Court order
 - Oversight after order

Petition

- **Presentation**
 - Form
 - Consequences
 - Court application

- **Service on Company**

- **Advertisement to creditors**
 - Consequences

Petition: Decision

- **Judicial Practice on key issue**
Is there a real issue about standing as creditor
- **Judicial practice on timescale**

Petition: Case Management

- **Evidence**
 - Form
 - Cashflow insolvency
 - Balance sheet insolvency

- **Listing**

- **Hearing**

Abuse by Creditor

- **Pressure to pay**
- **Injunction to restrain presentation**
- **Injunction to restrain advertisement**
- **Ex parte and inter partes hearings**
- **Costs on dismissal**
 - Basis of assessment
 - Payment

Abuse by the Debtor

- “Raising a cloud of dust”
- Challenging Amount
- Insubstantial cross-claims

Changing to reorganisation

- Application for administration
- What typically happens
- Dismissal of the petition
- Treatment of petitioner's costs

Commencing liquidation proceedings in Poland



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What is the purpose of liquidation proceeding?

It should strive to satisfy creditors as much as possible, while preserving, but only if it is reasonably justified, the debtor's business.

Who commences?

- *debtor*
- *creditor*

What are the timescales?

Every entrepreneur, including those running a sole proprietorship, is obliged to file for bankruptcy if he or she becomes insolvent.

- The debtor has 30 days to do so from the date of insolvency.
- The consequence of failure to file for insolvency is the obligation to pay compensation.
- The court has two months to make a decision.

Commencement of the liquidation proceeding

If the assessment to be made is complex there is a potential for:

- delay between application and commencement of the liquidation proceeding,
- further debts to be incurred in that period, as the debtor continues to trade.

Before the court makes a decision to start liquidation proceeding or refuse it, the court appoints a temporary court supervisor (TCS) who will manage the debtor's assets and preserve it.

The primary purpose is to secure the debtor's assets.

After establishing TCS, the debtor may only perform ordinary management activities, other activities require the consent of the TCS.

During this time, the court conducts analysis of the liquidation application.

The court may oblige the TCS to submit a report including the debtor's financial condition, the type and value of his assets, and expected costs of the proceeding.



Grounds for initiating liquidation

Presumption of insolvency

- if entrepreneur fails to fulfill its due obligations and this condition has lasted for more than three months the court may presume that he is insolvent,
- if his financial liabilities exceed the value of the assets and this situation persists for a period exceeding twenty-four months the court may presume that he is insolvent.

There are two conditions that constitute the state of insolvency:

- the so-called general cessation of payments tests,
- the so-called balance sheet test.

Despite the existence of a balance sheet condition, the court may dismiss the application for declaring bankruptcy if there is no risk of the debtor losing the ability to perform its due monetary obligations in a short period of time.

To declare bankruptcy, it is necessary to establish that the debtor has more than one creditor.

Recommendations

The insolvency law should specify that insolvency proceedings can be commenced on the application of a debtor if the debtor can show either that:

- (a) It is or will be generally unable to pay its debts as they mature; or
- (b) Its liabilities exceed the value of its assets.



What is the potential for abuse?

- by a debtor that is not in financial difficulty in order to take advantage of the protections provided by the insolvency law,
- by creditors who are competitors of the debtor, where the purpose of the application is to take advantage of insolvency proceedings to disrupt the debtor's business,
- by creditors who uses insolvency as an inappropriate substitute for debt enforcement procedures.

The court dismissed the application for declaration of bankruptcy if:

the debtor proves that the receivable is entirely disputable

the assets of the insolvent debtor are not sufficient to cover the costs of the proceedings

Creditor who has filed a bankruptcy petition in bad faith will be charged with the costs of the proceedings, and may also be obliged to submit a public statement of appropriate content and form.

Additionally, the debtor or a third party may pursue a claim for damages from the creditor.

Costs of the proceeding

If the creditor withdraws the application for declaration of bankruptcy after the debtor has fulfilled the obligations, the debtor will be charged with costs.

Costs of the proceeding shall be charged to the debtor if the application is rejected, the debtor is also obliged to reimburse the costs incurred by the creditor.

Recommendations

The court may deny the application to commence and, where appropriate, impose costs or sanctions against the applicant, if it determines that:

- (a) *It does not have jurisdiction or the debtor is ineligible or does not meet the commencement standard; or*
- (b) *The application is an improper use of the law.*

The insolvency law should permit the court to dismiss proceedings if, after commencement, the court determines, for example, that the proceedings constitute an improper use of the insolvency law.



LIQUIDATION PROCEEDINGS

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LIQUIDATION MAIN ISSUES

- Liquidation proceedings are the less preferred way to cover liabilities, as they are not the way to reorganize a company
- PRIMARY GOAL: get assets liquidated as quickly as possible, in a cheap way, and distribute the proceeds among the creditors according to their status (secured or unsecured claims by law)
- Law priorities:
 - Sell the enterprise as a going concern, to preserve employment
 - If not possible, sell as a business unit, or auctioned in lots or individually
 - Pay employees as quickly as possible
- Key players:
 - The judge, serves as the director of the process in a very active role
 - The trustee, who carry on disempowerment measures of the assets, and manages them until realisation and distribution
 - The appointed liquidator

COMMENCEMENT LIQUIDATION PROCEEDINGS

Application can be filed:

- **Voluntary:** by the debtor
- **Compulsory:**
 - By creditors
 - Declared ex officio by the judge due to the failure of a reorganization process –indirect bankruptcy.
- If appointed by a creditor, the debtor may apply for **conversion** from bankruptcy to a reorganization proceeding, by filling the formal requirements
- **Preventive proceedings aiming to reorganization can only be requested voluntarily by the debtor, but not by creditors**

Liquidation proceeding

- **Petition**
- **Basic criteria:**
 - **Objective:** demonstrate the existence of the state of cessation of payments –requires insolvency standard, defined by law.
 - **Subjective:** the debtor must be eligible to be subject to insolvency proceedings according to the law. There are almost no exclusions, except some special cases like banks, insurance companies.
- **Debtor:** The judge orders the immediate opening of the proceeding, even if the commencement criteria are not met, under the debtor's confession to be insolvent.
- **Creditor: Must prove:**
 - The creditor holds a due debt.
 - That the debtor is in a state of payment cessation, by presenting one or more 'revealing facts'.

Creditor application process

After commencement:

- Notice to the debtor. The debtor must prove he is ‘in bonis’
- There’s no ‘pre-bankruptcy trial’
- The judge must decide if the commencement standards have been proved, then the judge initiates the liquidation or denies the request.
- Subject to Appeal

Debtor application process

- Although the commencement standards are the same, if the application of commencement of liquidation is filed by the debtor, the debtor only needs to confess its state of cessation of payment, and that should be enough to commence the insolvency proceedings after the court determine its jurisdiction.
- The debtor may file for conversion until 10 days after commencement. If not, liquidation proceeds.

Potential for Abuse

By creditor:

- If it is used towards obtaining payments by coercing the debtor. Law provides that insolvency proceedings are a last resort, when individual claims are ineffective due to the debtor's inability to pay debts as they fall due.
- Insolvency proceedings are not published to avoid credit damage
- The creditor may assume the costs of dismissal, and also inappropriate use may give rise to a claim for damages.

By debtor:

- We may notice some denials relating to applications after acquiring numerous debts with the sole effect of obtaining discharge