

Global Economic Downturn fact sheet

Insolvency – Receivership

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As part of the Institute's ongoing efforts to provide members with guidance and information on key issues affecting the current business environment, the Institute have developed a practical factsheet series, which presents guidance for members written by members.

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Receivership

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Receivership

Appointment of a receiver

Receivership involves the appointment of a person to take over the assets of a company with a view to achieving a particular purpose. Usually this is to obtain a return for an unpaid secured creditor.

An appointment may be made by a court or more commonly under what is termed 'private appointment' where it is done by a secured lender as a result of a prior agreement with the company. This private appointment is governed partly by the Corporations Act and partly by the agreement between the company and the lender.

The receiver may only be appointed privately when the agreement allows for the appointment. The lending agreement will usually specify certain events which if they happen allow the secured creditor to appoint a receiver to the company. If there is a right to appoint in the lending agreement, it is implied that some events automatically trigger appointment. These events include where a liquidator or another receiver is appointed to the company. The rights given to the lender may be under either:

- > A fixed charge where the borrower cannot sell assets the subject of security
- > A floating charge where the borrower can deal with the assets subject of the charge until the default occurs (crystallisation).

Differences to liquidation

Unlike liquidation, the appointment of a receiver is essentially governed by the rights given in the lending documents, not by the Corporations Act. Receivership will operate independently of any liquidation that may be in place. A receiver may be appointed and then a liquidator is appointed or a liquidator may be appointed first and then a secured creditor may appoint a receiver.

The impact of liquidation on receivership is that if a liquidator is appointed after a receiver is in place, the receiver stops being agent of the company (the liquidator is) unless the liquidator allows the receiver to continue as such. If a liquidator is appointed first, the receiver is never the agent of the company. If a company is already in voluntary administration then there are restrictions on appointing a receiver until the administration ends. There can be conflict between a receiver who acts primarily for the secured creditor and the liquidator who acts in the interest of all creditors.

Role of the receiver

A person may only be appointed as receiver if they are a registered liquidator. A receiver may also be disqualified from acting in respect of a particular company if he or she is connected to the company or the secured creditor in some way.

The receiver may only deal with those assets over which the security is granted in the lending documents. The important aspect of the appointment of a receiver by the secured lender is that the receiver will usually be agent of the company when he or she acts to deal with the assets. This results in the company having

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primary liability for the receiver's actions. To cover this, the Corporations Act makes a receiver personally liable for debts incurred during the course of the receivership. There are special rules about leases entered into by the company before the receiver was appointed.

Powers of a receiver

The receiver's powers are governed by both the lending agreement between the parties as well as the Corporations Act. The powers in the Corporations Act are extensive and will automatically apply unless they are specifically contradicted by the lending agreement.

The receiver's aim is to obtain funds to repay the secured creditor's debt. To this end, the receiver may deal with the assets that are the subject of the charge. The charge will often be over all of the business and its assets, which means that the receiver will be able to run the business with a view to either, generating the income, or selling it as a going concern.

The receiver has control of the assets but the company remains as a separate entity and the receivership does not affect the company as a separate structure. This means that:

- > The directors remain in place and may continue to operate any assets that are not subject to the control of the receiver
- > Directors also retain their obligations under the Corporations Act
- > Other creditors are not affected as such by the receivership (for example, they may still apply to court for winding up) but of course there may be few assets left to take action against
- > The receiver is entitled to seek information from directors and the receiver must report to ASIC if any breaches of the Corporations Act are found.

The receiver is entitled to deal with the assets in a way that is in the interest of the secured creditor but must, when selling assets, take all reasonable steps to get market price or the best price in the circumstances. When selling land, the receiver may also be subject to requirements under certain state legislation as regards the manner of the sale. When the receiver is applying funds, he or she must take account of certain priorities if the assets being dealt with are subject to a floating charge. The priority payments essentially relate to the employee entitlements, which must be paid before funds go back to the secured creditor. Once the funds are repaid to a secured creditor, the receiver resigns with the company structure remaining in place.

For more information, guidance and tools on the global economic downturn refer to charteredaccountants.com.au/news_issues/global_economic_downturn

About the author

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