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Responding to supplier administrations: HEIs

This note provides a general overview of administration and the options that are open to you as HEIs, including engaging in the creditor processes.

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Given the impact of the COVID-19 pandemic, the financial pressure that many companies are currently under may prove insurmountable. The financial support schemes cannot go on indefinitely and, when they are removed, it is likely that we will see the number of insolvencies increase.

One of the more recent larger supplier insolvencies in the education sector is the administration of Gaia Technologies, one of the UK's leading suppliers of ICT services to UK schools and universities. However, often suppliers to higher education institutions (HEIs) are small and medium-sized suppliers (SMEs). The Federation of Small Businesses has reported that some 250,000 SMEs could close in 2021 due to the pandemic, and so it is a very realistic possibility that HEIs have already experienced a supplier insolvency and/or will experience one as the impact of the pandemic continues.

For those unfamiliar with the concept of administration, it can be daunting when a supplier goes into administration.

This note provides a general overview of administration and the options that are open to you as HEIs, including engaging in the creditor processes.

What is insolvency?

Insolvency arises when individuals or businesses have insufficient assets to cover their debts or are unable to pay their debts when they fall due.

What is administration?

Administration is a formal insolvency procedure where a company is placed under the control of an insolvency practitioner, known as an administrator.

Administration stops any legal action or process against a company from proceeding, unless the administrators or the courts give permission.

What is the purpose of administration?

An administrator must perform his/her functions (in the interest of the company's creditors as a whole) with the objective of:

1. rescuing the company as a going concern;

2. achieving a better result for the company's creditors as a whole than would be likely if the

2. achieving a better result for the company's creditors as a whole than would be likely if the company was put into liquidation; and

3. selling the company's property in order to make a distribution to one or more secured or preferential creditors.

The administrators must identify a potential exit route for the business, which can include selling the underlying assets in a 'pre pack' sale, moving to a company voluntary agreement to restructure debts, or (in the worst case) liquidation and dissolution.

What can an administrator do?

The administrators take over the control of the company's business and assets from the company's directors in order to achieve one of the purposes of administration. The administrators will review the company's position and assess whether there is enough support (from employees, suppliers etc) to continue to trade the business.

The administrators can take whatever action they feel is necessary for the management of the company and its property, including making/fulfilling contracts.

What if I am owed money?

Unless you are a secured creditor, you should submit details of your claim to the administrators (known as a proof of debt) and wait for the administrators to assess it.

What happens if I owe the company money?

Your debt will still be due and the administrators will expect you to make payment. There may be reasons to withhold or set-off these monies and advice should be taken if appropriate.

Will the company still supply me post-administration?

In the absence of any express term to the contrary, contracts do not automatically terminate upon entry into administration.

The administrators may, after weighing up the interests of the company against those of the creditors, decide not to perform the contract – as was the case with certain Gaia contracts.

As a matter of course, you should review your contracts to see if they allow for termination if a

party enters into administration or if there is a change in its financial standing. If they do contain such a clause, then you should consider whether it is in your interest to exercise it.

Even if the existing contracts are continuing to be performed, you should have back-up plans in place in case the position changes or the company moves from administration to liquidation.

Administrators can also enter into new contracts on behalf of the company after their appointment.

When does administration end?

The administration automatically ends after one calendar year, unless the creditors or the court agree to an extension. In practice, many companies remain in administration for more than one year.

If the company can be rescued as a going concern, the administrators may be able to hand back control of the company to the directors; however, this rarely happens. More often, the net proceeds of the company's assets are distributed to the company's creditors, either by the administrator or by a subsequently appointed liquidator. The administration can therefore end either by the company moving into liquidation or by the company being dissolved without liquidation.

Lessons from Gaia

Gaia Technologies offered an overarching managed service to a vast quantity of universities, which meant its impact was widely felt. We advised a number of clients about their rights and options following that administration and each took different decisions, based on their own individual circumstances. The Gaia experience reaffirmed the importance of taking early legal advice, as underlying funders of Gaia emerged early in the process, which only added to the clients' confusion of who to deal with. Additionally, a number of third parties (who had not been paid by Gaia) were demanding monies from our clients, adding yet further confusion to the mix. Whilst both circumstances are not completely unusual in administration situations, they undoubtedly cause additional stress and anxiety.

If you suspect that a supplier is in financial difficulty, then try to have an open dialogue with them early on so that you can gather information about their position. You might also be able to renegotiate terms or provide support.

Engaging in the creditor process – what can I expect?

Often, people believe that engaging in the creditor process will be a daunting and cumbersome

Often, people believe that engaging in the creditor process will be a daunting and cumbersome task. However, the 2016 Insolvency Rules were brought in to modernise the existing provisions, from 1986, and reduce the burden of red tape.

These changes included the relaxation of the rules requiring physical creditor meetings and moved towards resolutions and decisions being made remotely, typically via a decision procedure known as deemed consent. At the same time, insolvency practitioners were encouraged to streamline their methods of communicating with creditors. Previously, a series of letters would have been sent to creditors to provide updates on a case, but now creditors can expect to receive a solitary letter inviting them to access an online portal where all information about a case will be posted.

If creditors do not accept that initial invitation to register on the portal, then they risk being left even more in the dark about the conduct of a case than they would have been under the old rules. Often, the portal is the only practical way for insolvency practitioners to communicate with creditors, and they can be left having to take costly countermeasures if creditors do not engage during the process. For example, if an insolvency practitioner seeking a resolution to approve his/her fees receives no reply from creditors, they may be forced to apply to court for that same approval. This will result in far higher fees being incurred and paid from funds in the estate, that might have otherwise been available for creditors.

Registration on a portal typically takes less than five minutes, and creditors can choose whether they want to be notified whenever new information is posted, removing the need to trawl through endless reports or to remember to keep checking back for updates.

A creditor who has a genuine interest in the outcome of a case (financial or otherwise) would be wise to find the time to complete this one simple step. Doing so will help you keep abreast of realisations, investigations, fees and the overall likely return to creditors.

Final words

If you are facing a situation where a supplier has entered or is at risk of entering into administration, ordinarily, the main concerns are ensuring continuity of supply. A pre-agreed transitional plan may help to achieve that in the event of administration.

You should also have a back-up plan in place and be aware of your contractual rights, particularly events that trigger termination, as different events could give rise to different remedies.

You should also check that your existing contracts with suppliers and customers provide adequate protection against the effects of insolvency. Key contracts should be reviewed, with a view to identifying your maximum exposure in the event of the other contracting party’s insolvency.

We have a wealth of experience dealing with insolvent suppliers, and HEIs who have faced issues arising from all forms of insolvency.

Please do let us know if you would like any more information on this topic or if there is any way in which we can help you further.

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