



INSOL International

Standard Directions for an Insolvent Trust

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Proposed Standard Directions for an Insolvent Trust

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Preamble

The enclosed draft Standard Case Management Directions (*CMDs*) have been proposed for adoption and use in for the first hearing in the circumstances where a trust can colloquially be said to be insolvent.

A trust is not a separate legal personality so cannot itself become insolvent. The use of this term is accepted as being a shorthand reference to circumstances where a trustee has insufficient trust assets to meet the liabilities he has assumed in his capacity as a trustee.

These draft *CMDs* are proposed for use where creditors where that situation arises.

In these circumstances it is necessary for the trustee to 'wind up' the trust so as to realise and apply any assets towards payment of liabilities owed to third party creditors.

Subrogation

Parties may be dealing with the trustee either in its own right (in which case they will have claims against the trustee in that personal capacity) or as trustee of the trust. In the latter case, creditors would still take action against the trustee, but will need to rely on the principle of subrogation in order to enforce against the trust assets. The principle of subrogation applies whereby one person, in this case the creditor, is put in the place of another, here the trustee, so that it can enforce the latter's rights. In the present context, the right which the creditor will wish to rely on to satisfy its debt is the trustee's right of indemnity from trust assets. This is of particular relevance in the context of trading trusts, as the corporate trustee of a trading trust may have very few or no assets of their own that are not held on trust.

As Lewin on Trusts 19th edition particularises at [21-018] to [21-055], the right of subrogation:

1. prevents the beneficiaries from avoiding liabilities which properly fall on the trust fund;
2. entitles the creditors to enforce their liabilities against trust property to the extent that the trustee would be so entitled; the creditors have no right of subrogation unless the trustee is entitled to an indemnity from the trust assets. The trustee's right of indemnity may arise in the trust deed and / or by relevant applicable legislation as is the case in many established common law jurisdictions such as England and Wales, and widely recognized trusts jurisdiction such as Jersey and Guernsey;
3. in cases where the liability of the trustee is limited to the trust fund, or part of the trust fund, will be limited to the Trust fund or part of the Trust fund to which the trustee's indemnity applies;
4. in cases where the trustee itself is insolvent, entitles creditors to enforce an unsecured claim against the trust property in cases where it would not be possible to enforce the claim against the trustee personally due to the trustee's insolvency; and
5. where a trustee has a right of indemnity in relation to a debt incurred by the trustee which carries interest, the creditor, in proceedings against the trust fund upon default by the trustee, would be entitled to recover that interest along with the initial debt.

Directions

In the event that the trustee is either insolvent or entitled to rely on a cap on indemnity (whether by agreement or by statute) and there is a shortfall in the assets of the trust, the question arises as to

¹ Valuable input on the substance of the *CMDs* also received from Andrew Shaw of South Square Chambers and Edward Drummond of Bedell Cristin Jersey Partnership.

* The views expressed in this article are the views of the authors and not of INSOL International, London.

what steps a trustee can take to wind up the trust so as to realise and apply the assets towards payment of liabilities owed to third party creditors.

Some, including the learned authors of *Lewin on Trusts*, suggest that the most appropriate step would be for the trustee to seek directions from the court. Lewin suggests directions that might need to be sought in these circumstances, and these draft CMD directions attempt to provide a mechanism for so doing, and also to address the further practicalities involved in the winding up of a trust.

Lewin suggests directions might need to be sought in respect of:

1. the order of priority for payment of liabilities, and whether the priority should be by reference to when the liability occurred or the amount of the liability;
2. whether the trustee is entitled to have recourse to the trust fund for the purpose of meeting any liabilities that are unlimited;
3. whether the trustee is entitled to pay ordinary administration costs out of the trust fund;
4. whether the trustee is entitled to remuneration and if so what;
5. whether any litigation is to be embarked on; and
6. whether the answers to any of the above, changes with effect from the date upon the trust estate can be said to have become insolvent.

A similar approach was taken in the recent decision of the Jersey Royal Court, *Re Estate Hickman*.² In that case, an executor applied for directions in respect of the procedure for dealing with the insolvent estate of a deceased person. The directions provided for the following provisions:

1. publication of a notice requiring creditors to submit claims;
2. forfeiture for claims not submitted by a certain time;
3. how do deal with preferential claims;
4. inspection of claims by creditors with an opportunity to file opposing evidence;
5. the admission or rejection of creditors' claims by the executor;
6. an appeal procedure for rejected claims; and
7. for payment of the executors fee out of the insolvent estate.

The Jersey Royal Court subsequently stated in the *Representation of the Z Trusts* 2015 (2) JLR 175 that in the case of an insolvent trust, it did not think that a regime of the kind adopted in *Re Hickman* should always be adopted, but rather that the court should be flexible in its approach, having regard always to the best interests of the creditors as a body, and taking into account the nature, number and type of creditor claims.

The court will also need to consider who is best placed to implement that regime, whether the trustee alone (assuming the role of "liquidating trustee" under the supervision of the court), the trustee with assistance of an insolvency practitioner appointed to liquidate the trust assets (who could handle the creditor claims adjudication process as a result of any perceived conflict on the part of the trustee against whom the claims are brought), or an independent insolvency practitioner appointed by the court (reducing the trustee to a bare trustee, similar to the court's ability (rarely used) to appoint a receiver of a trust). In the *Z Trusts* cases, the court decided to follow the first option, to leave the trustees to conduct the winding up of the trusts under the supervision of the court, rather than appointing an insolvency practitioner, principally in the interest of costs, and indicated that this would ordinarily be the case.

² [2009] JRC 040.



Scope of these draft Case Management Directions

The CMDs are intended to apply to the following scenarios:

- typical complex trust structures in common law jurisdictions such as Australia, Hong Kong and Singapore, recognized trusts jurisdictions such as Jersey and Guernsey and the Caribbean jurisdictions such as the BVI, Cayman Islands and Bermuda, to name a few;
- instances in such jurisdictions where a trustee is entitled to rely on a cap of indemnity;
- insolvent trusts with jurisdictional challenges, for example, where creditors reside in different parts of the world; and
- where parties to the insolvent trust are subject to the UNCITRAL Model Law³, trans-globally.

Some jurisdictions have statutory protections that limit the liability of the trustee to the value of the trust property. That is the case in Guernsey and Jersey for example. These CMDs aim to answer the questions that arise in such cases where the liability of a trustee is qualified.

High Level Objectives

The set of case CMDs attempts to address the issues that arise for creditors when trusts, settlors or beneficiaries become insolvent.

Case Management Directions

The enclosed draft CMD instructions have been drafted to allow a practitioner to adopt and amend as necessary. The inclusion of italics and draft brackets is intended to indicate where amendments may be necessary. This is not intended to represent the only amendments which may need to be considered in the context of each case and with reference to specific trust deeds and relevant legislation.

In consideration of both Lewin and Hickman above, and the further relevant practical issues, the CMDs provide a practical procedure.

Below follows a discussion of the relevant issues behind each of the enclosed CMDs, it is intended that the enclosed CMDs be read alongside and in conjunction with the following text:

CASE MANAGEMENT DIRECTIONS - EXPLANATORY NOTES

1. Filing of Claims

Following a petition from a petitioning creditor, these CMDs address the procedure for winding up the trust.

The party appointed to undertake the process of examining, admitting or rejecting claims is expressed as [*Trustee*] / [*Trustee in Bankruptcy*] / [*Insolvency Practitioner*] to be deleted as required in each case.

The extant trustee of the relevant trust may be suitable to act as this appointed party to undertake the process of examining, admitting or rejecting claims against itself where the inherent conflict of so doing is more perceived than real. As per Commissioner J. A. Clyde-

³ The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.



Smith esq at paragraphs 21-23 of *Representation of the Z Trusts* 2015 (2) JLR 175 where the example is given of a creditor's claim which is limited contractually to the trust fund, the claims therefore only extend to the trust property, and the trustee has no personal liability or real conflict.

The right of subrogation, by which the creditors of a particular trust may have recourse to the trust assets by virtue of the trustee's right of indemnity is specifically mentioned to demonstrate the jurisdiction on which the CMDs are being made.

In each particular case, it is necessary to first review the relevant trust deed and / or applicable legislation to ensure that no direction as contained in the proposed CMDs is *ultra vires* to the trustee's original powers pursuant to the relevant trust deed and / or applicable legislation; and / or whether there are any related procedural provisions already provided for as contained therein.

Paragraph 1 governs the procedure for notice to be given to creditors that the trust is to be wound up and the process for claims to be submitted for proof.

2. Confirmation of Claims; Filing of Revised Claims

Addresses the deemed date of filing of a claim and the procedure for any amendments to be made.

An attached schedule is suggested to be included where the all the creditors are known.

3. Evidence in Support of Claims

Governs the procedure of the supply of evidence in support of claims.

4. Claims for Preference

Provides an opportunity for creditors to assert that their claim should be given priority.

This is included in square brackets to demonstrate the authors' view that claims for preference are not applicable in proceedings regarding the distribution of a trust fund in these circumstances of insolvency.

It is the authors' view that, such claims for preference in these circumstances should not be permitted.

This paragraph is included to allow for variance in either trust deed or other jurisdictions.

Please see paragraph 15 below for further detail.

5. Provable Debts

Governs the procedure regarding proving and inspecting debts and establishes that a creditor shall bear the cost of proving their claim unless the court orders otherwise.

6. Inspection of Claims

Provides that the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] must fix a time, date and place for the inspection of claims after the Closing Date for the submission of proofs, and that notice must be published and/or provided re the same.

7. Objection to Claim or Claim for Preference

A creditor or any other interested person, including therefore a beneficiary, can oppose the admission of a claim.

8. Proofs of Debts to be Examined and Admitted or Rejected

Sets out the procedure for the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] to admit or reject claims in whole or in part and provide notice regarding the same.



Establishes a creditor's, or interested party's right to request that the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] apply to court for a review of its decision.

9. Consideration of Claims

Establishes that where the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] rejects a claim and gives notice of the same, that notice must specify the reasons for the rejection and inform the party on whom the notice is served of their right to request the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] to apply to the court for a review of the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner]'s decision.

10. Set Off

It is suggested that this paragraph be included where where a creditor of the relevant trustee is also a debtor of that trustee.

In general, insolvency set-off arising automatically, however in the context of insolvent trust(ee)s, we consider that that proposed directions for the application of the right of set-off may be helpful.

11. Moratorium on Proceedings by Claimants

Operates to prevents any creditor from pursuing any proceedings in respect for any claim for preference against the trustee, the trust fund, or any of the assets contained therein after the date that these CMDs come into effect without the leave of the court.

12. [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner]'s Fees and Expenses

Operates to govern the payment of the: (i) trustee's outstanding costs in administering the trust; and (ii) [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] costs in administering the trust fund and costs, fees and expenses in relation to the CMD procedure.

- (i) The trustee's outstanding costs of administering the trust fund incurred prior to the filing of the petition are to be paid from the trust fund in line with the general principle as set out in Lewin 19th Edition at [21-003] *et seq*, that a trustee should be indemnified for any costs spent in the administration of the trust, save for in circumstances of breach of trust.
- (ii) The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] costs in administering the trust are to be paid out of the trust fund in a continuation of the principle at (i) above. The costs, fees and expenses of the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] in relation to costs as a result of these CMDs are to be paid out of the trust fund.
- (iii) Remuneration of the trustee is suggested to be provided from the trust fund where there are relevant provisions for the trustee's remuneration contained in the relevant trust deed and / or provided for under relevant legislation, save for any remuneration in respect of any action taken in breach of trust. This supposition is suggested by Lewin at [20-221] *et seq*.

13. Trustee's Remuneration

This provision is suggested where there are relevant provisions for the trustee's remuneration contained in the relevant trust deed and / or provided for under relevant legislation, save for any remuneration in respect of any action taken in breach of trust. This supposition is suggested by Lewin at [20-221] *et seq*.

14. Petitioning Creditor(s)' Costs

The payment of the petitioning creditor's costs in bringing the originating petition are provided for out of the trust fund.

It is anticipated that in practice, in most circumstances, there would likely be a funding agreements in place between the petitioning creditor and the [Trustee] / [Trustee in Bankruptcy] /



[*Insolvency Practitioner*] prior to the commencement of the proceedings, in which case this provision may not be required.

15. Presentation of Trust Accounts

Establishes a procedure for the preparation of the trust accounts by the [*Trustee*] / [*Trustee in Bankruptcy*] / [*Insolvency Practitioner*] for service on the creditors and allows the creditors to challenge the trust accounts in court on the summons of the [*Trustee*] / [*Trustee in Bankruptcy*] / [*Insolvency Practitioner*] where necessary.

Establishes that the trust fund will be distributed in the following order of priority:

- (i) payment of the [*Petitioning Creditor(s)' and the*] [*Trustee*] / [*Trustee in Bankruptcy*] / [*Insolvency Practitioner*]'s costs, fees and expenses; then
- (ii) in payment of any Claim for preference which has been accepted [*plus interest*]; then
- (iii) *pari passu* in payment of any Claim which has been accepted but in respect of which no Claim for preference has been made or accepted; then
- (iv) [*pari passu in payment of any Claim for a future debt which has been accepted and which will be discounted by [X] amount*]; then
- (v) *pari passu* in payment of any Claim which have been subordinated by the relevant Creditor(s); and then
- (vi) distribution to the beneficiaries under the [*Name*] Trust.

Priority

These provisions allow for the [*Trustee*] / [*Trustee in Bankruptcy*] / [*Insolvency Practitioner*]'s costs, fees and expenses will be paid first and that the creditors' claims will be paid on a *pari passu* basis save for where any claim for preference has been accepted.

It is the authors' view that the creditors' claims should be paid on a *pari passu* basis, after the payment of the [*Trustee*] / [*Trustee in Bankruptcy*] / [*Insolvency Practitioner*]'s fees and expenses.

The payment of claims on a *pari passu* basis is supported by Lewin at [22-046] where it is stated that “*some of the liabilities to creditors may be preferential debts within the insolvency legislation. It is thought nonetheless that the provisions conferring a preference can have no application to the distribution of the proceeds of the right of indemnity, since those provisions are intended to do no more than confer a preference in the distribution of assets beneficially owned by the insolvent trustee, the proceeds are not so owned*”.

Lewin at [22-047] considers the concept of payment of claims ranked in order of time and in the absence of English case law on this point, suggests that a “*distribution on a pari passu basis would on occasion avoid difficult and cumbersome enquiries*”. It is the authors' view that Lewin's suggestion should be adopted.

Payment of the petitioning creditor's costs

Provision of the payment of the petitioning creditor's costs of the petition have been inserted in square brackets to provide for circumstances where the petitioning creditor has not entered into a funding agreement with the [*Trustee*] / [*Trustee in Bankruptcy*] / [*Insolvency Practitioner*] prior to commencing proceedings. In practice it is considered that this wording will usually be omitted. No provision has been made for the beneficiaries' costs in the CMDs because the authors cannot envisage any scenario which would allow the beneficiaries' to have their costs provided for at this stage. They are not likely to have an active role at this stage, and are merely interested in the application. If the beneficiaries decide to bring any further application within the proceedings, their costs of that application will be determined as part of that application.



Interest

The provision for the payment of interest on a debt has been included in square brackets to allow for circumstances where the trustee's right of indemnity extends to interest over a debt incurred by the trustee, and therefore the right of subrogation also extends to interest on the relevant debt.

Discounted future debts

The provision regarding the discounting of future debts has been included in line with the relevant legislation. Many common law jurisdictions provide a statutory framework for the discounting of the payment of proven future debts.

16. Limitation of Liability of [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner]

Provides that the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] shall not be liable in damages for any action taken by him in good faith under this procedure unless the court orders otherwise.

17. Service of Notices

Sets out the procedure by which the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] must serve notices on creditors and / or interested persons.

18. Power to Extend and Abridge Time

Establishes the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner]'s right to extend or abridge the period of time to comply with any of the CMDs as he sees fit.

19. Service out of the Jurisdiction

Provides that creditors residing outside of the jurisdiction may be served with the originating petition/application and any related documents.

In many common law jurisdictions there are rules governing service out of the jurisdiction, for example in England and Wales service out is available in circumstances where, *inter alia*: where (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and (ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary or proper party to that claim. The relevant legislation should be reviewed on a case by case basis.

20. Liberty to Apply

This catch all provision is intended to allow the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner], or any creditor or interested party to apply to court with regards the CMDs.

The authors have not included a provision regarding litigation by or involving the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] with relation to the liabilities claimed against the trustee because it is the authors' view that any such litigation considered should first receive the court's sanction via a *Beddoe* application.

By proceeding by way of a *Beddoe* application, the court will then be in a position to determine, on a case by case basis, whether it is appropriate that the litigation be commenced at the expense of the trust fund, and in the circumstances where, if the contested liability is found to be valid, the assets as contained in the trust fund may not be sufficient to cover the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner]'s costs of the litigation and the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] would therefore be forced to cover their own costs.



CASE MANAGEMENT DIRECTIONS

1 FILING OF CLAIMS

- (a) The [Trustee] of the [NAME] Trust is entitled to have recourse to the [NAME] Trust Fund for the purpose of meeting his personal liabilities incurred in the course of his office as Trustee. This right of indemnity is contained in [section [X] of [LEGISLATION] and / or paragraph [X] of the [NAME] Trust Deed]. This right of indemnity is limited to [the value of the assets] / [the value of [X] amount of the assets] of the [NAME] Trust Fund pursuant to [section [X] of [LEGISLATION] and / or paragraph [X] of the [NAME] Trust Deed].
- (b) Creditors of the [NAME] Trust and as defined herein are entitled to have their claims settled by recourse to the trust assets of the [NAME] Trust Fund to the extent that the [Trustee] of the [NAME] Trust Fund would be so entitled to under the [Trustee's] indemnity and in line with the procedure set out herein.
- (c) The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] shall identify, quantify and pay claims of his creditors in accordance with the following procedure, and:
 - (i) must, with the least possible delay, cause a notice to be published in [defined newspaper];
 - (ii) may cause a notice to be published in any other way the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] thinks fit; and
 - (iii) shall give notice to each of the convened parties.
- (d) The notice must:
 - (i) require each creditor of the Trustee of the [Name] Trust Fund to file with the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] a statement that contains full particulars of the creditor's claim (a "Proof");
 - (ii) specify the date by which claims are to be filed, being a date that is not less than [21] days after the date of the notice ("the Closing Date");
 - (iii) state that any creditor who does not submit a claim within the time specified in the notice pursuant to 1(d)(ii) shall forfeit his or her right to participate in the distribution of the [Name] Trust Fund; and
 - (iv) state that the notice is given by order of the [Name] Court.
- (e) A creditor who believes that an amount due to the creditor ranks for payment in priority to any other debt must so claim.
- (f) A creditor who believes he or she has a surety, guarantee, security interest or other charge affecting the property of the [Name] Trust Fund must so claim.
- (g) A creditor who does not submit a claim within the time fixed by the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] in accordance with paragraph 1(d)(ii) above forfeits his or her right to participate in the distribution of the [Name] Trust Fund.

(Any respondent to the notice published pursuant to paragraph 1(c)(i), 1(c)(ii) and 1(c)(iii) is hereinafter referred to as a "Creditor".)

2 CONFIRMATION OF CLAIMS; FILING OF REVISED CLAIMS

All claims that have been notified to the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] [and as set out the Schedule attached to this Order] shall be deemed to have been filed on or before the Closing Date. Should any Creditor wish to make any amendment to the



claim which has already been notified to the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] it shall deliver an amended claim in writing to the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] on or before [5pm] on the Closing Date.

3 EVIDENCE IN SUPPORT OF CLAIMS

Notwithstanding any documentation or other evidence which may already have been provided to the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] or of which he may otherwise be aware, every Creditor shall on or before the Closing Date deliver to the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] all documents and other evidence in its possession, together with details of any evidence it believes does or may exist and upon which it wishes to rely but which it cannot obtain and the reason for its belief as to the existence of that evidence and why it cannot be obtained.

4 [CLAIMS FOR PREFERENCE

- (a) *Notwithstanding anything which it may already have indicated to the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner], if any Creditor believes that the whole or any part of its claim ranks for payment in priority to any other claim or that it has a surety, guarantee, security interest or other charge affecting or interest in any of the assets of the [Name] Trust Fund (a "Claim for Preference") it shall on or before the Closing Date provide to the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] full details in writing and all evidence in its possession, together with details of any evidence it believes does or may exist and upon which it wishes to rely but which it cannot obtain and the reason for its belief as to the existence of that evidence and why it cannot be obtained.*
- (b) *If notice of any Claim for Preference shall not have been received by the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] by [5pm] on the Closing Date such claim shall be deemed to have been waived.]*

5 PROVABLE DEBTS

- (a) All debts and liabilities, present or future, or contingent, to which the Trustee of [NAME] Trust is subject at the date that the petition is made, or to which the Trustee of [NAME] Trust becomes subject before payment of the final dividend by reason of any obligation incurred before the date that the petition is made, shall be debts provable in the distribution of the [Name] Trust Fund.
- (b) In the case of a debt which, by reason of its being subject to any contingency or contingencies or for any other reason does not bear a certain value the Creditor shall make an estimate of its value.
- (c) A Creditor shall bear the cost of proving the debt unless the Court decides otherwise.
- (d) Every Creditor who has lodged a proof shall be entitled to see and examine the proofs of other Creditors at a time fixed by the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] as set out at paragraph 7 below.
- (e) A Creditor may from time to time amend or withdraw the Creditor's proof and every such amendment shall be subject to the same formalities as the original proof.

6 INSPECTION OF CLAIMS

- (a) The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] must, as soon as practicable after the Closing Date, fix a period of time during which, and place where, the claims may be inspected.
- (b) The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] must give notice in writing of the period and place to the Creditors.
- (c) The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] may cause notice of the period and place to be published in any other way the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] thinks fit.



7 OBJECTION TO CLAIM [OR CLAIM FOR PREFERENCE]

If a Creditor or any other interested person wishes to oppose the admission of a claim, the person must, within [14] days from the expiration of the period of time fixed under paragraph 6(a), lodge with the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] a statement in writing setting out the grounds on which the admission of the claim is opposed.

8 PROOFS OF DEBTS TO BE EXAMINED AND ADMITTED OR REJECTED

- (a) The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] may admit or reject proof of a debt in whole or in part.
- (b) Before admitting or rejecting proof of a debt the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] shall examine the proof and any statement opposing the admission of the debt.
- (c) Before admitting or rejecting proof of a debt the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] may require further evidence in support of, or in opposition to, its admission.
- (d) The [Trustee]/[Trustee in Bankruptcy] / [Insolvency Practitioner] may reject in whole or part any claim for interest on a debt if the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] considers the rate of interest to be extortionate.
- (e) If the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] rejects proof of a debt in whole or in part the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] shall serve notice of rejection in the manner set out at paragraph 17 on the person who provided the proof.
- (f) If the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] rejects a statement opposing admission of a debt in whole or in part the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] shall serve notice of rejection in the manner set out at paragraph 17 on the person who provided that statement.
- (g) If a person upon whom notice has been served in accordance with paragraph 8(e) or paragraph 8(f) is dissatisfied with the decision of the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] and wants the decision reviewed by the Court he or she must, within the time set out at paragraph 9, request the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] to apply to the Court for a date to be fixed for the Court to review the decision.
- (h) The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] shall comply with a request made in accordance with paragraph 8(g).

9 CONSIDERATION OF CLAIMS

- (a) This paragraph applies where the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] rejects in whole or in part:
 - (i) a claim; or
 - (ii) a statement of opposition lodged during the time fixed pursuant to paragraph 7.
- (b) The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] must give notice of his decision to:
 - (i) the person whose claim or any part of it has been rejected; or
 - (ii) the person whose opposition to the admission of a claim or any part of it has been rejected, as the case may be.
- (c) The notice must:



- (i) specify the reason for the decision; and
 - (ii) inform the person to whom it relates of his or her right, under paragraph 8(g) hereof request the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] to apply to the Court to review the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner]'s decision.
- (d) A request under paragraph 8(g) hereof must be made within [21] days of the date of notice being given in accordance with paragraph 9(b).
- (e) In order to reach such decisions the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] may obtain such professional advice as he reasonably requires to assist him and may require any Creditor to attend upon him to answer questions and / or to provide further information and / or documentation.

10 [SET OFF

- (a) *An account to be taken of the sums claimed by the [Trustee] to be subject to the right of set off pursuant to a specified debt owing to the [Trustee] and to be offset against a specified claim by a Creditor or Creditor(s) submitted under paragraph 6(a).*
- (b) *The [Trustee] will submit proof of the sum to be offset pursuant to the procedure set out in paragraph 9 herein.*
- (c) *The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] will give notice to the relevant Creditor or Creditor(s) of the sum to be offset against a specified claim pursuant to the procedure set out in paragraph 17 herein.*
- (d) *If the Creditor or Creditor(s) upon whom notice has been served in accordance with paragraph 10(c) is dissatisfied with the decision of the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] and wants the decision reviewed by the Court he or she must, within the time set out at paragraph 9(d), request the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] to apply to the Court for a date to be fixed for the Court to review the decision.*
- (e) *The notice must:*
 - (i) *specify the reasons behind the determination of the sum to be offset;*
 - (ii) *identify the relevant debt owed to the [Trustee] to which the right of set off applies;*
 - (iii) *identify the relevant submitted claim against which the sums are to be offset and the Creditor or Creditor(s) to whom this relates; and*
 - (iv) *inform the relevant Creditor or Creditor(s) of his or her right, to request the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] to apply to the Court to review the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner]'s decision.*

11 MORATORIUM ON PROCEEDINGS BY CLAIMANTS

From the date upon which this procedure comes into effect no Creditor shall without leave of the [Name] Court issue any proceedings in respect of any claim or any Claim for Preference against: (a) the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner]; (b) the [Name] Trust Fund; or (c) any of the assets therein.

12 [TRUSTEE] / [TRUSTEE IN BANKRUPTCY] / [INSOLVENCY PRACTITIONER]'S FEES AND EXPENSES

- (a) The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] shall be entitled to be paid and to take payment from the assets comprised in the [Name] Trust Fund of all reasonable fees, costs, charges, allowances and expenses properly incurred or payable by him of and incidental to the exercise of his powers and duties under this procedure and otherwise of and incidental to the administration of the [Name] Trust Fund.



- (b) The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] shall keep Creditors informed as to his costs, fees and expenses as they are rendered from time to time and will provide reasonable particulars if so requested.
- (c) Paragraph 12(a) above will include the reasonable costs incurred by the [Trustee] in the administration of the [NAME] Trust Fund prior to filing of the petition in this proceedings save for where the [TRUSTEE] is found to be in breach of trust.

13 [TRUSTEE'S REMUNERATION]

The Trustee of [NAME] Trust shall be entitled to be paid and to take payment from the assets comprised in the [Name] Trust Fund for any outstanding or on-going remuneration owing to him save for any remuneration in respect of any action found to have been taken in breach of trust.

14 [PETITIONING CREDITORS' COSTS]

The petitioning Creditor[s] who [has] / [have] commenced these proceedings against the [Name] Trust Fund shall be entitled to be paid and to take payment from the assets comprised in the [Name] Trust Fund for all reasonable costs properly incurred in relation to this procedure.

15 PRESENTATION OF [NAME] TRUST ACCOUNTS

Within [15 working days] following determination of all claims [and all Claims for Preference], whether by the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] or by the [Name] Court, the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] shall prepare or cause to be prepared draft accounts in respect of the [Name] Trust (the "Trust Accounts") and shall serve them on all Creditors and issue a summons giving not less than [4 clear days] notice to appear before the [Name] Court to show cause why the Trust Accounts should not be approved by the [Name] Court and the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] be authorised to distribute the assets comprised in the [Name] Trust Fund in accordance with the Trust Accounts. The Trust Accounts shall provide for the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] to apply and distribute the [Name] Trust Fund in the following order of priority, in turn:

- (a) payment of the [Petitioning Creditor(s)]' costs in bringing the origination petition in these proceedings and the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner]'s costs, fees and expenses; then
- (b) [pari passu in payment of any Claim for preference which has been accepted [plus interest]]; then
- (c) pari passu payment of any Claim which has been accepted but in respect of which no Claim for preference has been made or accepted [plus interest]; then
- (d) [pari passu payment of any Claim for a future debt which has been accepted and which will be discounted by [X] amount]; then
- (e) pari passu payment of any Claim which have been subordinated by the relevant Creditor(s); and then
- (f) the beneficiaries under the [Name] Trust.

PROVIDED ALWAYS that the debts shall only be paid to the extent of [[X] part of] the [Name] Trust Fund, that the [[X] part of the] [Name] Trust Fund shall be applied to meet each category of debts in turn in the order set out above (such that if there is no surplus after the payment of the debts within one category, there be no distribution to any subsequent categories), and that the debts within each category referred to in sub-paragraphs (b), (c), (d) and (e) above shall rank equally amongst themselves and shall be paid in full unless the [Name] Trust Fund is insufficient in which case they shall abate in equal proportions.

**16 LIMITATION OF LIABILITY OF [TRUSTEE] / [TRUSTEE IN BANKRUPTCY] / [INSOLVENCY PRACTITIONER]**

The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] shall not be liable in damages or otherwise for anything done or omitted to be done by him in the discharge or purported discharge of his duties hereunder unless it is proved to the satisfaction of the [Name] Court by the person so alleging that the act or omission was made in bad faith, or with wilful default or gross negligence. For the avoidance of doubt this limitation shall not apply to the other duties of the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner].

17 SERVICE OF NOTICES

A notice that is required to be served on a person under this procedure:

- (a) must be in writing; and
- (b) may be sent by post to the person's usual or last known place of abode or place of business, or, in the case of a company, to its registered office or last known place of business.

18 POWER TO EXTEND AND ABRIDGE TIME

- (a) The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] may, on such terms as the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] thinks fit, extend or abridge the period within which a person is required or authorised to do an act in pursuance of this procedure.
- (b) The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] may grant an extension although the application for the extension was not made until the expiration of the prescribed period, or any extension of that period.

19 SERVICE OUT OF THE JURISDICTION

The [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] is permitted to serve the originating petition and / or application and any related documents out of the jurisdiction on Creditors identified in response to 1(c)(i), 1(c)(ii), and 1(c)(iii) herein.

20 LIBERTY TO APPLY

That the [Trustee] / [Trustee in Bankruptcy] / [Insolvency Practitioner] and any Creditor shall have liberty to apply.



AlixPartners LLP
 Allen & Overy LLP
 Alvarez & Marsal
 Baker McKenzie
 BDO
 Brown Rudnick LLP
 BTG Global Advisory
 Clayton Utz
 Cleary Gottlieb Steen & Hamilton LLP
 Clifford Chance LLP
 Conyers Dill & Pearman
 Davis Polk & Wardwell LLP
 De Brauw Blackstone Westbroek
 Deloitte LLP
 Dentons
 DLA Piper
 EY
 Ferrier Hodgson
 Freshfields Bruckhaus Deringer LLP
 Goodmans LLP
 Grant Thornton
 Greenberg Traurig LLP
 Henry Davis York
 Hogan Lovells
 Huron Consulting Group
 Jones Day
 King & Wood Mallesons
 Kirkland & Ellis LLP
 KPMG LLP
 Linklaters LLP
 Morgan, Lewis & Bockius LLP
 Norton Rose Fulbright
 Pepper Hamilton LLP
 Pinheiro Neto Advogados
 PPB Advisory
 PwC
 Rajah & Tann Asia
 RBS
 RSM
 Shearman & Sterling LLP
 Skadden, Arps, Slate, Meagher & Flom LLP
 South Square
 Weil, Gotshal & Manges LLP
 White & Case LLP