RESTRUCTURING TOOLS FOR COMPANIES

As the effect of the pandemic is stretching our economy the use of appropriate business restructuring tools will be required.

Using existing legislation with the use of a **Company Voluntary Arrangement (CVA)** and the provisions within the **new restructuring bill** currently being considered by parliament, may be more readily used as a mechanism to formalise restructuring plans.

Scottish restructuring specialists, Dunedin Advisory Ltd, together with prominent legal practices offer some key messages:

COMPANY VOLUNTARY ARRANGEMENT (CVA)

Christine Convy CA, Founder and Director of Dunedin Advisory, believes "CVAs are a useful tool in post Covid business rescue" however does give a warning to practitioners and business owners to consider their format carefully. She states "It is essential that sufficient time is taken to scrutinise business plans and information to ensure the correct proposal is put in place. Fundamental to this are the following key components:

- The insolvency practitioner and professional advisors need to have trust in the management team skill and capability.
- The business needs to demonstrate a real chance of success.
- It must not be used as a method to buy some time with the inevitable liquidation of the business at a later stage which is not in any stakeholders interest.
- Where there are uncertainties particularly as the new post Covid norm is not known, flexible outcomes must be built into the proposal to avoid its unnecessary failure."

Tim Cooper, Partner, Addleshaw Goddard and Chair of R3 in Scotland, recalls "the poor use of CVAs historically, being a sticking plaster solution to insolvency, and not addressing the reasons for the underlying business distress." He believes "they are an excellent tool, if used properly. Case law across the UK demonstrates the Courts perceive them as a flexible process provided they are transparent."

There have been very few CVAs in the past — only one in Scotland in recent years with the majority of CVAs undertaken across the UK resulting in liquidation. Tim comments on the "wasted opportunity to use this tool, which has been with us for almost 35 years, as a means of delivering genuine and long term restructuring to a business ensuring rescue, renewal and recovery for all stakeholders."

John Clarke, Partner, Wright Johnston Mackenzie, believes "It is always the case – but never more so than now – that anyone worried about their business should take advice sooner rather than later. The business recovery advisers have a number of 'tools' that they can deploy, and in the right circumstances CVAs are excellent. But, to maximise their value, they need to be used early in the recovery process."

Why is this when it is such a useful component for restructure enabling different outcomes for various stakeholders?

Our culture in the UK shies away from any hint of insolvency and there is a proud stance to meet all commitments in full. We do not generally ask for financial support and debt forgiveness is often seen as failure. Unlike other countries, who embrace change and continually negotiate using insolvency or failure to learn from and move forward, we have a reluctance to use insolvency in a positive manner. The effective use of pre-packs in Administration as a solution in appropriate circumstances often comes with a backlash of criticism.

Gillian Carty, Partner, Shepherd and Wedderburn, highlights "the restrictions now placed on enforcement generally are creating limitations on actions available to creditors in the recovery process. Legislation currently before parliament seeks to support a rescue culture with far reaching changes recognising the value of a moratorium to provide some time for companies to work through issues caused by the current Covid-19 crisis." She confirms "the current insolvency act already provides a moratorium protection for SMEs as part of the CVA process which is a very flexible tool" and believes "now is the time to be imaginative in finding a workable solution that is not too costly for SMEs to consider and is a viable proposal for all stakeholders."

Pamela Muir, Partner, Thorntons Law, states "the CVA process to restructure a viable business whilst addressing serious financial problems, should be ideal." She contends "it has never been wholly acceptable to creditors, who quite rightly have their own financial concerns. Added to the starting attrition rate of CVAs, and their most inevitable failure "down the line", it is not surprising the lack of use started out at a low level and then only declined." Adding "trust is vital in a CVA process; trust in the proposal, trust in the management team which have to deliver it and trust in its prospects of success. CVAs might just have their moment!"

CORPORATE GOVERNANCE AND INSOLVENCY BILL 2020 'THE BILL'

New tools created in the Bill, such as a moratorium and restructuring proposals supervised by monitors may also allow breathing space for companies where CVAs would not be the answer.

Whilst there is much uncertainty in business, what is certain, is that creditors and companies alike are going to have to be much more adaptive and flexible in dealing with financial challenges. Aggressive debt recovery processes are being discouraged, especially as government policy is encouraging a more consensual and adaptive approach.

Gillian Carty warns that "the provisions in the Bill look like they will be onerous and therefore probably too costly for SMEs to consider. There are strict criteria to qualify for the small company moratorium, a need for creditor consent, and a need to structure the proposal so that creditors understand how the proposal compares with the alternatives."

Pamela Muir states "CVAs with proposals linked to the course of the pandemic and the guidance all companies have to adhere to are more likely to achieve success. Alternate outcomes depending on external circumstances will allow CVAs to flex rather than fail."

Tim Cooper advises "The business community should embrace the rescue culture and professionals have a large part to play in working with businesses to ensure the appropriate solutions are in place that provide added value and are demonstrative of a workable rescue package."

John Clark adds "The Bill adds another complexity to things, but reinforces the 'cash is king' message. Businesses should monitor their cash positions very closely and listen to 'market intelligence' about their customers. Have they changed the way in which they pay or the timing of payment? They may be in difficulty – so again take early advice."

Christine Convy believes "now is the time in Covid-19 where an imaginative and robust restructure is required for many businesses and the CVA can be put to good use. When government support runs out even healthy businesses will need to consider the wider stakeholder support to trade out of Covid-19. Never have we seen such a time where across most industries the sales pipeline has completely stopped, and for such a long period. Government needs to consider how to support business return to profitability with a variety of measures that can be introduced not least reducing tax rates and allowing longer time to pay."

She further adds "our Recognised Professional Bodies need to continue the strong message to the profession and the wider community. There is no room for a light touch approach offering low fixed price CVA models in template format where there is a risk that the viability is not fully considered — a proper feasibility study should be undertaken. The excellent work carried out by qualified accountants and legal professionals supporting many businesses will be paramount in working alongside insolvency practitioners and business owners to establish a flexible, workable and cost effective solution that has a true prospect of success."

As a profession we must build in the appropriate outcomes and options to enable a return to normal trade post Covid, with some being over a period, well beyond 2-3 years. We need to see success stories from CVAs to rebuild market confidence. CVA is a very effective mechanism with considerable flexibility to make bespoke proposals entirely suited to a business and its needs – they need to represent business success not failure. If we can overcome some of the limitations within the Bill it may also have a place in supporting a rescue culture as we move forward.

CHRISTINE CONVY CA MIPA MABRP
Director
Dunedin Advisory Limited
cc@dunedinadvisory.com
www.dunedinadvisory.com

dunedin | advisory

TIM COOPER
Partner
Addleshaw Goodard LLP
tim.cooper@addleshawgoddard.com
www.addleshawgoddard.com

ADDLESHAW GODDARD

GILLIAN CARTY
Partner
Shepherd and Wedderburn LLP
gillian.carty@shepwedd.com
www.shepwedd.com

SHEPHERD+ WEDDERBURN

PAMELA MUIR
Partner
Thorntons Law LLP
pmuir@thorntons-law.co.uk
www.thorntons-law.com

Thorntons
We do what's right

JOHN CLARKE
Partner
Wright, Johnston & Mackenzie LLP
jbc@wjm.co.uk
www.wjm.co.uk

WJM Wright, Johnston & Mackenzie
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